



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 112 OF 2012**

**COSMOS HOLIDAYS PLC.....JUDGEMENT CREDITOR**

**VERSUS**

**GLOBAL FRESH AGENCIES.....JUDGEMENT DEBTOR**

**RULING**

1. The Judgement – Creditor, **COSMOS HOLIDAYS PLC**, has sought orders to compel the directors of the Judgement – Debtor to be cross-examined on the means and assets of the Judgement-Debtor, and to produce the books of account and other documentary evidence which reflect the means and assets of the judgement - Debtor.
2. The directors against whom the orders are sought were named as;
  - i. **DALIP SINGH DHANJAL;**
  - ii. **NARINDER SINGH DHANJAL;**
  - iii. **BALDEV SINGH DHANJAL; and**
  - iv. **NIRAMAL SINGH DHANJAL.**
3. It was the further request of the Judgement-Creditor that if the directors defaulted in complying with orders requiring them to submit themselves to cross-examination, the court should make orders against the directors personally.
4. The application was supported by the affidavit of **ESTHER GATHONI KARIUKI**, an advocate working at the Law Firm of Hamilton Harrison & Mathews Advocates. That Law Firm was acting for the Judgement-Creditor in this case.
5. It is the applicant’s case that it obtained judgement against the Judgement-Debtor at the High Court of Justice, Queen’s Bench Division, Leeds District Registry, England. The Judgement was dated 10<sup>th</sup> August 2009, and was in Claim **No. 6L590055**.
6. The judgement was registered in Kenya on 16<sup>th</sup> March 2012. However, the judgement had remained

wholly unsatisfied.

7. According to the applicant, it had failed to find any assets belonging to the Judgement-Debtor, which could be attached in satisfaction of the decretal amount. It was because of that fact that the applicant deemed it necessary to ask the court to order the directors of the Judgement-Debtor to submit themselves to cross-examination.

8. In answer to the application, **NIRMAL SINGH DHANJAL**, one of the directors of the Judgement-Debtor filed a replying affidavit.

9. He confirmed that the judgement which had been obtained in England, had been registered in Kenya, and that the same was wholly unsatisfied.

10. However, he made it clear that the foreign judgement in issue was subject to an appeal which was still pending before the Court of Appeal in Nairobi. The particulars of the said appeal were given as **DHANJAL INVESTMENTS LIMITED Vs COSMOS HOLIDAYS PLC, NBI CIVIL APPEAL No. 317 of 2013.**

11. The Judgement-Debtor appreciates that the appeal, of itself, does not constitute a stay of execution. However, Mr. Nirmal Singh Dhanjal indicated, in his replying affidavit, that he would be instructing the advocates acting for the Judgement-Debtor to apply for stay of execution pending the hearing and determination of the appeal.

12. However, the applicant pointed out that even though more than 7 months had lapsed since Mr. Nirmal S. Dhanjal indicated that the respondent would apply for stay of execution, no such application had been lodged.

13. The respondent indicated that it had offered security to the applicant. Details of the said security were given as **PLOT No. 161 SECTION XLVIII MOMBASA ISLAND, MBARAKI.**

14. A Certificate of Official Search dated 15<sup>th</sup> September 2014, shows that the land is owned by **HOLILL ASSOCIATES LIMITED.**

15. The security offered by the respondent was rejected by the applicant on 30<sup>th</sup> March 2015.

16. Following its rejection of the security, the applicant submitted that there was nothing to preclude the applicant from executing the judgement or in applying for the cross-examination of the directors of the Judgement-Debtor, to aid the applicant in the execution of the judgement.

17. On the other hand, the respondent says that it cannot fathom why the applicant is so desirous of cross-examining its directors, when the respondent had offered adequate security.

18. The respondent also pointed out that the applicant was able to effect service upon it, easily, at its registered offices. And after being served, the respondent's director promptly came forward to explain the exact status of the respondent.

19. In those circumstances, the respondent believes that the applicant ought not to be given the orders it seeks, because it appears that the applicant had only rejected the security offered because it wished to choose the particular assets from which the decree should be satisfied. The court was asked not to allow the applicant, the luxury of the choice of assets.

20. The application was made pursuant to Order 22 Rule 35 of the Civil Procedures Rules.

21. The respondent expressed the view that that rule was designed to lift the veil of a corporate body, where it is shown that the said corporate body had acted either fraudulently or had been conscientiously mismanaged, with the intention and purpose of defrauding its creditors.

22. As the applicant had not shown either of those ingredients against the respondent, it was the respondent's contention that the application must fail.

23. In support of its submissions, the respondent cited **CORPORATE INSURANCE Co. LIMITED Vs SAVEMAX INSURANCE BROKERS LIMITED [2002] 1 E.A. 41**, at page 46, wherein Ringera J. (as he then was) said;

***“And it is a well known principle of company law that the veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying on business as no more than a cloak, mask or sham, a device or stratagem for enabling the directors to hide themselves from the eye of equity. That may well be so if on the evidence it is clear that the directors have dealt with the assets and resources of the company as their personal bounty for use for their own purposes. Such facts may well be disclosed in the examination of the directors or in affidavits filed?.***

24. There is no doubt in my mind about the correctness of that pronouncement.

25. The learned Judge also stated as follows, at page 45;

***“Plainly, by dint of (b) and (c) above the managing director or other officer or director of a corporation may be examined upon order by the Court as to whether or what debts are owing to the company and/or whether the company has any and what property or means to satisfy the decree***

.....

***The application for examination of the director of the company on the debts owed to the company or on its assets is made in execution of a decree?.***

26. In this case there is no stay of execution. Therefore it is open to the applicant to bring the application for the examination of the respondent's directors, on the assets owned by the respondent.

27. Pursuant to Order 22 Rule 35:

***“Where a decree is for the payment of money, the decree-holder may apply to court for an order that –***

***a. the judgement-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 judgement-debtor, and whether the judgement-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 judgement-debtor or officer, or other person, and for the production of any books or documents?.***

28. That rule does not extend to the extent of having the directors of a company being held personally liable for the decretal amount owed by the company.

29. A decree-holder is allowed to cross-examine a judgement-debtor to ascertain what property or means he has, for satisfying the decree. Therefore, the decree-holder cannot be accused of seeking the luxury of choosing the property against which it would like to carry out execution of the decree. It is a right given to the decree-holder to seek an order to compel the judgement-debtor to submit to cross-examination.

30. I find that the respondent has not given any reason that would be sufficient to bar the decree-holder from seeking to cross-examine the director.

31. Therefore, I now order that **NIRMAL SINGH DHANJAL** will personally submit himself to cross-examination by the decree-holder, on the issues concerning the property or means which the judgement-debtor has for satisfying the decree.

32. The court will set the date for the said cross-examination.

33. Finally, the judgement-debtor is ordered to pay to the decree-holder, the costs of the application dated 30<sup>th</sup> June 2015.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>th</sup> day of August 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Miss Olbara for the Judgement Creditor

Miss Mogire for Buti for the Judgement Debtor

Collins Odhiambo – Court clerk.