REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 719 of 2003 (OS)

ERNIE CAMPBELL & CO. LTD……..……...….DECREE HOLDER/ RESPONDENT

VERSUS

GITHUNGURI DAIRY PLANT COMPANY LTD…...JUDGEMENT DEBTOR/ APPLICANT

RULING

In the Chamber Summons dated 11th March, 2008, the applicant/judgement debtor seeks;

(1) That further proceedings be stayed until the judgement debtor's appeal herein is heard and determined.

(2) That this Honourable court be pleased to give directions to facilitate the judgement debtor's appeal herein.

(3) That the costs of this application be provided for.

The grounds in support of the application are;

(1) The judgement debtor is aggrieved by the ruling of the Deputy Registrar delivered herein on 29th February 2008.

(2) The judgement debtor has a right of appeal against the said ruling.

(3) The judgement debtor's right of appeal will be rendered nugatory if the stay is not granted.

The deponent of the supporting affidavit, **Mr. Charles Ndichu Mukora** is one of the directors of the judgement debtor herein. He is also one of the directors whom the judgement creditor has applied to be examined orally on the debts owed by the judgement debtor. He states that the purpose of the application is to ensure that the right of appeal is not rendered nugatory, since the intended appeal has prospects of succeeding. And that it is in the interest of justice to give a stay of further proceedings pending the hearing and determination of the intended appeal.

The judgement creditor through one of its directors **Mr. Parbat Lalji Halai** filed a replying affidavit on 15th April, 2008. The deponent states that the prayer for stay of proceedings herein till the appeal is heard is made in bad faith because;

(1) The arbitral award judgement was entered way back on 29th April, 2003 and judgement herein was entered by this court on 22nd July 2005.

(2) The decree resulting from the aforesaid judgement remains unsatisfied todate and efforts to attach the assets of the judgement debtor have borne no fruits due to the fact that the decree holder has been unable to trace any assets of the judgement debtor.

(3) That the only proper way of establishing the assets of the judgement debtor is by examining its directors on the whereabouts of the assets as done by the decree holder in the Chamber Summons dated 30th March, 2007.

(4) The judgement debtor's application is therefore an attempt to further delay and frustrate the decree holder from obtaining its fruits of judgement.

The deponent further contends that the prayers sought in the application will have the effect of freezing any other or further execution of the decree herein, which would be prejudicial to the decree holder. In essence the decree holder would not be able to execute the decree by any other means if the mode adopted is stopped. It is the contention of the deponent that the judgement debtor is totally undeserving of the discretion of this court since it has not demonstrated any good faith by paying any portion of the amount owed or providing any security for the payment of the same. And that since it is the directors of the judgement debtor who are intended to be examined, there is no conceivable loss or injustice that will befall the judgement debtor if a stay of proceedings is not granted.

The deponent further contends that the right of appeal must be balanced with the right of decree holder to acquire the benefits of his judgement. And the law is categorical that the directors of a company can be examined in order to establish the debts owed to the company and the company's means of settling the decree, hence no wrong can be visited on the directors if the examination proceeds.

Dr. Kuria learned counsel for the applicant submitted that there is a right of appeal from a decision of the Deputy Registrar on issues like the present one. I am in agreement with him that the jurisdiction of the Deputy Registrar is exercised on behalf of the High Court. It means the powers of the Judge had been delegated to the Deputy Registrar by virtue of undertaking a judicial duty on behalf of the High court. It is therefore my decision that there is no requirement to seek and obtain leave from the Deputy Registrar in circumstances like the present matter. The objection raised by **Mr. Kairu** Advocate has no merit. **Dr. Kuria** submitted that the Memorandum of appeal was lodged within 7 days and that the applicant would be contending that the intended cross examination of the directors would be oppressive and illegal because the facts sought to be examined occurred long before they became directors on 24th May 2000.

Dr. Kuria Advocate submitted that the books of accounts which the directors are required to produce did not exist when they became directors. He contended that the Registrar of Companies requested and the former directors were unable to produce them. In his view, the order for examination of directors seeks to achieve and/or accomplish that which is impossible.

In support of his able submission, **Dr. Kuria** cited the case of **Juma & others v Attorney General HCCC No.345/2001** where **Mbogholi** and **Kuloba JJ** held;

"**Section 77 of the constitution of Kenya guarantees every accused person a fair hearing. A trial in a criminal court is in the nature of contest. A fair hearing requires by its nature equality between the contestants subject the supreme principles of criminal jurisprudence requiring the presumption of innocence and that the guilt of the accused be proved beyond any reasonable doubt. When one of the contestants has no pre-trial access to the statements taken by the police from potential witnesses the contest can neither be equal nor fair. In addition given the undoubted inequality as between the prosecution and the accused in many cases like with regard to access to forensic scientists, it is of paramount importance that the duty of disclosure be appreciated by those who prosecute and defend in criminal cases.**

We are fully aware that in the adversary process of adjudication, the element of surprise was formally accepted and delighted in as a great weapon in the arsenal of the adversaries. But in the civil process this aspect has long since disappeared and full discovery is a familiar feature of civil

practice. This change resulted from acceptance of the principle that justice is better served when the element of surprise is eliminated from the trial land the parties are prepared to address issues on the basis of complete information of the case to be met….Non disclosure is a potent source of injustice and even with the benefit of hindsight it is often difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence".

