



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 562 OF 2009**

**EPASS INTERNATIONAL LIMITED.....PLAINTIFF**

**VERSUS**

**PICALILLY INTERNATIONAL LTD.....1<sup>ST</sup> DEFENDANT**

**WORLD VISION KENYA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this Court is the Notice of Motion dated **1<sup>st</sup> December 2017** by which **WORLD VISION KENYA** (the **2<sup>nd</sup> Defendant/Applicant**) seeks the following Orders:-

**“1. THAT leave be granted for the Directors of the 1<sup>st</sup> Defendant/ Judgment Debtor, Ms Hildah Wairimu Ndungu and Ms Samantha Nyambura Maina be orally examined on oath as to the debt owing to the 2<sup>nd</sup> Defendant/ Applicant resultant from the judgment of this court delivered on 25<sup>th</sup> November 2016 and what properties or means of satisfying the judgment that the 1<sup>st</sup> Defendant/Judgment Debtor possesses.**

**2. THAT this Honourable Court be pleased to direct the 1<sup>st</sup> Defendant/ Judgment Debtor’s said Directors to produce in court for the 2<sup>nd</sup> Defendant’s inspection, books of accounts and other statutory books, records and/or documents belonging to the 1<sup>st</sup> Defendant/ Judgment Debtor.**

**3. THAT in default of the Directors of the 1<sup>st</sup> Defendant/Judgment Debtor Company complying with the above orders, an order for committal to civil jail and sequestration of personal property be made against the said Directors personally, or such further orders as the court may deem fit and just to make.**

**4. THAT the court does order MS HILDAH WAIRIMU NDUNGU and MS SAMANTHA NYAMBURA MAINA directors of Piccalilly International Limited, the 1<sup>st</sup> Defendant/ Judgment Debtor herein o personally satisfy the decree given on 25<sup>th</sup> November 2016 and issued on 15<sup>th</sup> December 2016 for the outstanding amount now being Kshs.8,138,303.00/=**

**4. THAT the costs of this application be borne by the 1<sup>st</sup> Defendant/ Judgment Debtor in any event.”**

2. The Application which was premised upon **Order 22 Rules 35 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act** and all other enabling provisions of the law, was supported by the Affidavit of even date sworn by **FRANCOIS BATALINGAYA**, the National Director of the **2<sup>nd</sup> Defendant/Applicant**.

3. The **1<sup>st</sup> Defendant/Respondent PICCALILLY INTERNATIONAL LTD** opposed the Application through the Replying Affidavit sworn by **HILDA W. NDUNGU** one of the Directors of the **1<sup>st</sup> Defendant Company**. The application was canvassed by way of written submissions. Both parties duly filed their written submissions in the matter.

**BACKGROUND**

4. Judgment in this matter was entered against the Defendants jointly and severally on **25<sup>th</sup> November 2016** in favour of the Plaintiff **EPASS INTERNATIONAL LIMITED**. The judgment was for the sum of **Kshs.3,140,500.00** and **Kshs.471,555.00** together with interest thereon at court rates from **31<sup>st</sup> March 2008** and **6<sup>th</sup> May 2008** until payment in full, together with interest thereon from the date of the judgment

until payment in full.

5. The court further ordered that any sums paid by the 2<sup>nd</sup> Defendant to the Plaintiff in the judgment be recovered from the 1<sup>st</sup> Defendant by way of indemnity.

6. On or about **20<sup>th</sup> April 2017** the 2<sup>nd</sup> Defendant/Applicant fully settled the decretal sum of **Kshs.8,138,303.00** with the Plaintiff and now has an unsatisfied money decree against the 1<sup>st</sup> Defendant pursuant to the order of indemnification made by the Court. The 2<sup>nd</sup> Defendant submits that the 1<sup>st</sup> Defendant has to date failed and/or refused to settle that amount. The 2<sup>nd</sup> Defendant states that it has been unable to identify any attachable property belonging to the 1<sup>st</sup> Defendant for execution hence the present application.

7. On its part the 1<sup>st</sup> Defendant readily admits that it is indebted to the 2<sup>nd</sup> Defendant in this amount of **Kshs.8,138,303.00**. The 1<sup>st</sup> Defendant further avers that it is ready and willing to settle the debt only that its funds are held up in South Sudan, where the company had invested substantially with a view to raising sufficient funds to pay off the debt herein. The 1<sup>st</sup> Defendant states that it is arranging to revive its trading activities in Kenya and pleads to be granted four (4) months to clear the outstanding debt.

#### **ANALYSIS AND DETERMINATION**

8. I have carefully considered the submissions filed in this matter. The fact of the debt is not disputed at all by the 1<sup>st</sup> Defendant. The only question is whether the named directors of the 1<sup>st</sup> Defendant should be summons by the court for purposes of cross-examination on the assets and means of the company.

9. **Order 22 Rule 35 of the Civil Procedure Rules 2010** provides:-

**“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 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.**

10. In **Masefield Trading (K) Ltd V Rushmore Company Limited & Another Civil Suit no.1794 of 2000: [2008] eKLR Kimaru, J** reiterated as follows with regards to the Court’s jurisdiction under **Order 22 Rule 35**:

**“I think the above rule grants this court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of Incorporation. In Postbank Credit Limited (in Liquidation) Vs Nyamangu Holdings Limited (2015) eKLR, it was held 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.”**

11. As stated earlier the 1<sup>st</sup> Plaintiff’s indebtedness to the 2<sup>nd</sup> Defendant is not denied at all. The 1<sup>st</sup> Defendant merely pleads that it has been unable to settle the debt as its funds are tied up in South Sudan. They request to be given time to raise the funds required to pay the 2<sup>nd</sup> Defendant.

12. Despite its claims that funds are tied up in South Sudan the 1<sup>st</sup> Defendant did not annex any document to show that they have any bank accounts or funds in South Sudan. Moreover, the 1<sup>st</sup> Defendant sought for four (4) months to pay off the debt but there is no indication that they have done so yet this application was filed almost two (2) years ago. If the 1<sup>st</sup> Defendant was truly minded to pay off this debt they would have done so by now.

13. It is trite that a party is entitled to the fruits of its judgment. The 2<sup>nd</sup> Defendant has averred that they have been unable to trace any assets of the 1<sup>st</sup> Defendant against which execution can proceed. It is only the directors of the 1<sup>st</sup> Defendant who are able to shed light on the state of the company and to disclose what assets if any the company may have.

14. As such I do allow this present application. I do direct that the two named directors be and are hereby summoned to appear in court for cross-examination on the means the 1<sup>st</sup> Defendant has to settle this debt. It is so ordered.

15. Costs of this application are awarded to the 2<sup>nd</sup> Defendant/Applicant.

**Dated in Nairobi this 19<sup>th</sup> day of June 2020.**

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**Justice Maureen A. Odero**