



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 660 OF 2005

MARGARET SOARES.....PLAINTIFF/DECREE HOLDER

VERSUS

JANE OTIENO.....DEFENDANT/JUDGMENT DEBTOR

RULING

Examination on debts and assets of Judgment-debtor

[1] I have been called upon to determine whether Honourable Dalmas Otieno, the spouse of the judgment-debtor should be called upon to attend court and be examined orally 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 application is made under Order 22 rule 35 of the Civil Procedure Rules.

[2] Parties have filed affidavits and submissions which I have considered. The Applicant claims that Honourable Dalmas Otieno is the husband to the judgment-debtor. The judgment-debtor lives with him and in flashy domicile. He claims that the judgment-debtor has accounts and other properties which the Honourable Dalmas Otieno has knowledge about. He should be summoned to give the information on the debts and properties or means of the judgment-debtor to satisfy the decree herein. The said Honourable Dalmas Otieno contends that the he has already given all the information through his replying affidavit sworn on 6th February, 2014. He also took issue on the prospects of the application herein because the Applicant must establish; 1) the debtor's debts and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment-debtor's identified debts and properties which are subject of investigation. He is of the view that has not been done. Further, he submitted, Honourable Dalmas Otieno will be prejudiced for being subjected to the court process without any basis. Res judicata has also been raised based on the fact that issues of the judgment-debtor's ability to pay were heard in the notice to show cause herein.

[3] After a careful consideration of the submissions by the parties, I observe that the Applicant posits that the court has unfettered discretion under Order 22 rule 35 of the CPR to summon any person for an examination as per the rule. The Respondent disagrees and states that the discretion is fettered. I should think it is profitable to delimit the scope of that Order in answer to the question before me. There are copious judicial decisions on this point. But let me cite what Ringera J (as he then was) said in the case of **NBI HCCC NO 1287 OF 200 ULTIMATE**

LABORATORIES v TASHA B LOSERVICE LTD (unreported) that:

“The court’s duty under the Order and Rule in question is limited to ensuring that the person being examined answers all the questions which are fairly, pertinent and properly asked and it is thereafter up to the decree-holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree”.

Ringera J (as he then was) continued:

“While I agree with the defendant’s/judgment debtor’s advocate that the objective of an examination of a company’s director or officer under Order XXI Rule 36 is to obtain discovery, for the purpose of execution of a decree against the company, 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 don’t agree that the court does not have the power in an application in execution which is grounded under the above provisions as well as the inherent power of the court and all other provisions of the law to lift the corporate veil of the company and order the director to personally discharge the debts of the company”.

[4] 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. Accordingly, I do not think, the rule places such a high and onerous standard as it has been argued by the Respondent, that the Applicant must establish; 1) the debtor’s debts and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment-debtor’s identified debts and properties which are subject of investigation. That kind of approach will defeat the entire purpose of the rule because the rule enables the Applicant to seek for information in the nature of discovery to assist the decree-holder to follow through on the execution. If the decree-holder already has such definite information of the debts and properties of the judgment-debtor, there will be no need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment-debtor’s known properties. The second thing; any person may be summoned under the rule, and such person need not have any or direct connection with the issues in the case whatsoever as urged by the Respondent. What needs to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule.

[4] Having taken that position, the Applicant has demonstrated that Honourable Dalmas Otieno 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 information contained in the replying affidavit by the said Honourable Dalmas Otieno is not sufficient for purposes of Order 22 rule 35 of the CPR as it is mere denial of knowledge of commercial transactions and interests of the judgment-debtor. And as I have stated, it is immaterial that he has no any or direct connection with the issues in the suit. He is a person on whom the court could, and does invoke rule 35 of Order 22 of the CPR to attend and be examined in accordance with the said rule 35. There is a basis for the application and thus, I do not really see any prejudice being occasioned on Honourable Dalmas Otieno. He

will be subjected to the court process by the order of the court, which is issued after careful consideration of the merits. Accordingly, I order that Honourable Dalmas Otieno shall attend the court on a date to be appointed by the court to be 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.* It is so ordered.

[5] The upshot is that the application dated 19th November, 2013 is allowed. Costs for the application are awarded to the Applicant as against the judgment-debtor.

Dated, signed and delivered in open court at Nairobi this 24th March, 2014

F. GIKONYO

JUDGE