No doubt the intended appeal is from the decision of the Deputy Registrar allowing the decree holder to examine directors of the judgement debtor under the provisions of Order 21 Rule 36 which provides;

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

(a) the judgement-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 judgement-debtor, and whether the judgement-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 judgement-debtor or officer or other person and for the production of any books or documents".

Mr. Kairu learned counsel for the respondent correctly submitted that any officer of a company can be called upon for examination. It is admitted that the officers who were ordered to appear for examination are directors of the judgement debtor. The other point raised by **Mr. Kairu** Advocate is that the respondent has been clinging to a paper decree since July 2005. And that the amount currently outstanding is over Kshs. 18 million. It is clear that the judgement debtor has not offered to make payments towards satisfying the debt. It is also clear that previous attempts to execute the decree invited objection proceedings with the consequence that the judgement creditor could not go ahead with execution process.

In my view, an application for examination is made as part of the enquiries to establish the assets and status of the judgement debtor. It is not in any manner meant to oppress the previous or current directors of a corporation. The examination or enquiry is an exercise to give direction to the judgement creditor as to whereabouts of the assets and status of a corporation.

Perhaps it is necessary to appreciate that the examination has not taken place and there is nothing to show that the intended exercise would in any manner prejudice the rights and interests of the judgement debtor or its directors. We cannot assume or speculate that a wrong would be undertaken against the current directors simply by allowing for their examination. There is no evidence or material to show that the Deputy Registrar did not take into consideration relevant issues in coming to the decision of allowing the examination of the directors of the judgement debtor. I have not been shown, albeit in a small depth that the Deputy Registrar acted in error by taking into consideration extraneous matters which would prejudice a fair hearing of the matter.

During the examination, the directors are required to disclose information or material within their knowledge or reach, as to the assets and liquidity of the judgement debtor. They would not be required to incriminate themselves since there is no order lifting the corporate veil.

In my understanding, during the examination, the directors are only required to disclose a complete and honest record of the company's assets without in any manner jeopardizing their rights to a fair trial. I am not in any way saying that the directors have the right to refuse to answer questions put to them. It is incumbent upon the directors to disclose whether any property of the company was wrongly transferred or any monies were properly hidden without the reach of the creditors. If the judgement debtor has no intention of defrauding the genuine creditors like the present respondent, it is the obligation/duty of the

directors to co-operate fully with the intended investigation by making a complete and full disclosures at the time of examination. That task is fairly simple provided the directors are inclined in the discovery of the truth.

It means the directors are required to provide satisfactory answers to any question as to the status and assets of the judgement debtor. I understand the applicant objects to the examination of its directors on the ground that the intended examination will be oppressing and that the judgement creditor is acting both arbitrarily and unfairly. As stated earlier, the purpose of seeking examination is to ascertain as much as possible about the facts concerning the assets and operation of the judgement debtor. The information so obtained would be used as a basis upon which execution process would be put in motion, hence it is intended to enable the judgement creditor obtain a favourable result in execution of the paper judgement in its possession.

It is clear that the judgement creditor's recourse to execution against the company has yielded no result, therefore the need to examine the directors has arisen. I reckon that no court would allow an examination of a party, when it would be oppressive, vexatious and unfair. However anyone involved in the affairs of a company, where a debt exists, has a duty to the creditors to help in the investigation into the affairs of the company in order to establish the assets and financial health of the said company. That is precisely what the judgement creditor intends to achieve in the intended examination of the judgement debtor's directors. The success of the paper decree in possession of the respondent would depend on what the intended examination would reveal. I therefore think there is nothing oppressive or unfair about such an exercise.

I hold the view that an examination under Order 21 Rule 36 is intended to find out whether any or what debts are owing to the judgement debtor and whether the judgement debtor has any and what property or means of satisfying the debts of the company. It is for that reason that directors must undergo examination in order to give all the necessary particulars to enable the judgement creditor to recover the debt. It must be noted that the investigation is against the company and it is in the public interest that individuals do not hide behind the corporate veil to perpetuate an illegality. The protection granted to a company has an element of obligation bestowed upon the persons managing and/or controlling the affairs of a company. They cannot run away from that legal obligation with a view to delay and/or defeat genuine creditors.

