



**Gikandi Ngibuini t/a Gikandi & Company Advocates v Kwale
Cement Factory Limited & 3 others (Miscellaneous Civil Application
80 of 2020) [2022] KEELC 15496 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 80 OF 2020
LL NAIKUNI, J
NOVEMBER 23, 2022**

BETWEEN

GIKANDI NGIBUINI T/A GIKANDI & COMPANY ADVOCATES APPLICANT

AND

KWALE CEMENT FACTORY LIMITED 1ST RESPONDENT

SHRIKE INVESTMENT LIMITED 2ND RESPONDENT

LUCAS INVESTMENT LIMITED 3RD RESPONDENT

RISING STAR COMMODITIES LIMITED 4TH RESPONDENT

RULING

I. Preliminaries

1. The Ruling before this Court relates to the Notice of Motion Application dated 21st April, 2021 filed by the Applicant herein. It is brought under the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) Cap 21, Order 22 Rule 35 of the [Civil Procedure Rules](#) 2010.

II. The Applicant's Case

2. The Applicant is seeking for the following orders that: -
 - a. The Respondents' directors namely, Ali Badrudin Ali, Badrudin Alibhai Punjani, Gulbanu Badrudin Alibhai Punjani, Alisha Amini Nathoo, Nazlin Amin Mohamed Nathoo, Deenabeen Kirtikumar Chaniyara, be ordered to attend court on a date to be fixed, to be examined on the Respondents' property and means of satisfying the decretal sum of Kshs 110,914,815/- together with accrued interest.



- b. The Respondents' directors to produce all books of account, annual returns and any other documents that may be necessary to demonstrate the Respondents' means, assets and liabilities.
 - c. In default of attendance or of showing sufficient cause, there be an order that the personal moveable and immovable property of Ali Badrudin Ali, Badrudin Alibhai Punjani, Gulbanu Badrudin Alibhai Punjani, Alisha Amini Nathoo, Nazlin Amin Mohamed Nathoo, Deenabeen Kirtikumar Chaniyara, jointly and several, be attached and sold in execution of the decree issued on 27th January 2021.
 - d. The costs of this application be awarded to the Applicant.
3. The Application is premised on the grounds, testimonial facts and averments made out under the twelve (12) Paragraphed Supporting Affidavit dated 21st April, 2021, sworn by Gikandi Ngibuini, an Advocate of the High Court of Kenya and all superior courts in Kenya, practicing as such in the name and style of Gikandi & Company Advocates, the Plaintiff/Applicant Company. The Applicant avers that:
- i. He as their Advocate on record then acted for the Respondents in the civil case "ELC (Mombasa) No. 64 Of 2018 Kwale Cement Factory Limited & 3 Others v National Bank of Kenya Limited.
 - ii. His bill of costs was vide a ruling delivered on 27th August 2020 in the Civil case – "ELC (Mombasa) Misc. Application No. 8 of 2020, taxed at a sum of Kenya Shillings One Hundred and Four Million, Six Thirty Five Thousand Two hundred and Three (Kshs. 104,635,203/-). A certificate of taxation dated 2nd September 2020 was issued and served on the Respondents.
 - iii. He applied in the current suit for entry of judgment as per the Certificate of Taxation. The Honorable Court on 27th January, 2021, entered Judgment for Kenya Shillings One Hundred and Four Million, Six Thirty Five Thousand Two hundred and Three (Kshs 104,635,203/-) plus interest at 12% per annum from 3rd September 2020.
 - iv. Pursuant to the entry of Judgment, he extracted a Decree dated 27th January 2021. The sum now due under the decree was Kenya Shillings One Ten Million Nine Fourteen Thousand Eight Fifteen Hundred (Kshs. 110,914,815/-) which continues to accrue interest at 12% per annum.
 - v. He then obtained warrants of attachment and sale of moveable property issued on 27th March 2021 to the Dask Auctioneers. However, the Auctioneers had been unable to trace any attachable goods belonging to the Respondents.
 - vi. The Deponent averred that from his interaction with the Respondents, he verily believed they had the means to satisfy the decree herein in full but had deliberately hidden their assets to defeat any attempted execution.
 - vii. It was therefore necessary that the Respondents' directors be examined on the Respondents' assets and liabilities and that they be compelled to produce all books of accounts, annual returns and any other documents that may assist in establishing the Respondents' means.
 - viii. He had carried out a search of the Respondents' companies. The official searches had revealed the following as the directors/ shareholders;



