



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 824 of 2005

Editorial Summary

1. *Civil Appeal*
2. *Subject of High Court case*

EXECUTION PROCEEDINGS

- 2.1 *Contract*
- 2.2 *Service rendered*
Freight charges due and owing
from Nairobi to various destinations
in the world.
- 2.3 *Claim Ksh. 596,260/- or \$ 7,525.79,*
interest and costs.
- 2.4 *Trial – file originally filed at High Court.*
- 2.5 *Application for summary judgment granted*
(Mbaluto J) (22nd March 2012)
- 2.6 *File transferred to subordinate court was*
never effected (Ransley J)
- 2.7 *Original plaintiff unable to execute as original*
defendant company closed offices.
- 2.8 *Original plaintiff was able to trace only one*
director.

- 2.9 *Director engages advocate separate from that of defendant.*
- 2.10 *Director claims he was a sleeping director and knows nothing of claim.*
- 2.11 *Original plaintiff files application to cross examine director.*
- 2.12 *Ruling of Deputy Registrar that the director merely became “a director to the defendant’s company (Judgment debtor) to safeguard his interest [on] the basis of monies he was owed by judgment debtor ...”*
- Explanation as to why he has no book of accounts accepted.*
- A party cannot produce what he doesn’t have.*
- No provision under Order 21 r 35 Civil Procedure Rules to command director to court for failing to produce judgment debtors books of accounts.*
- Decision made 14th October 2005.*
- 2.13 *Original plaintiff files appeal to High Court on 21st October 2005 against the Deputy Registrar’s decision.*
- 2.14 *Appeal opposed.*

3. *Appeal*

- 3.1 *Chamber summons dated 24th February 2005 issued against director Shabbir Fidaali Hebatullah.*
- 3.2 *Purpose of Chamber summons 24th February 2005 under Order XXI r 36 Civil Procedure Rules is to ascertain the whereabouts of the assets of the*

judgment debtor in order to pursue legal remedy to recover judgment debtor?

3.3 *The object of Order XXI r 36 Civil Procedure Rules is to further ascertain if any fraud had been committed by the directors of the judgment debtor.*

3.4 *Case law*

Societe Generale Du Commerce Et De L'Industrie En France

Vs

Johann Maria Farina & Co
(1904) KBD 794

Hohler, Collins (Mr) Mathew (LJ)

Failure to answer to court of debt due.

Director upon application committed to contempt of court.

3.5 *Hon. Trial Magistrate erred in dismissing Chamber*

Summons of 24th February

2005.

4. *In reply as per affidavit*

4.1 *The director did not refuse to answer questions put to him or produce documents.*

4.2 *The director attended court.*

4.3 *When he had no answer to give, he cannot give an answer.*

4.4 *The appeal be dismissed.*

5. *Held:*

5.1 *Decision of deputy registrar did not address issues raised.*

5.2 *File returned back to the same deputy registrar to Answer and decide questions raised.*

5.3 *Clause to commit director to civil jail should only be applied afterwards and only if there was a likelihood*

of persons being examined being in contempt of court.

6. Case Law:

By appellant:

Societe Generale Du Commerce Et De L'Industrie

En France

Vs

Johann Maria Farina & Co

(1904) (I) KBD 794

Hohler, Collins (Mr) Mathew (LJ)

7. Advocates :

- i) Parekh instructed by M/s Shah & Parekh & Co Advocates for
appellant/judgment creditor
- ii) B.M. Quadros instructed by B.M. Quadros & Co Advocates for
respondent/director

**ETHIOPIAN AIRLINES S.C. APPELLANT/
ORIGINAL PLAINTIFF**

VERSUS

**LYNDALLIAN AIR FREIGHTERS & FORWARDERS LTDRESPONDENT/ORIGINAL
DEFENDANT**

(Being an appeal from the Ruling of Hon. T. Wamae Chief Magistrate in

Civil Case No. 1752 of 2001 dated 14th October 2005 at

Milimani Commercial Courts)

J U D G M E N T

I. INTRODUCTION

1. This appeal arises from execution proceedings emanating from the decision of the Deputy Registrar High Court of Kenya. Order 49 r 7(3) of the Civil Procedure Rules Cap 21 refers:
2. The original suit was filed on the 7th August 2011, at the High Court of Kenya Nairobi. The original plaintiff and now appellant

M/s Ethiopia Airlines S.C. had filed suit against

M/s Lyndallian Air Freighters and Forwards Ltd, the original defendant and now respondent in this appeal, in contract, for services rendered. The respondent company failed to pay charges amounting to Ksh. 596,260/- or \$7,525.79, interest and costs for services rendered on freight delivered from Nairobi to various destinations in the world.

3. In their defence, the respondents, apart from admitting the description of the parties denied each and every allegations. The appellant applied for summary judgment. This application came before Mbaluto J who granted the prayers for summary judgment on 22nd March 2002.

