



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 453 of 1998

MEA LTD PLAINTIFF

VERSUS

C.S.B CHEPUTUK & J.J. CHERUIYOT T/A RIFT VALLEY

FEEDS & GENERAL SUPPLIES LTDDEFENDANT

RULING

The plaintiff has made an application under **Order XXI Rule 36 of the Civil Procedure Rules** seeking that C.S.B. Chebutuk and J.J. Cheruiyot, the managing Directors of the defendant company be summoned to court and orally examined as to what property or properties the judgment-debtor has or which means it has of satisfying the decree. The plaintiff further prayed that the said C.S.B. Chebutuk and J.J. Cheruiyot be ordered to produce before this court any book of accounts, cheque books and documents relating to the operations or transactions of the judgment-debtor from January 1997 up to date and the said defendant be examined on the said documents. The application is supported by the annexed affidavit of Daniel Munyoki Ngunia, the finance director of the plaintiff. The grounds in support of the application as stated on the face of application are that the judgment-debtor (*defendant*) had not satisfied the decree of the court and the plaintiff (*Decree-holder*) had been unable to trace any attachable assets of the defendants. The plaintiff stated that inspite of the decretal amount then of **Kshs.2,625,571/-** being unsatisfied the plaintiff as a decree-holder has been unable to ascertain the financial worth of the judgment-debtor. The plaintiff was of the opinion that the defendant was keeping away the said records related to its operations so as to conceal them and prevent the plaintiff from attaching the said assets of the defendant. The directors of the defendant company were duly served with the application. They did not file any pleadings in opposition to the application.

On the 5th of May 2005, Mr Chepkong'a Boiywo Chebutuk, a director of the defendant appeared before the court and testified under oath. He stated that he, with his wife, Jennifer Cheruiyot were the directors of the defendant company. He testified that the defendant company at the moment did not have any assets. He testified that he was not in a position to produce the books of accounts of the said company because the said books of accounts had been held as a lien by an auditor called Ester Kirui due to the fact that the defendant had not paid her professional fees. Mr Chebutuk denied that he had formed the company purposely to defraud creditors. He conceded that the defendant company had not paid any taxes to government since it was incorporated in 1994. He testified that he was willing to pay the debt owed by the company if given time. He stated that he was ready to assume the responsibility of paying the said debt owing although at the moment he was not in a position to make any payment.

He testified that the business that the defendant company used to run had collapsed due to theft and pilferage by its employees. Other than the expected proceeds from his father's land that he had cultivated, the said Mr Chebutuk testified that he did not have any source of income. He testified that

since February 1998 when he closed the business, he did not have any steady income. He stated that he was not able to even settle a loan which had been advanced to the defendant company by the Kenya Commercial Bank Ltd. He denied that the company was a sham.

He testified that the company was a different entity from himself. He stated that he had managed the affairs of the company prudently until the collapse of the business in the year 1998. He further testified that the company did not have any assets - even the security charged to the bank to secure the loan had been a title of a property owned by his father. Mr Chebutuk stated that the books of accounts of the defendant company had not been finalised to date because he had failed to settle the professional fees of the auditor. He stated that he could have produced the books of accounts of the company were it not for the fact that the said books of accounts had been retained by the auditors pending the settlement of her professions fees.

I have considered the application by the plaintiff and the oral evidence adduced by Mr Chebutuk, a director of the defendant company. **Order XXI Rule 36 of the Civil Procedure Rules** provides that:-

“Where a decree is for the payment of money, the decree-holder may apply to the court for an order that:

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- (a) The judgment-debtor; or*
- (b) in case of a corporation, any officer thereof; or*
- (c) any other person, be orally examined as to whether any or what debts owing to the judgment-debtor, and whether the judgment-debtor has any or 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.”*

Mr Chebutuk, a director of the defendant company in response to the application filed to summon him to appear before this court, did not file any replying affidavit. He further did not produce the books of accounts of the defendant company. The excuse for his failure to produce the said books of accounts is that the same were being held by the auditors for the reason that he had not settled her outstanding professional fees. He also stated that the defendant company did not have any assets since the business that it was conducting collapsed in 1998 as a result of theft and pilferage. Mr Chebutuk testified that since the company was formed, it had not paid tax of any sort. Neither had it prepared any books of accounts.

From the said evidence adduced by Mr Chebutuk, it is clear that the directors of the defendant company mismanaged the defendant company. Mr Chebutuk, as a director of the defendant company managed it in such a manner that it resulted to the creditors being defrauded. In the instant case, the plaintiff is unable to recover the sum decreed by this court because of the mismanagement of the assets of the defendant company by its directors. This court is unable to make any finding if the defendant company has any assets because Mr Chebutuk, as a director of the defendant company has failed to avail the said books of accounts to this court. Instead the said Mr Chebutuk has offered to personally settle the decretal amount due to the plaintiff from the proceeds of the harvest from his father’s farm that he was allowed to cultivate.

Having carefully considered the said evidence adduced by Mr Chebutuk and putting into consideration that courts have to assist successful litigants to give effect to decrees of the court, it is my view that this is one case where this court will lift the veil of incorporation and hold the said Mr Chebutuk liable to settle the debts of the defendant company. This court accepts the said Mr Chebutuk’s undertaking that he shall settle the debt owed by the defendant company as decreed by this court. The said Mr Chebutuk shall therefore agree with the plaintiff how best to settle the said outstanding amount decreed by this court. Should there be a lack of agreement, the plaintiff shall be at liberty to execute against the said Mr Chebutuk for the said decretal sum on the strength of his undertaking. The plaintiff shall have the costs of this application.

DATED at NAKURU this 3rd day of August 2005.

L. KIMARU

JUDGE