



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 190 OF 2006

JAMES ISABIRIYE
MUGOYA.....APPLICANT

VERSUS

DEW SECURITY SERVICES
LIMITED.....RESPONDENT

AND

**MUGOYA CONSTRUCTION & ENGINEERING.....J/
DEBTOR**

JUDGMENT

The background of this appeal is that on 2nd November, 2006, this Court gave judgment for Kshs.8,911,140.15 in favour of the Respondent herein against the judgment-debtor. Attempts to execute the decree by attachment and sale of the judgment-debtor's movable assets yielded no fruits. The decree holder thereupon filed an application for Mr. James Isabiriye Mugoya, the judgment-debtor's Managing Director, to be orally examined in Court as to the means of the judgment-debtor under **Order XXI Rule 36** of the **Civil Procedure Rules**.

When that application came up for hearing on 2nd March, 2009, the Advocate for the judgment-debtor raised a preliminary objection on the grounds that the application was fatally defective; that the decree was more than one year old and no notice to show cause had been issued; and that the judgment-debtor's directors had not been personally served with the application. In a ruling delivered on 30th March, 2009, the Deputy Registrar overruled this objection. His reason was that the order sought to have the director appear in Court was not for the director to show cause why the decree should not be executed against him, but for him to be examined as to the assets and debts of the judgment-debtor. The Deputy Registrar thereupon granted the orders for the examination of the judgment-debtor's Managing Director, and the examination was set down for 16th September, 2009.

On the hearing date, the judgment-debtor's Managing Director did not attend Court. The Deputy Registrar then issued a warrant for his arrest which precipitated this appeal. The grounds for appeal were:-

1. *The learned Deputy Registrar erred when he issued a warrant for the arrest of the Appellant.*
2. *The learned Deputy Registrar erred when he failed to appreciate that the Appellant was not the judgment-debtor in this suit.*
3. *The learned Deputy Registrar erred when he failed to appreciate that what was before him was a notice of preliminary objection dated 11th September, 2009.*
4. *The learned Deputy Registrar erred when he failed to appreciate that there is no jurisdiction under Order XXI Rule 36 of the Civil Procedure Rules for the issuance of a warrant for the arrest of a director of a Corporation which is a judgment-debtor in any suit.*
5. *The learned Deputy Registrar failed to appreciate that it was not available to him to issue a warrant for the arrest of the Appellant without regard to the safeguards established at Section 38 of the Civil Procedure Act, Cap. 21.*
6. *The learned Deputy Registrar failed to appreciate that the Appellant had not refused to attend Court for examination as to the judgment-debtor means and assets.*
7. *The learned Deputy Registrar exercised his discretion without due regard to the protection of the fundamental rights and freedoms established under the express provisions of Sections 72 (1) and 77 (9) of the Constitution of Kenya.*

Each party filed written submissions. After considering those submissions and the authorities cited therein, I note that the main issue in this appeal is whether the Court had jurisdiction to issue the warrant of arrest. **Order XXI Rule 36** of the **Civil Procedure Rules**, states as follows –

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

1. *the judgment-debtor; or*
2. *in the case of a Corporation, any officer thereof; or*
3. *any other person,*

be orally examined as to whether any or what debts are owed 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.”

The Appellant in this case is not the judgment-debtor and was not intended to be examined as the judgment-debtor. On the contrary, it was intended that his cross-examination as an officer of the judgment-debtor would assist the Court to do justice in the matter by ascertaining from him whether the judgment-debtor had any properties from which the decree could be satisfied. Once those properties, if any, were identified, then the Court would be better positioned to know how the decree would be enforced.

By refusing to attend Court, the Managing Director of the judgment-debtor denied the Court the opportunity to know whether the judgment-debtor had any assets which could be used in satisfaction of the decree.

All the authorities cited by the Appellant emphasize one principle of law i.e., once incorporated, a Company becomes a legal person in its own right completely separate from its shareholders and directors. This is usually referred to as the rule in **Salomon’s Case [1897] AC 22 (HL)**. On the basis of that principle, Mugoya Construction and Engineering Ltd. is a totally separate legal entity from James Isabiriyi Mugoya, its Managing Director. The law would therefore not suffer Mr. Mugoya to be held personally liable or accountable for the debts of Mugoya Construction and Engineering Ltd., as the two are totally separate and different legal entities. The Company itself is liable for its own debts, and the Managing Director was only being called upon, not to pay the Company’s debts, but to assist the Court in ascertaining whether the Company had assets which could be used to satisfy the Court decree. None of the cases cited by the Appellant has similar facts to the ones before this Court, and therefore those cases are not applicable in the circumstances of this case.

By refusing to attend Court, the Appellant literally spurned the Court, which was contemptuous on his part, and the Court has inherent jurisdiction to ensure that its orders are not disobeyed. That jurisdiction is derived from **Section 3A** of the **Civil Procedure Act** which states –

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

In my humble view, it is contemptuous of the Court for any person to be summoned to attend Court and fail to do so. In such situations, it is imperative that such persons be brought to Court to explain why they should disobey Court orders with impunity. That was why the Deputy Registrar ordered the issue of warrant of arrest against the Appellant. For this reason, I find that this appeal lacks merit and it is accordingly dismissed with costs to be paid personally by the Managing Director. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 14th day of October, 2010.

L. NJAGI

JUDGE