In **Civil Appeal No.117/1986 and Civil appeal No.118/1986 J. K. Kanja and Francis T. Nyammo – appellant vs James Tullidgoh and another,** the Court of Appeal held;

"**The Liquidator must show the need to examine and second, the Court must not allow examination when it would be oppressive, vexatious or unfair. The Judge thought what was oppressive should be determined in the light of modern public policy that anyone involved in the affairs of an insolvent Company owed a duty to help the Liquidator to investigate the affairs of the Company in the interest of the creditors. The Judge thought that attitudes and values expressed in cases decided in the Court of Appeal a century ago, but still authoritative, may have become obsolete. Applying those principles, the learned Judge, thought the Registrar's order for public examination of the petitioner was not oppressive and dismissed the prayer to discharge the summons.**

We are impressed by the learned Judge's resning and if we may respectfully say so, his illuminating approach to the construction of section 263 at the present day. If it is a choice between construing the section in a manner which protects the privacy of business transactions as against to protection of creditors and shareholders, we think the public interest of this country would be best served by opting for the latter. Hoffman J's test is refreshingly simple and is devoid of the niceties and refinements which characterized some of the older formulations of principle. We also think it is not difficult to apply. So we put to ourselves two questions, namely, first; have the Liquidators shown a need for examination of the appellants? And second, would it be oppressive or unfair to examine them?

As to the first question, we find positively that the Liquidators have shown such need. There is

prima facie evidence that two houses which belonged to the insolvent Company have found their way into the ownership of the spouses of the appellant directors and no consideration appears to have been given dor these changes of ownership. Second, some payments of not insignificant amounts were made by the insolvent company to the appellants' Companies for which, ex facie, there was no reason, third, the appellants, or one of them, appeared to have knowledge at sometime, that the Company was incapable of paying its debts but they nevertheless continued to carry on business. It is not improbable that the appellants have perfectly acceptable explanations for these matters and may well emerge from examination in Court unscathed. The liquidators gave them a fair opportunity of answering these enquiries but they were less than co-operative and seem to have taken a legalistic stance, arguing instead, that they could only legitimately disclose these matters in defence to actions which they believed the Liquidators decided to institute against them. We think, if there was over a need for the invocation of the Court's power under section 263 to compel forensic examination of directors, this case affords an apt one.

As to the second question, we cannot see that it would be either oppressive or unfair to the directors of a Company who are in a real sense, its fiduciaries, to be obliged to provide information about the tade, dealings and other affairs of an insolvent Company. They are peculiarly well placed to have the required knowledge or information and it would be wholly wrong to aid them to withhold such information especially where this is required to protect unpaid creditors and contributories. At all events, we believe sound reasons of public policy decided the Legislature to give the Court this unusual inquisitorial power and it would be wrong to whittle it down by needlessly restrictive judicial interpretation".

I have deliberately addressed my mind to the pertinent issues that concerns the success and merit of the intended appeal. The venture, I had undertaken is meant to consider the existence of any special circumstances and/or unique requirements that should curtail the intended examination of the directors of the company. From what I have discussed in this ruling, it appears there is no overwhelming hindrance and/or prejudice that will be occasioned if the intended examination is allowed to proceed. In other words there is nothing to show that the intended appeal would be rendered nugatory should an order of stay not granted. And a stay being a discretionary power of the court, it should not be exercised in a manner to prevent ordinary and daily process of the court.

In my understanding the examination would not in any way prejudice the rights of the judgement debtor or its directors to get a fair hearing. It is on that note that I am in agreement with **Mr. Kairu** Advocate that the case of **Juma & others vs Attorney General** is irrelevant to the issues before this court. It is also my position that Section 77 of the Constitution cannot be evoked to aid a party who is apparently involved in a process to delay or defeat the decree of this court.

The directors would have the opportunity to answer what is within their knowledge. I think it would be wrong to say that we were not directors at the time the current debt arose and therefore we will not be in a position to provide records of the company and answer questions regarding the assets and liabilities of the company. A company being a corporate legal entity acts through its current and past directors. The liabilities of a company cannot be attributed and/or assumed by the past directors simply because there is a change of guard in the company's management. It is therefore my decision that the applicant is undeserving of orders sought in the application under my determination. As was rightly pointed out by **Mr. Kairu** Advocate, they have not demonstrated any good faith by paying any portion of the amount or providing any security for the payment of the same. And since it is the directors of the judgement debtor who are being examined, there is no conceivable loss or injustice that would result if a stay of proceedings is not granted. As things stand, the fear of the directors is misconceived. In any case there is no legitimate explanation offered on behalf of the judgement debtor as to why examination of its current directors would be prejudicial and unfair.

In conclusion it is my decision that the application has no merit and it is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 30th day of April, 2008.

M. A. WARSAME

JUDGE