



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 244 OF 2012

PCEA TUMU TUMU HOSPITAL.....PLAINTIFF/JC/APPLICANT

-VERSUS-

MEDICOMP TECHNO SERVICES LTD.....DEFENDANT/JUDGMENT DEBTOR

AND

GEORGE JOMBO.....RESPONDENT

RULING

The plaintiff sued and obtained judgment against the defendant for the principal sum of Kshs. 8,709,140/80 plus costs and interest. It sought to execute the decree by way of attachment and sale of the defendant's moveable assets. The defendant's properties were subsequently attached and sold in an auction but all that was recovered was a paltry sum of Kshs 127,300/= out of which the sum of Kshs 55,230 was retained by the auctioneers as their charges.

By a motion dated 31 August, 2018, the plaintiff has now moved this honourable court for an order to summon the respondent to attend court for examination on the judgment debtor's assets and to produce books of accounts. In the alternative, it has sought to have defendant's corporate veil lifted so that execution can proceed against the respondent personally.

The motion is premised on Order 22 Rule 35 of the Civil Procedure Rules, 2010 and is supported by the affidavit of Hudson Kinyua, who has described himself as the Plaintiff's administrator. The gist of Kinyua's depositions is that the decree in favour of the plaintiff has not been fully satisfied and efforts to execute it by way of attachment and sale of the judgment debtor's properties have been rendered futile primarily because the judgment debtor has no known assets that could be attached and sold to recover the decretal sum.

To compound the quest for execution even further, Kinyua has deposed that the defendant's file cannot be located at the companies' registry and that it has been unable to obtain such information as would be relevant in executing against the judgment debtor.

Nevertheless, the plaintiff has always known the respondent as a person who has always held himself out as the defendant's managing director and who therefore, is the proper person to be examined on the affairs of the defendant or, in the alternative, he is the right person against who execution should issue should this court lift the defendant's corporate veil.

The respondent opposed the plaintiff's motion and, in that regard, filed a notice of preliminary objection and replying affidavit. In the objection, he contended that the form which the plaintiff's motion took is irregular; that the decree which the plaintiff is seeking to execute is against the defendant and not against him as a person and that the defendant being a limited liability company, he or any other of its directors is not personally responsible for its debts.

In the replying affidavit, he admitted that he is not only a director of the defendant but that he also acted in that behalf in the transaction out of which the plaintiff's action against the company arose. However, he also deposed that he is not the only director but that there are other directors who ought to have been targeted by the plaintiff as well; to the extent that he is the only one who has been singled out in the applicant's motion, he contended that the motion is discriminatory for that very reason. The rest of the respondent's depositions are more or less legal in nature as he has largely dwelt on interpretation of section 35 of the Companies Act No. 17 of 2015; the concept of the legal personality of a corporation; and the circumstances when a corporate veil can be lifted.

The motion was heard together with the preliminary objection; the learned counsel for both parties adopted their depositions in their respective affidavits to support their positions.

Although the respondent opposed the plaintiff's motion, Mr Waweru, his learned counsel, submitted that he is not opposed to the prayer seeking the respondent to be summoned to court to be examined on the judgment debtor's assets and produce its books of accounts.

With this concession, there was nothing much left for the court to rule on because, as far as I understand the applicant's motion, that was the main and only substantive prayer the plaintiff was seeking for. The other prayer was in the alternative and, legally and logically, both of them could not be granted.

If I have to say anything more on this issue, I would only reiterate that Order 22 Rule 35 of the Civil Procedure Rules under which the motion was made provides for examination of a judgment debtor as to his property; such a debtor would include a corporation such as the defendant; that rule reads as follows:

35. Examination of judgment-debtor as to his property

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.

Of particular interest to the present motion is part (b) of Rule 35 which is sufficiently clear that where a corporation is the judgment-debtor, any officer of that corporation may be summoned in court for examination on the affairs of the corporation in particular respects prescribed by the Rule and for production of any books or documents.

There is no doubt that the defendant is a judgment debtor and that the respondent is not just one of its officers but he is admittedly its managing director. There is evidence by the plaintiff that its attempts to execute the decree in its favour by attachment and sale of the defendant's property have been rendered inconsequential because there are no assets to attach.

In these circumstances, I am satisfied that the plaintiff has laid out a basis for the examination contemplated under rule 35 of order 22 and it was wise of the learned counsel for the respondent to concede to the plaintiff's prayer in this respect. For this reason, I hereby allow prayer 1 of the plaintiff's motion dated 31st August, 2018. The plaintiff shall also have costs of the application. It is so ordered.

Dated, signed and delivered in open court this 26th day of April, 2019

Ngaah Jairus

JUDGE