4. The appellant proceeded to execution proceedings. The respondent closed down its offices and their whereabouts could not be traced. Upon doing a search, one director was traced known as

Shabbir Fidaali Hebatullah. The appellant now judgment creditor applied that he be cross examined by an application dated 24th February 2005.

5. The purpose of the application is, upon examining the said director, he is to disclose the whereabouts of the assets of the judgment debtor as well as to produce its books of accounts. This was to enable the judgment creditor identify the assets and pursue this legal remedies.

6. The respondent did have Shabbir Fidaali Hebatullah, the director attend court. The said director engaged the services of separate advocate to represent him being M/s B.M. Quadross, Advocate. The respondent was represented by M/s Violet Barassa who did not participate in this appeal.

7. In his cross-examination, the director admitted he was indeed a director of the respondent company. He became one as of 1st March 1999. The other director to the company was one Reuben O. Okereke. Mr Hebatullah was a registered proprietor of property LR Nairobi/Block 103/106. He sold tis property to Reuben O. Okereke who in turn paid a sum of Ksh. 80,000/- per month as rent. The property was transferred to the name of the respondent's company Lyndallian Air Freighters and Forwards Limited. It appears that the property was further changed to "Savings and Loans" (the actual sum is unknown). The said "Savings and loans" a mortgage firm exercised its powers of sale under the statutory law. The property therefore no longer exists.

8. Mr. Hebatullah explanation was that he merely became a director of the respondent on 1st March 1999 to safe guard his interest. He sold the said property to the co-director for Ksh. 20 million. When the mortgage company exercised its rights of sale, he only obtained Ksh. 10 million. He took 4 million and paid the co-director together with a further 6 million payment made. It is therefore the co-director who now owes him Ksh. 10 million.

9. Nonetheless, he was but a sleeping director. The day to day management of the firm was entirely in the hands of one Reuben O. Okereke. He was not able therefore to bring up the books of accounts nor shed any further light on the company's affairs.

10. The Hon. Deputy Registrar, upon her findings came to the conclusion that indeed Shabbir Fidaali Hebatullah merely became a director to safeguard his interest on the basis of moneys he was owed by the judgment debtor. His explanation as to why he had no books of account was accepted "a party cannot produce what he does not have."

11. Looking at Order 21 r 35 Civil Procedure Rules, the Hon. Deputy Registrar found no provision to commit the said director to civil jail for failing to produce a judgment debtor's books of accounts. The application was accordingly dismissed on the 14th October 2005.

12. Being dissatisfied with this decision, the judgment creditor appealed to this High Court on 21st

October 2005.

II PROCEDURE

13. Whereas the decision was made on 14th October 2005, by the deputy registrar, the appeal was brought under Order 49 rule 7(3)

Civil Procedure Rules Cap 21. It was filed on the 21st October 2005, within the required 7 days limit according to law.

14. It is not clear why no action was taken on this file but on perusal of the administration notes, the original file was not availed to the appeals section until 13th September 2011. Admission of hearing was undertaken on 17th January 2012 and directions on 9th March 2012 under Order 43 r 13 Civil Procedure Rules, the record of appeal having been duly filed.

15. The hearing was heard on 5th June 2012.

III APPEAL

16. The grounds of appeal against the decision of the deputy registrar being

16.1 The learned deputy registrar erred in law and in fact in failing to appreciate that Mr. Shabbir Fidaali Hebatullah by virtue of being a director of the judgment debtor was impliedly aware of the affairs of the judgment debtor and was in a position to produce its books of accounts.

16.2 ... in failing to appreciate that the document produced by Mr Shabbir Fidaali Hebatullah in court proved that he was indeed involved in the financing of the judgment debtor and could not be heard to say he was not aware how his investment was being utilized.

16.3 ... in failing to appreciate that the explanation given by Mr Shabbir Fidaali Hebatullah with regard to the sale and change of LR Nairobi/Block 103/106 was not truthful.

16.4 ... in failing to appreciate that contrary to the allegations by the said Mr Shabbir Fidaali Hebatullah, there was no evidence to prove he was “duped” by his co-director Mr Mr Okereke.

16.5 ... in failing to consider the submissions by the applicant in the light of the cross examination.

16.6 ... in dismissing the appellant’s application.

IV ARGUMENTS

17. The appellant’s arguments was that the issue of the respondent judgment debtor owing money’s to the judgment creditor was not in question. The issue before the deputy registrar was under Order XXI r 36

Civil Procedure Rules Cap 21 (now Order 22 r 35 Civil Procedure Rules), the examination of the judgment debtor as to his property to ascertain the whereabouts of the assets of the judgment debtor in order to pursue legal remedy to recover the judgment debt.

18. What the intention of the appellant judgment creditor was to have the director produce the books of accounts of the judgment debtor as to find out where the assets of the said judgment debtor are allocation.