- a. Kwale Cement Factory Limited Alisha Amini Nathoo Nazlin Amin mohamed Nathoo Deenaben Kirtikumar Chaniyara
 - b. Shrike Investment Limited
 - c. Lucas Investment Limited
 - d. Rising star Commodities Limited Ali Bardudin Alibhai Punjani Gulbanu Badrudin Alibhai Punjani
- ix. In the circumstances, the directors, who had not been operating the affairs of the Respondents as required by law, ought to take responsibility for the payment of the decree herein.

III. The Case by the Respondent

4. On 4th June 2021, the Respondents through a 21 paragraphed Replying Affidavit sworn by Ali Badrudin Punjani and the four (4) annexures Marked as “ABP – 1 to 4” annexed hereto made the following averments: -
- a. The averments in the Applicant’s supporting affidavit were admitted except the Applicant was acutely aware of the Respondents debt crisis having represented them in the Civil Case - ELC 64 of 2018 – ‘Kwale Cement Factory Limited & Others v National Bank”.
 - b. It was not true that the Respondents had refused to pay the Applicant his legal fees.
 - c. The Respondents businesses were acutely affected and as at 9th March, 2021 they still owed jointly and severally National Bank a sum of Kenya Shillings Four Billion Six Ninety Nine Million, Two Twenty Thousand Three and Nine Hundred and sixty Cents (Kshs. 4,699,220,309.60) which amount continues to attract interests.
 - d. The Respondents were currently on their knees financially and were in fact negotiating with all the creditors restructuring debt owed to be able to fulfil their debt obligations.
 - e. Pursuant to the contents of Paragraph 4, the properties of the applicants have been placed on sale to recover the debt owed to the National Bank.
 - f. Other than the amount owed by the Respondents to National Bank, they also owed Chase Bank a sum of Kenya Shillings Eleven Million Four Thirty One Thousand Three Eighty Eight Hundred and Seventy Cents (Kshs 11,431,388.70) as at 2nd May, 2017 which debt has continued to increase together with interests. The said matter is also before this court the civil case number being ELC. No. 248 OF 2017.
 - g. Due to the financial difficulties facing the Respondents, they entered into negotiations with National Bank to find the best way of repaying the debt owed.
 - h. If the Respondents had the money to offset all their obligations they would have done so except things had been made worse by the fact that the their businesses were on their knees.
 - i. The books of account of the Respondents if inspected by the Honorable Court would definitely capture the highlighted debts.
 - j. Pursuant to the negotiation between the Respondents and National Bank, the Applicants gave their personal properties as additional collateral.



- k. Both National Bank and KDIC auctioneers had listed all the properties for both the Respondents its Directors.
- l. His residence situated in Nyali had so far been proclaimed by Garam Investments Auctioneers under the instructions of the National Bank which demonstrates how tough the Respondents and its Directors financial situation is.
- m. To partly offset the debt owed to National Bank, the 3rd Respondent went to the extent of disposing off 332 acres of land situated at the Lamu Constituency.
- n. Pursuant to the contents of Paragraph 14, the Honorable Court could indeed confirm that the Respondents were making every deliberated effort to fulfil their financial obligations.
- o. To offset part of the Applicants obligations, they went to the extent of giving National Bank Power of Attorney to sell some of their properties.
- p. In addition to the above, the Directors of the Respondents had limited liability in the companies, it was therefore not fare that all the Directors were compelled to equally offset the companies' debt obligations as averred by the Applicant.
- q. The Respondents reiterate that they had not refused to pay the Applicant his legal fees other than the fact that the Respondents are faced with debt obligations from creditors who demand payments as well.
- r. As a consequence of the Respondents debt obligations, they had even found it difficult to pay salaries of its employees.
- s. As already demonstrated above, the Respondents assets are already being liquidated to offset their debts.

