



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 3664 of 1995

EUPHRASIA WARIARA MUKUIPLAINTIFF

VERSUS

NAKEN MOTORS LTD.....DEFENDANT

RULING

1. By the application dated 11/02/1997, brought under Order 21 Rules 36 and 91 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, and all enabling provisions of the law, the applicant, **Euphrasia Wariara Mukui** prays for orders **THAT:?**

(1) ***Michael Ngugi Kinyua and Esther Wairimu Kimani, the Directors of the Judgment-debtor company be orally examined on the assets of the Judgment-debtor company and the said Directors do produce all the books, accounts and all other relevant materials relating to the said company for examination by the Decree-holder.***

(2) ***In default of the said Michael Ngugi Kinyua and Esther Wairimu Kimani producing the books, accounts and all other relevant materials and in default their satisfying the court as to the whereabouts of the assets of the company the said Michael Ngugi Kinyua and Esther Wairimu Kimani be held to be personally liable for the judgment debt.***

(3) ***The costs of this application be borne by the Judgment-debtor company.***

2. The application is supported by the sworn affidavit of **Sankale Ole Kantai**, an advocate of the High Court who says that he is authorized to swear the affidavit on behalf of the decree-holder. He depones that judgment in this matter was entered on 23/07/1996 and a Certificate of Costs issued on 31st October 1996, and a Certificate of Costs issued on 31/10/1996. That since then, his efforts and those of one **Stanley Mugacha** a Court Broker trading as **Galaxy Auctioneers** to trace the assets of the judgment-debtor company have been fruitless and that the decree thus remains unsatisfied to date. He further says that he believes that it would be just and equitable and expedient for the directors of the judgment-debtor company to be ordered to produce all the books for examination by the Decree-Holder.

3. The respondents appointed the firm of **Muhanji & Kitheka Advocates** to act for them in the matter, and on 9/05/1997, the said firm of Muhanji & Kitheka filed Grounds of Opposition saying that the director **Esther Wairimu** did not have the day to day control over the Judgment-debtor company and that she did not have in her possession and custody, the books of accounts of the judgment-debtor company. Esther Wairimu also filed a Replying Affidavit. For the reason that there was no appearance for the respondents at the hearing of the application. I shall set out the averments of this Replying Affidavit. It

is on the strength of the averments of this affidavit that this court will decide this application.

4. Esther Wairimu (Esther) says in her sworn affidavit dated 9/05/1997, that she was a co-director of Naken Motors up and until 1996 when she retired, upon the recommendation of a Special Annual General Meeting. She says that the judgment-debtor company whose offices were situated on Rabai Road in Nairobi's Eastlands area, and that the offices were rented from the Nairobi City Council. She says that while one Michael Ngugi Kinyua brought into the company his expertise and experience of 28 years in selling second hand cars, she provided the finances for the company, built a fence around the plot, built an office and also had telephone services connected. She says that afterwards, she left the day today running of the business to her co-director Mr. Kinyua and that it was Mr. Kinyua who made all the payments for the cars sold through the judgment-debtor company though she admitted that she signed such cheques. At paragraph 11 of the affidavit Esther says that in or about 1994, she began to believe that things were not going right at the judgment-debtor company and that in or about 1995/1996 she was arrested for debts owed to customers whose cars had been sold through the judgment-debtor company. Esther also says that eventually she was arrested and charged for theft of various sums of money received by the respondent. She says finally that since she was not responsible for the day today running of the judgment-debtor company, she should be discharged.

5. At the hearing of this application M/S Rombo & Co. Advocates for the two directors, though duly served with the hearing notice on 24/01/2008 did not appear. Esther was also duly served with the hearing notice on the 13/02/2008 along Pumwani Ring Road area within Nairobi, but she too chose not to attend court.

