



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**COMMERCIAL DIVISION, MILIMANI**  
**CIVIL CASE NO. 213 OF 2002**

**TWIGA PAINTS LIMITED .....PLAINTIFF**

**VERSUS**

**MURPHY MARKETING SERVICES LTD.....DEFENDANT**

**RULING**

The application the subject of this ruling is the one dated 30th March 2004 and filed in court on the same date.

I confirm that the amended application filed in court on 15th December 2004 was filed without leave of the court and accordingly I will not consider those amendments for the purpose of this ruling.

The subject application is brought under Order 21 Rule 36 and 91 of the Civil Procedure Rule, Section 3A and 63 (e) of the Civil Procedure Act.

The pertinent prayers of that application are: -

- That there be a stay of the order of Magistrate Meoli made on the 21st October 2003 and all consequential orders thereto pending the hearing and determination of this application or further orders;
- That the ex – parte order of Magistrate Meoli 21st October 2003 be hereby set aside ex debito justitiae.
- That there be such other orders as the court deems fair and just to grant in the circumstances of this case.

On 21st October 2003 the defendant company's directors and their counsel failed to attend court, even though that date was taken by consent and accordingly the plaintiff's application proceeded ex parte. The plaintiff's application was under Order 21 rule 36 of the Civil Procedure Rules and it sought the production of the defendant company's books of account and the examination of its directors. The court on 21st October 2003, on an oral application being made by the Plaintiff's counsel, ordered that the aforesaid directors be held personally liable for the defendant's company's debts hereof.

It is that order which is the subject of this present application.

The counsel for the directors argued that the orders granted ought not to have been granted because they were not prayed for in the plaintiff's application and the court was obligated only to grant orders as sought. He further said that since the defendant company and its directors were separate entities the corporate veil ought not to have been lifted.

The plaintiff respondent argued in opposition that the purpose of the plaintiff's application was to ascertain the assets of the defendant company so that if the plaintiff so wished it could go after those assets. The defendant company's directors in failing to attend court on 21st October 2003 denied the plaintiff that right to ascertain the assets; accordingly he said that the court had no other option but to direct that the said directors be made personally liable for the debt. Counsel further alluded to the director's dishonesty in that he argued that when notified of the judgment they proceeded to change the trading name of the company and also its location of trading. Although this contention was objected to by applicant's counsel on the basis that it was not contained in the replying affidavit I confirm that I perused the plaintiff's application dated 1st August 2003 and found that, that contention is to be found in the supporting affidavit of that application. It being on court record the court cannot ignore it. Plaintiff's counsel also argued that the applicants have brought the present application under the wrong provisions of Law in that in seeking orders sought which amount to an appeal or review the same are unattainable under Sections 3A and 63 (e) of the Civil Procedure Act.

In this ruling I wish to pick up the latter point raised by the Plaintiff's counsel. Indeed not only do I find that the present application is misconceived for having being brought under the wrong provisions of the law it is also wrongly brought as an application where as it ought to have been brought as an appeal. The Deputy Registrar derived the power to entertain the plaintiff's application, under Order 21 Rule 36 of the Civil Procedure Rules, from Order 42 Rule 5 (1) of the Civil Procedure Rules. Having entertained the same under that order and having granted an order that the applicants be personally liable for the defendant company's debts; the applicant if they wish to challenge that order ought to have appealed to the High Court as provided in Order 42 Rule 5 (2) and (5). These rules provide: -

**(2) "An appeal shall be from a decision of the Registrar Under the orders referred to in sub rule (1) to a judge in chambers;**

**(5) The Memorandum of the appeal, setting out the grounds of the appeal shall be filed within seven days of the decision of the Registrar."**

It is patently clear that the present application is misconceived from the reading of the above provisions. The directors ought to have filed within seven days an appeal against the order of SPM Meoli (Mrs) of 21st October 2003. Having failed to so file the present application must fail.

The order of this court is that the application dated 30th March 2004 is dismissed with costs to the plaintiff decree holder.

**Dated and delivered on this 22nd day of April 2005.**

**MARY KASANGO**

**JUDGE**

Read and delivered at Nairobi by Azangalala J, this 22nd day of April 2005.

**F AZANGALALA**

**JUDGE**

**Read in the presence of: -**