IV. The Supplementary Affidavit by the Applicant in Responses.

5. On 30th August, 2022, the Applicant filed a 10 Paragraphed Supplementary Affidavit dated 18th August, 2022 in response to the averments made out under the Replying affidavit dated 4th June 2021. The Applicant averred that: -
 - a. He had severally discussed the issue of the fees due to him by the Respondents with Mr. Punjani and Mr. Zuher Ladak who were the General Manager overseeing the operations of the four Respondents while Punjani was the Managing Director of the said entities.
 - b. Mr. Punjani had completely failed to explain to the court what happened to the colossal and huge sums of money that the Respondents borrowed from both the National Bank of Kenya and other financial institutions. In the Replying Affidavit, Mr. Punjani categorically stated that indeed the said entities owed National Bank of Kenya over Kenya Shillings Four Billion (Kshs. 4,000,000,000/-). However, the said Mr. Punjani had not explained how the said money was ever expended and considering that a sum of Kenya Shillings Four Billion (Kshs. 4,000,000,000/-) was a huge amount of money, it behooves upon the said Mr. Punjani to explain with precision how the said sum of money was actually spent.
 - c. He had had several discussions with Mr. Punjani who he had met personally and also had had several discussions with him on telephone. From the said discussions, he was aware that the four Respondents diverted the money they borrowed and the said money was taken up by Mr. Punjani for his own personal use. He said so because Mr. Punjani expressly told him that he was indeed the majority shareholder in the companies that own to prominent hotels in



Mombasa known as Sun Africa Hotel (previously referred to as Nyali Beach Hotel). In fact, at the last meeting he had with Punjani on 5th June 2022 at Sun Africa Hotel (situated near Voyager Beach Hotel) and even while there, he could see the way the said Punjani was relating with employees. It clearly showed that the said employees were treating Mr. Punjani as the owner of the said hotel. In the same meeting he mentioned that he owned a number of hotels in Europe. However, in all those holdings Mr. Punjani used names of third parties so as to hide identity. He also noticed that the said Mr. Punjani was driving a motor vehicle make Toyota Land Cruise V8 which was a very expensive motor vehicle.

- d. Moreover, the said Mr. Punjani handed him copies of title documents for properties registered in the names of other parties whereby the said Mr. Punjani told him that he did not like holding properties in his name. In this regard, the said Mr. Punjani told him that he owned prime properties in Maasai Mara, Kwale and Lamu. All in all, the said Mr. Punjani had severally requested him to look for a buyer for any of the said properties in order to have the said properties sold so that, in the process, he would recover the fees due to him. However, as he had not met the owners of the said properties, he had been apprehensive to deal with the said properties since he had no idea how the said Mr. Punjani acquired the same and yet maintains the properties in the names that were different from himself.
 - e. The said Mr. Punjani also mentioned to him that one of his many other companies were engaged in a major undertaking with one of the parastatals and that by September, 2022 that the said Mr. Punjani expected to be in control of substantial sums of money. All what was stated herein together with the above statement was indicative of the fact that the Respondents' allegations that they were not able to pay the decretal sum herein was not based on any genuine grounds at all.
 - f. In light of the above, he had no doubt that the said Mr. Punjani was using the Respondents as a shield to insulate himself from settling debts due from the said entities. He annexed a copy of an email dated 1st June 2022 sent by the said Punjani to himself enclosing a copy of one of the said title deed which was registered in the name of Tawasal Safari and Tour Limited. Additionally, at the aforesaid meeting, Punjani handed to him copies of a number of title deeds registered in the name Zania Limited.
 - g. In the circumstances, he prayed for an order for the Respondents not only avail the books of account in court but also that Punjani should personally appear in court so that he may be cross examined on the contents of the affidavits filed by himself on 7th June, 2021.
 - h. It was only through the production of all the books of accounts of the said four entities that one can ascertain where the billions of shillings borrowed by the Respondents was utilized. Moreover, the lifestyle of the said Mr. Punjani was of a man of means. He possessed great wealth but yet now claimed that the Respondents did not have any money to settle their debts. In such circumstances, it was only fair and just for the Plaintiff's application to be allowed to avoid the said Mr. Punjani using the concept of incorporation of companies in a fraudulent manner.
6. With leave of Court, the Respondents through a 5 Paragraphed Replying Affidavit sworn by Ali Badrudin Punjani dated 7th September, 2022 responded to the Supplementary Affidavit deposed that in response to the averments in Paragraphs 2, 3, 4, 5, 6 & 7 he stated that whatever information was contained in the said Supplementary Affidavit, the same was privileged communication between an Advocate and client.



