



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND ADMIRALTY COURTS

CIVIL SUIT NO. 207 OF 2015.

TROPICAL WOOD LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

SAMILISINTERNATINAL INVESTMENTS....DEFENDANT/JUDGMENT-DEBTOR

R U L I N G

1. This Ruling relates to the Notice of Motion Application dated 17th May, 2017. It is brought under the provisions of Section 635 of the Companies Act, No. 17 of 2015, Order 51 Rule 1, Order 22 Rule 35 of the Civil Procedure Rules 2010, Section 1A, 3A, 6 and 63 of the Civil Procedure Act, Chapter 21, Laws of Kenya and all other enabling provisions of the Law.

2. The Applicant is seeking for orders that:-

a. The Honourable Court be pleased to issue summons directed to Mr. Peter Odhiambo Ojijo, who is the director of the Defendant/Judgment Debtor to attend Court on an appointed day to be orally examined, as to the business and affairs of the Defendant/Judgment debtor, and/or the property or properties of the Defendant/Judgment debtor, and/or the Defendant's/Judgment debtor's means of satisfying the decretal sum.

b. The Honourable court be pleased to issue an order directed to Mr. Peter Odhiambo Ojijo, in his capacity as the director of the judgment debtor to produce before the Court books of accounts, audited financial statements, annual returns, bank statements, cheque books and other statutory documents relating to the operations and transactions of the judgment debtor for the last Four (4) years and the said director be examined on oath on the said documents.

c. The Honourable Court be pleased to make such further orders in the interest of justice upon examination of Mr. Peter Odhiambo Ojijo.

d. Costs of the Application be provided for.

3. The Application is premised on the grounds on the face of it and supported by an affidavit dated 17th May 2017, sworn by Rebecca Kibowen, the director of the Plaintiff/Applicant Company. The Applicant avers that judgment was entered herein, on the 15th November 2016, in its favor as against the Defendant/Respondent, whereupon, the Applicant was awarded as costs of Kshs 404,040.

4. However it has not been able to trace any assets of the judgment debtor to satisfy the decree and numerous letters written to the Respondent/Judgment debtor calling upon them to satisfy the decretal sum have not yielded any fruits.

5. That the Defendant/judgment debtor is still legally subsisting and carrying on business and that Mr. Peter Odhiambo Ojijo, was and is still the Managing Director of the Defendant/judgment debtor. He has conducted the business affairs of Respondent in a fraudulent manner solely to defeat the creditors including the Applicant. Therefore as a director, he is based placed to explain the operations and current status of the Defendant/Judgment debtor.

6. It is therefore in the interest of justice that the Application be allowed and summons be issued as prayed for examination of Mr. Peter Odhiambo Ojijo, as to the means and assets of the Judgment debtors Company and he be compelled to produce the books of the Company.

7. The Application was served and the Respondent requested for time on several occasions to file and serve a Replying Affidavit but did not. The Applicant then filed their submissions in support of the Application.

8. I have considered the Application, the grounds and the Affidavit in support, alongside the submissions filed. I find that; Order 22 Rule 35 of the Civil Procedure Rules, 2010, empowers the Court to order for attendance of an officer of a Judgment debtor's Company to be examined orally on whether any or what debts are owing to the Company and any means or property the Company may have to satisfy the Applicant's decree.

9. Order 22 Rule 35 states 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”.

10. The above provisions were considered in the case of; *NBI HCCC No. 1287 of 2000 Ultimate Laboratories vs Tasha Bioservice Limited (Unreported)*, and the Court stated that;

“Two things emerge from the above proposition. One, 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.

I therefore, take the view 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.”

11. The position in the above authority which I entirely concur with was also considered in the case of; *Masifield Trading (K) Ltd vs Rushmore Company Limited & Another HCCC No. 1794 of 2000; (2008) eKLR*.

12. Mr. Peter Odhiambo Ojijo whom the Applicant requires summoned is described as the Managing Director of the Defendant's/Judgment Debtor's Company. This is confirmed by a document marked “RK3”, annexed to the Affidavit in support of this Application, which gives the details the names of the directors/shareholders of the Defendant's Company as per the Company's Annual Returns last dated 4th February 2013. This information has not been rebutted in the absence of a response to this Affidavit.

13. The Court notes that, a decree was issued by the Court on 3rd April 2013 in favour of the Applicant in the sum of Kshs 8,932,000 with interest thereon at Court rates until full payment and costs. There is no evidence that this decree has been satisfied.

14. In the given circumstance, I find that, it is in the interest of justice that the prayers sought for herein be granted. As held in the case of; *Postbank Credit Limited (in Liquidation) vs 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. The upshot of all this is that the Notice of Motion Application dated 17th May 2017 is allowed in terms of prayers 1, 2 and 4.

16. It is so ordered.

Dated, delivered and signed in open Court at Nairobi this 14th day of December, 2017.

G.L. NZIOKA

JUDGE

In the presence of;

Mr Wamalwafor the Plaintiff/Decree holder

Mr Odhiambo for Mr Buntotich....for the Defendant/Judgment debtor

TeresiaCourt Assistant