

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 623 of 2004

ABDUL RAZAK KHALFAN (Suing on behalf of the
International Air Transport Association –IATA).....1ST PLAINTIFF

MERCANTILE LIFE &
GENERAL

ASSURANCE COMPANY LTD.....2ND PLAINTIFF

VERSUS

PINNACLE TOURS AND TRAVEL LTD.....1ST DEFENDANT

SUSAN
RULING

WAMAE.....2ND

DEFENDANT

On 31st July 2007, the Deputy Registrar of this court allowed the plaintiffs' application which sought the attendance in court of the directors of the 1st defendant for the purposes of being cross-examined on oath as to the assets and means of the 1st defendant company to satisfy the decree issued in the plaintiffs' favour pursuant to the provisions of **Order XXI Rule 36 & 91** of the **Civil Procedure Rules**. The Deputy Registrar however ruled that Susan Esibia Wamae, having resigned as a director of the 1st defendant, should not attend court. He held that it would serve no useful purpose for the said director to be summoned to attend court in view of the fact that she had resigned from the company two years before the plaintiffs made the particular application seeking the attendance of the directors of the 1st defendant in court for the purpose of cross-examination.

The 1st defendant was aggrieved by the decision of the Deputy Registrar. Pursuant to the provisions of **Order XLVIII Rule 5(5)** of the **Civil Procedure Rules**, it appealed to this court seeking the setting aside of the said decision of the Deputy Registrar. In its memorandum of appeal, the 1st defendant prayed that the order of the Deputy Registrar

requiring the attendance of the directors of the 1st defendant for the purpose of being cross-examined
be vacated. The grounds in support of the appeal were that the 1st defendant was aggrieved that the Registrar had failed to consider material averments in the 1st defendant's
replying affidavit before arriving at the said decision. The 1st defendant was further aggrieved
that the Deputy Registrar had failed to consider the 1st defendant's submissions before arriving at the said decision. The 1st defendant faulted the Deputy Registrar for reaching
the
finding that the 2nd plaintiff should not be orally examined on the 1st defendant's
assets
and
books
of
account.

Counsel for the parties to this appeal filed written submissions prior to the oral hearing
of
the appeal by the court. On record are written submissions of the 1st defendant, of the
1st
and
2nd plaintiffs and of the 2nd defendant. The 1st defendant filed a reply to the 1st and
2nd
plaintiffs' and the 2nd defendant's written submissions. At the hearing of the
application,
I
heard rival arguments made by Mr. Gachuhi for the 1st defendant, Mr. Ogunde for the
plaintiffs and Mr. Naikuni for the 2nd defendant. I have also carefully read the written
submissions filed by the respective counsel for the parties in these proceedings. The
issue
for
determination by this court is whether the 1st defendant established sufficient grounds
to
entitle the court to upset the decision of the Deputy Registrar. It was clear to this court
that
the dispute between the 1st defendant and the plaintiffs was in regard to the
interpretation
to
be given to provisions of **Order XXI Rule 36** of the **Civil Procedure Rules**,
especially
in
regard to the purpose of requiring the attendance of directors of a company in court to
be
cross-examined. **Order XXI Rule 36** of the **Civil Procedure Rules** provides that:

*“Where a decree is for the payment of money, the decree-holder may apply to the court
for
an
order
that-
(a) the judgment-debtor;
or
(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 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
judgmentdebtor
or officer, or other person, and for the production of any books or documents.”*

In Nairobi HCCC No. 1287 of 2000 Ultimate Laboratories vs Tasha Bioservice Ltd

(unreported), Ringera J (as he was then) laid down what he considered to be the scope of

Order XXI Rule 36 of the **Civil Procedure Rules**. At page 5 of his ruling, he held 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.”

At page 8 of his ruling, he stated that:

“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.”

In **Caneland Ltd vs Dolphin Holdings Ltd & Anor [1999] 1EA 29**, it was held that the

courts may in some instances allow the lifting of the veil of incorporation if the dictates of

justice demands it especially where it became apparent that the shareholders of the company

were treating the company as its agent.

In the present appeal, the 1st defendant’s complaint against the decision of the Deputy Registrar is that by allowing the application to cross-examine the directors of the 1st defendant, the Deputy Registrar had in effect lifted the corporate veil in circumstances not

contemplated by law. The 1st defendant took issue with the Deputy Registrar’s failure to

consider the 1st defendant’s stated position that it was willing to avail all the documents and

books of accounts of the company to the plaintiffs for the purposes of the plaintiffs ascertaining the assets and liabilities of the 1st defendant. The 1st defendant was of the view

that it was therefore unnecessary for the non-executive directors of the 1st defendant to be

cross-examined. On their part, the plaintiffs opposed the appeal on the sole ground that the

fact that the 1st defendant was willing to avail its documents to the court was not a bar to

the Deputy Registrar requiring the attendance of the directors of the 1st defendant for the purposes

of cross-examination to ascertain the assets of the company for the purpose of settling the

decree. On her part, the 2nd defendant urged the court not to overturn the decision of the Deputy Registrar which excused her from attending court to be cross-examined as she had resigned as a director of the company long before the decree was issued by the court. Having evaluated the facts of this case, the grounds of appeal, the submissions made and the applicable law, I take the following view of the matter. It was apparent to this court that the non-executive directors were unwilling to attend court to be cross-examined on the assets of the company on the ground that the documents they were offering to supply to the plaintiffs was sufficient to establish the state of financial affairs of the 1st defendant. I think, with the greatest respect to the 1st defendant, that the requirement that the directors of a company attend court for the purpose of being cross-examined on the assets of the company is not predicated upon whether or not such company had prepared documents which allegedly established its inability to settle the decree. The purpose of cross-examination of such directors of a company is to determine whether the assets of the company were misapplied by the said directors with a view to defrauding its creditors. Such information cannot be obtained or gleaned from documents prepared by the company. Of necessity, the directors of the company will be required to offer an explanation to the satisfaction of the court that the dealings of the company during the relevant period were above board. I therefore find no merit with the claim by the 1st defendant that the Deputy Registrar erred and when he ordered the directors of the 1st defendant to attend court to be cross-examined for the purpose of determining the whereabouts of the assets of the 1st defendant company. The designation 'executive' or 'non-executive' director does not come into play when the court seeks to examine directors of a company on its assets under the appropriate rule of the Civil Procedure Code. It is under consideration.

As regard the complaint by the 1st defendant to the effect that the 2nd defendant was being left off the hook yet at the material time she was the managing director of the 1st defendant, I hold that the Deputy Registrar fell in error when he excused the 2nd defendant from being required to attend court to be so cross-examined. It was clear from the pleadings filed by the parties herein, that the 2nd defendant was the managing director of the 1st defendant when the debt was incurred. She cannot therefore raise the plea that she is no longer a director of the 1st defendant when she was an active director at the time the debt was incurred.

In the premises therefore I find that the appeal of the 1st defendant lacks merit and is hereby dismissed to the extent that the non-executive directors of the 1st defendant wish to be excused from attending court for the purpose of cross-examination in accordance with **Order**

XXI Rule 36 of the **Civil Procedure Rules** is disallowed. I set aside the part of the decision

of the Deputy Registrar that excused the 2nd defendant from court attendance. The 2nd defendant, just like the other directors, shall attend court for the purpose of being cross-examined

on the assets of the 1st defendant company with a view to ascertaining means of the 1st defendant company to satisfy the decree herein issued in favour of the plaintiffs.

The

plaintiffs shall have the cost of this appeal.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2009.
L. KIMARU
JUDGE