7. His advocate informed him, which information he verily believed to be true that the Applicant could not use the same against him and that the averments in the said Affidavit ought to be redacted and/or struck out. He averred that the same offended the provision of Section 134 (1) (2) of the Evidence Act Cap. 80 Laws of Kenya. It was in answer to the contents of Paragraphs 8 and 9 of the Applicant's Supplementary Affidavit, he believed that the Applicant is trying to gain advantage over him using privileged information which is illegal and unfair.

V. Analysis and Determination

8. I have keenly considered the Application dated 21st April, 2021 by the Applicant herein, the Affidavit in support, the replies thereof, the relevant provisions of the Constitution of Kenya, 2010 and the statutes. In order to reach an informed, reasonable and fair decision, the Honorable Court has formulated the following two (2) issues for its determination. These are:-
- a. Whether the Notice of Motion application dated 21st April, 2021 by the Applicant has any merit.
 - b. Who will meet the Costs of the said application.

ISSUE No. a). Whether the Notice of Motion application dated 21st April, 2021 by the Applicant has any merit.

9. Under this Sub – heading, it is mainly based on the provision of Order 22 Rule 35 of the Civil Procedure Rules, 2010. The provision states 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;
 - b. in the case of a corporation, any officer thereof; or 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 Judgment - Debtor or officer, or other person, and for the production of any books or documents”.
10. The provision empowers the Court to order for attendance of an officer of a Judgment debtor's Company to be examined orally on whether any or what debts are owing to the Company and any means or property the Company may have to satisfy the Applicant's decree.
11. The above provisions were considered in the case of:- ”HCCC (Nbi) No. 1287 of 2000 Ultimate Laboratories v Tasha Bioservice Limited (Unreported)”, and the Court stated that:-

“Two things emerge from the above proposition. One, the power of the Court to summon a person to attend and be examined under Order 22 Rule 35 is circumscribed within the purpose set out in the Rule. That is:-

“.....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 therefore, take the view that, as long as the Applicant has shown that the Respondent is in a position to provide information in the nature of discovery....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, the Court should summon the person to attend and be examined in relation to the purpose stated in the Rule.”

12. The position in the above authority which I entirely concur with was also considered in the case of:- *“Masifield Trading (K) Limited v Rushmore Company Limited & Another* HCCC No. 1794 of 2000; (2008) eKLR.
13. In the instant case, it is seen that Mr. Ali Badrudin Punjani and Gubanu Badrudin Akibhai Punjani, from the Applicant’s annexure “GN - 4(18)” are described as the directors/ shareholders of Rising Star Commodities Limited while Alisha Amini Nathoo and Nazlin Amin Mohamed Nathoo are described as the director/shareholders of Kwale Cement Factory Limited as confirmed by a document marked as “GN - 4(19)”, annexed to the Affidavit in support of this Application, which gives the details the names of the directors/shareholders of the Defendant’s Company as per the records at the Registrar of Companies on 25th March, 2021. This information has not been rebutted in the replying affidavits by the Ali Badrudin Punjani.
14. The Court notes that, a decree was issued by the Court on 12th March, 2021 in favour of the Applicant in the sum of Kenya Shillings One Hundred and Four Million Six Thirty Five Thousand Two and Three Hundred (Kshs. 104,635,203/-) with interest thereon at Court rates until full payment and costs. There was no evidence shown to the effect that this decree had been satisfied.
15. In the given circumstance, I find that, it is in the interest of justice that the prayers sought for herein be granted. In arriving at that decision, I have relied on the case of:- *”Postbank Credit Limited (in Liquidation) v Nyamangu Holdings Limited* (2015) eKLR”, that:-

