



DRAFT

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.153 OF 1998

GENERAL TYRE SALEP LTD PLAINTIFF

VERSUS

GAREX (K) LTD DEFENDANT

RULING

The application dated 23/1/2002 seeks to set aside orders made on 4.9.2001 in this suit ordering the directors to personally satisfy the debt and pay costs of this case. It is also sought to grant leave to defend the Notice of Motion dated 17.11.200. The application is grounded on the grounds on the application and is supported by affidavit of the applicant. Basically the applicant swears that she was not in Kenya on 7.8.2001 and could not have read the Kenya Times and that day she did not read it on any other day. And that the order made was illegal and contrary to Order 21 rule 36 under which it was purportedly made. I have read the lengthy grounds and supporting affidavit. I am satisfied that the applicant was not in a position to read the notice of service in the Kenya Times of 7/8/2001. Further more I find the advertised "Substituted Service By Advertisement" to be misleading in that the words "---- you be ordered jointly and severally to settle the decree holder's claim against judgment debtor. Further that the decree holder be granted leave to execute the decree herein against yourselves as directors of judgment debtor in execution of decree issued against you in the High Court -----" misleading and oppressive. They should not have been in the notice. The application dated the 17.11.2000 simply reads –

1. That the named directors of the judgment debtor 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 decree and –
2. That the persons named attend to be examined and-
3. That they produce any books or documents relevant to the way in which the judgment debtor company was being run or carrying on its transactions and operations."

The Civil Procedure Order 21 Rule 36 states as follows:-

"Where a decree is for the payment of money the decree-holder may apply to the court for an order that –

- a) Judgment debtor, or

b) In the case of a corporation any officer thereof, or

c) Any other person by 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”

In this case no liability is placed on the directors of the corporation. It being a legal entity. In this case one of the directors, not the Applicant, had guaranteed payment of the judgment debt. That must have been in his personal capacity.

In the circumstances I am of the view that service was not satisfactory, and therefore the applicant is entitled to order to set aside the court order made on 4/9/2001. She is also granted leave to defend the application dated 17.11.2001.

The costs of this application shall be paid by the Respondent.

Dated at Mombasa this 10th Day of April, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

In the presence of Mr. Kinyua and Mr. Kinyanjui.

Mr. Kinyanjui:

I apply for copy of the Ruling.

Court:Supply upon payment of copying charges.

J. KHAMINWA

COMMISSIONER OF ASSIZE