



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Case 427 of 1991**

**TRANS-NATIONAL BANK LTD ..... PLAINTIFF**

**V E R S U S**

**NEW SPORTS VIEW INN LTD ..... DEFENDANT**

**Coram : Before Hon. Justice L. Njagi**

**Kanyi Juma for applicant**

**Odongo for respondent**

**Court clerk – Kinyua**

**RULING**

By an application dated 25<sup>th</sup> February, 2004 and made by way of a Chamber Summons taken out under O.XX1 rules 36 and 91 of the Civil Procedure Rules, the decree holder seeks an order from the court for the director of the judgement – debtor to be orally examined as to the defendant / judgement-debtor's property or means of satisfying the decree herein. The application is supported by the annexed affidavit of Abdulrahman Abubakar, a branch manager of the plaintiff bank.

At the hearing of this application, Ms. Osino appeared for the applicant while Mr. Odongo represented the respondent. After considering the supporting and replying affidavits and the arguments and submissions of both counsel, it seems to this court that the genesis of the application is rooted in the plaintiff's desire to execute the decree herein in a bid to recover the decretal sum which stood at Kshs. 1,746,363.75 as at 23<sup>rd</sup> March, 1999. Interest continues to accrue therein at 25.5.% per annum.

The auctioneers who were instructed to attach the defendant's assets in an attempt to realize the decretal sum did not find any attachable assets. The plaintiff therefore believes that the defendants have ceased to operate from the latter's offices and are evading attachment. As the plaintiff does not know of other assets or property belonging to the defendant which it may attach, it concludes that it is the defendant's director, Mr. D. M. Kabogo, who may know what may have happened to the defendant's assets. Hence, this application.

In his replying affidavit sworn on 7<sup>th</sup> November, 2005, by Mr. Daniel Munene Kabogo, the person named as the director of the defendant in the plaintiff's aforesaid application, gives a litany of the miseries through which the judgement debtor has undergone since 1994. In that year, the company became insolvent and ceased operating. In the period immediately preceding the insolvency, the

company encountered massive losses causing it to incur enormous debts on account of accrued rent arrears. Consequent upon those arrears, the landlord locked out the defendant out of the premises and eventually sold those premises together with the defendant's tools of trade without giving the defendant time to retrieve the books of account. As the lock-out was effected abruptly and without notice and / or warning, the defendant was unable to retrieve any useful documents from the premises. Thereafter, the management of the defendant company was put under a manager whom the deponent could only remember as a Mr. Joe who had since left the country for Tanzania and cannot be traced. Mr. Kabogo believes that the documents demanded were destroyed and / or lost when the premises had been closed, and if any of them exist, then the only person who can be able to explain their whereabouts would be Mr. Joe aforesaid. He concludes by stating that he does not have the documents demanded by the plaintiff, nor can he trace them even if he was compelled to do so. The company has been out of business for almost eleven years and is otherwise bankrupt.

The application before the court is made under rule 36 of Order 21. It is instructive that the object of this rule is to obtain discovery for purposes of execution in order to avoid unnecessary trouble and delay in obtaining satisfaction of money decrees. The applicant seeks to elicit information from Mr. Kabogo as to whether the defendant company has any property, assets or means of satisfying the decretal sum. Mr. Kabogo's affidavit evidence is simple. The company ceased operating nearly twelve years ago when it became insolvent. In other words, Mr. Kabogo is saying that the company has neither property, assets, nor means of satisfying the decretal sum. The circumstances leading to this sad state of affairs are lucidly demonstrated in his affidavit.

The applicant's second prayer is for Mr. Kabogo to produce all statements of accounts held by the defendant, books of accounts, annual returns of the company filed by the defendant with the Registrar of Companies and all other relevant documents with regard to the operations and assets of the defendant. Again, Mr. Kabogo has explained in his affidavit how and why he is not in a position to oblige, and has further given the name of the person who could have assisted. Unfortunately, that person is a Mr. Joe who left the court's jurisdiction for Tanzania and cannot be traced. In my view, the applicant would have done better by seeking to obtain information on the company's annual returns if any, from the Companies Registry. On the basis of Mr. Kabogo's affidavit evidence, I don't think that examining him under rule 36 would elicit any more information than is already contained in his replying affidavit. To grant the orders sought would, therefore, not add any value to the information he has already given, and may even prove to be an exercise in futility. That would be time consuming.

On the basis of the evidence before the court, I don't think that to orally examine Mr. Kabogo under the lines sought in prayers 1 and 2 will be of any assistance. Indeed, in paragraph 8 of the supporting affidavit, the plaintiff believes that the defendants have ceased to operate from their offices and are evading attachment. The grounds upon which this belief is premised are not disclosed. Whatever they may be, Mr. Kabogo's evidence gives an indication to the contrary.

In the circumstances, I don't think that it would be prudent to grant the orders sought. The application is accordingly dismissed. Each party will, however, bear its own costs of the application. It is so ordered.

***Dated and delivered at Mombasa this 9<sup>th</sup> day of June, 2006.***

L. NJAGI

JUDGE