



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 291 of 1998**

**MHANDISI ENTERPRISES LTD.....PLAINTIFF**

**VERSUS**

**VICTORIA COMMERCIAL BANK & 2 OTHERS.....DEFENDANTS**

**R U L I N G**

Chamber summons dated 10/3/2006 brought under Orders V Rule 17, Order XXI Rule 36, Section 3A and 92 of Civil Procedure Act, seeking examination of named directors of the company as to the assets and means of the company and of directors. And the directors do produce books, papers, documentary evidence showing the affairs of the company. And in default of providing suitable assets for the satisfaction of the decree given by court on the 11/3/2005.

The grounds upon which the application is based are stated and the application is supported by affidavit of Arthur Willian Ogwayo. The decree debtor is the 3<sup>rd</sup> defendant and it has not been satisfied. It is sworn that the decree arose out of a loan which the defendants from a bank guaranteed by the plaintiff. The directors were aware of the loan and the loan was used by company through the directors who were running the day to day affairs of the company. And the directors should be called upon to pay the decree. The third defendant was sued as Muruta Industries Ltd. On 29/1/1997 the name was changed to Muruta Industries. On 10/3/2005 judgment was entered for plaintiff against the 3<sup>rd</sup> defendant in the sum of Kshs.17,345,940/= with interest at court rates and costs.

The plaintiff/decree-holder tried to execute but without success. Only 2 vehicles were discovered as owned by 3<sup>rd</sup> defendant. One vehicle which was traced, KSW 457 was found to have been sold to one Kamau. The warrants were returned unexecuted. This application is made under **Civil Procedure Rules, Order 21 Rule 36**. The directors have been examined and their evidence shows clearly that the money obtained was used on various projects not connected with the company (3<sup>rd</sup> defendant) through which the loan was obtained.

It is clear the 3<sup>rd</sup> defendant was not put into operation as it should with the money obtained but that the money was used by directors on their own projects. The directors committed fraud and put the company out of business. No business was carrying out and hence no books of accounts were available.

Applicant relied on the case of **Mea Ltd. Vs. CSB Cheputuko & another** where an application was made under **Order 21 Rule 36**. No books of accounts were brought to court as they were detained by auditors. No tax had been paid. However, the director undertook to pay the decretal amount on behalf of company and the court made order that execution may be made against him instead of the decree-debtor.

The other case is **Ultimate Laboratories vs. Tasha Bio Service Ltd. – HCC No. 1287/2000** at Nairobi. A similar application was made under **Order 21 Rule 36**. The learned judge said:-

***“I do not agree that the court does not have the power in an application in execution which is ground under above provisions ... to lift the corporation veil of the company and order the director to personally discharge the debts of the company.”***

In that case, the court found that the company simply refused to pay its debts. The court ordered the director to assume company's debts.

In the present case the plaintiff guaranteed the 3<sup>rd</sup> defendant/decree-debtor a loan from 2<sup>nd</sup> defendant. Security was the plaintiff's property L.R. 209/399/5 valued at Kshs.20 million. The 3<sup>rd</sup> defendant defaulted in repayments after one year. The loan was for a project done in Tanzania. The directors were helping Sailesh Devani in the project in Tanzania. The directors decided to borrow money in the name of 3<sup>rd</sup> defendant. Sailesh Devani had nothing to do with 3<sup>rd</sup> defendant. Money was received on behalf of defendant company. Defendant received Kshs.4 million. Director Yashpal Wadhwa was running a project with Sailesh Devani as a personal project not of company.

It was disclosed that the money was deposited in A/C No. CA 1165 where signatures were 5 directors including himself Sailesh, his son and daughter-in-law and his wife namely;

1. *Yashpal Wadhwa*
2. *Vinod Wadhwa*
3. *Sandeed Wadhwa*
4. *Anita Wadhwa*
5. *Sailesh Devan*

The account belonged to defendant. There is sufficient evidence that the

directors who were supposed to run the affairs of the company agreed to borrow the money in the name of the company and diverted it to other purposes not connected with the company/3<sup>rd</sup> defendant/decree-holder.

In my view the directors were using the name of the company as a screen to obtain funds for other purposes. I am satisfied that this is a case where the directors fraudulently directed funds meant for the company to their uses. Judgment has already been entered for plaintiff. The application prayers 5 and 6 are granted. The four directors of the company, 3<sup>rd</sup> defendant shall bear the liability of the company to pay the decree made against the company to the plaintiff and in default the plaintiff shall execute the decree against them jointly and severally.

The costs of this application shall be paid by the directors.

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 30<sup>th</sup> day of October, 2009.

**JOYCE N. KHAMINWA**

**JUDGE**