“A person to be summoned under Order 22 Rule 35 (c) of the *Civil Procedure Rules*, to provide information on the property of the Company will also be required to produce any relevant documents or copies thereof on the assets of the Company or books of accounts including but not limited to the Judgment Debtor’s annual financial statement, documents of title property of the Company in his possession and which he may have obtained as a director and/or shareholder of the Judgment - Debtor.”
16. All said and done, based on the legal reasoning stated above, I find that the filed Application by the Applicant in the interest of Justice, Conscience and Equity has merit and hence need to be allowed as prayed accordingly. After all, it is a purely an inquiry requirement of obtaining certain information within the knowledge of the Directors of the Judgement – Debtor and which will assist this Court in arriving at an appropriate decision with regard to the execution and satisfying the Decree herein.

ISSUE b). Who will meet the Costs of the application

17. It is trite law that the issue of Costs is at the discretion of the Court. Costs means any award granted to a party at the conclusion of any legal action, process or proceedings in a litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events, it means the results or outcome of any legal action, process or proceedings in any litigation.
18. In the instant case, the Honorable Court finds that the Applicant has not succeeded in prosecuting his Notice of Motion application dated 21st April, 2021 and therefore the Respondents will bear its costs accordingly.



VI. Conclusion and Disposal.

19. Ultimately, from the above detailed analysis of facts and law to this application, on the preponderance of probability, I find that the Notice of Motion application dated 21st April, 2021 by the Applicant has merit, Specifically, I proceed to grant the orders upon the fulfillment of the following pre - conditions: -
- a. That the Notice of Motion application dated 21st April 2021 is found to have merit and should and is hereby allowed.
 - b. That the Respondents' directors namely, Ali Badrudin Ali, Badrudin Alibhai Punjani, Gulbanu Badrudin Alibhai Punjani, Alisha Amini Nathoo, Nazlin Amin Mohamed Nathoo, Deenabeen Kirtikumar Chaniyara, be ordered:
 - i. to attend this Honorable Court on 20th February, 2023 to be examined on the Respondents' property and means of satisfying the decretal sum of Kenya Shillings One Ten Million Nine Fourteen Thousand Eight Fifteen Hundred (Kshs. 110,914,815/-) together with accrued interest.
 - ii. to produce all books of account, annual returns and any other documents that may be necessary to demonstrate the Respondents' means, assets and liabilities.
 - c. That in default of attendance or of showing sufficient cause, there be an order that the personal moveable and immovable property of Ali Badrudin Ali, Badrudin Alibhai Punjani, Gulbanu Badrudin Alibhai Punjani, Alisha Amini Nathoo, Nazlin Amin Mohamed Nathoo, Deenabeen Kirtikumar Chaniyara, jointly and several, be attached and sold in execution of the decree issued on 27th January 2021.
 - d. That the Costs of this suit to be borne by the Respondents jointly.
20. It Is So Ordered Accordingly.

RULING DELIVERED, SIGNED AND DATD AT MOMBASA THIS 23RD DAY OF NOVEMBER, 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)
ENVIROMNENT AND LAND COURT AT
MOMBASA

In the presence of:

- a. M/s. Yumna, Court Assistant;
- b. Mr. Kongere Advocate for the Applicant.
- c. Mr. Birir Advocate for the Respondents