19. From the ruling of the Hon. Deputy Registrar it was clear that the arguments by the director of “becoming such a director on 1st March 1999 was to safeguard his interest” was rejected. It had little to do with the agreement of sale he entered into with his co-director on 29th March 1999.

20. Further the explanation by the said Shabbir Fidaali Hebatullah was unacceptable. He sold his property for Ksh. 20 million to his

co-director. He was paid 12 million of which he paid 4 million back to Okereko the co-director of the judgment debtor.

21. The property was charged to Savings and Loans Kenya Ltd, a mortgage company. The actual sum had never been disclosed. Only the books could disclose this.

22. There were this various questions that required to be answered by the director judgment debtor.

23. It was therefore upon the deputy registrar to find out the whereabouts of the assets to the company and to go further to see if there was any fund that had been committed.

24. The issue of committal to civil jail had been ruled by the deputy registrar, does not fall under Order XXI r 35 Civil Procedure Rules. The appellant argued that it does but under case law. They referred to the case law of

Societe Generale Du Commerce Et De L'Industrie En France

- Vs -

Johana Maria Farina & Co

1904 (1) KB (Page 794)

A director of a company declined to answer questions. The court ruled that the director was bound to answer questions concerning debts due to the company, even if he had ceased being a director. The question that arose then was whether the "acceptance upon which the company was sued on, was in his handwriting?". He declined to answer this question. The matter was adjourned. An application to commit him for contempt of court was made. The director appealed and the appeal was dismissed.

25. In reply in this matter, the respondent director stated that he did attend court when so called upon. That he did answer the question put to him and if he had nothing to answer he could not so do. Therefore the appeal be dismissed.

26. The reasons of such dismissal is that upon the examination of the director judgment debtor, the Hon. Deputy Registrar concluded that the director had no information that he was requested to give.

27. The Hon. Deputy Registrar was also correct in not allowing committal to civil jail as Order XXI rule 36 Civil Procedure Rules did not provide for it.

IV **FINDINGS**

28. There is a judgment in place in favour of the appellant against the respondent since the year 2002, 22nd March. There has never been any application to set this judgment aside nor orders to appeal against the said decision.

29. The issue herein is that of execution proceedings. The judgment debtor company closed its offices and its whereabouts was unknown. Due diligence was undertaken by the appellants to trace the directors. This was successful and one Shabbir Fidaali Hebatullah did appear to court. The basis of his appearance is found under Order XXI r 36

Civil Procedure Rules (now Order 21 r 35) that reads:

"Where a decree is for the payment of money, the decree holder may apply to the court for an order:-

a) *The judgment debtor*

b) *In 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.”*

30. The judgment creditor appellant herein was correct to ask for this. What the application should not have had was the clause to commit to civil jail. This would only be applied for only if there was a likelihood of the person so being examined being in contempt of court.

31. The issue therefore was not civil jail under

Order XXI r 36 Civil Procedure Rules but a separate application seeking contempt proceedings against the applicant.

32. The ruling by the Hon. Deputy Registrar did not answer and or deal with questions raised by the appellant as outlined in their submissions to this court. This was whether:-

32.1 *Shabbir [sold] his property to the judgment debtor or to [Mr] Okereke another director of the judgment debtor?*

32.2 *If the property was worth 20 million why did Shabbir receive only payment of Ksh. 12 million?*

32.3 *If he received Ksh. 12 million why did he pay Ksh. 4 million to the buyer? (According to Shabbir, the buyer was his co-director Okereke?)*

32.4 *Whether Shabbir had an advocate to advise and act for him in the transaction?*

32.5 *Why did Shabbir not take any steps to safeguard his rights to receive balance of the purchase price?*

32.6 *According to Shabbir in his evidence, he said “he because aware last month” (a period from 29th March 1999 to 30th June 2005).*

33. These questions were not addressed by the Hon. Deputy Registrar.

34. A director is a person who is in charge of any activity, a person who is a member of any managing board of a business. This means that annual general meeting of a corporation is held every year. The business of the board, its assets are to be in the said minutes between 1999 and 2005.

35. Even if the director claims to be a sleeping director, he would be at least receive the said documentations as to the affairs of the company.

36. I would find that the decision that was arrived at by the Hon. Deputy Registrar was inadequate. It is hereby set aside.

37. That this file be remitted back to the same deputy registrar. In the deputy registrar’s absence, any registrar in charge of the portfolio for rehearing within 30 days. (Order 42 r 26 Civil Procedure Rules)

38. The appeal is allowed with costs to the appellant judgment creditor.

DATED THIS 11th DAY OF JUNE 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

- i) *Parekh instructed by M/s Shah & Parekh & Co Advocates for
appellant/judgment creditor*
- ii) *B.M. Quadros instructed by B.M. Quadros & Co Advocates for
respondent/director*