6. At the hearing of the application Mr. Njoroge who appeared for the applicant relied on the grounds of the face of the application and on the supporting affidavit and urged the court to grant the orders sought. He relied on **HCCC No.1287 of 2000 (Milimani Commercial Courts) – Ultimate Laboratories –vs- Tasha Bioservice Ltd** in which the court dealt with the issue of whether the corporate veil may be lifted in execution proceedings. In the said case, the court was referred to a passage in PENNINGTON'S COMPANY LAW, 7th edition at page 51 ?

“The court cannot make an order under the statutory provision simply because the company is insolvent, or because the company was formed to enable the shareholders to escape personal liability for the debts incurred in carrying on a business. It is only where the persons responsible for managing the company's business have been guilty of dishonesty that personal liability may be imposed on them, but a single act of dishonesty which they commit or in which they participate suffices for the order to be made against them. The dishonest intentions of the respondent may be apparent from the circumstances in which the company's business was carried on. Thus, in a case where a company was insolvent, but its directors continued to carry on its business and purchased further goods on credit, Maugham, J. declared one of them personally liable for the price of those goods.”

7. That passage referred to provisions under the **English Insolvency Act of 1985** which provide that parties who carry on business of an insolvent company with intent to defraud its creditors would be personally liable to make such contributions to the company's assets as the court thinks fit.

8. In the instant application, the applicant/plaintiff wants the directors to be summoned for examination as to the assets of the defendant and to produce all books of accounts and other material relating to the said company and in default the two directors as named to be held personally liable for the judgment debt. From the Replying Affidavit, it is quite clear that the business of the judgment-debtor company was not carried out above board; that it was not transparent and that the directors appear to have taken and converted to their own use proceeds from the sale of client's second hand cars. The plaintiff prays in a nutshell, that the directors should not be allowed to hide behind the corporate veil at the detriment of the plaintiff. Under the relevant rule 36 of Order 21, an examination of the directors as is envisaged by the plaintiff/applicant decree/holder is to establish whether any or what debts may be owing to the judgment-debtor and whether the judgment-debtor has any and what property or means of satisfying the decree. The court has power under the said provisions to lift the corporate veil of the company and to order the

directors to personally discharge the debts of the company.

9. The law on the corporate and separate legal entities of companies was spelt out in the case of **Salomon v Salomon & Co. Ltd. [1897] AC 22**. The long and short of that decision is that since a company is a separate and distinct legal entity, the company's debts and liabilities cannot normally be placed on the shoulders of the company's share holders or directors. It is only in exceptional circumstances however, that that principle can be put aside, especially in cases where the corporate veil is used either by the shareholders and/or directors to perpetrate fraud or improper conduct. A case in point is that of **Jones – vs- Hipman [1962] 1 WCR 832**. This court is duly guided by those principles.

10. Under Section 3A of the Civil Procedure Act, this court has inherent and unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Order 21 Rule 36 of the Civil Procedure Rules also empowers this court on the application of the judgment creditor to 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. Taking all the circumstances of this case into account, I am persuaded that the orders sought are merited, for there is no doubt in my mind that the directors of the judgment-debtor company engaged in improper conduct when they sold clients vehicles and failed to remit the proceeds. In the instant case the judgment-debtor pocketed Kshs.599,500/= which it received on behalf of the plaintiff/decree-holder for the purpose of purchasing an Isuzu matatu.

11. In the result I allow the application dated 11/02/1997 and order that

(i) Michael Ngugi Kinyua and Esther Wairimu Kimani, the Directors of the Judgment-debtor company be orally examined on the assets of the judgment-debtor company and the said directors do produce all the books, accounts and all other relevant materials relating to the said company for examination by the Decree-Holder.

(ii) In default of the said Michael Ngugi Kinyua and Esther Wairimu Kimani producing the books, accounts and other relevant materials and in default of satisfying the court as to the whereabouts of the assets of the company the said. Michael Ngugi Kinyua and Esther Wairimu Kimani be held to be personally liable for the judgment-debt.

(iii) The costs of this application be borne by the judgment-debtor company.

It is so ordered.

Dated and delivered at Nairobi this 16th day of May 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:?