



BMG Holdings Limited v Jomax Group Limited & 2 others (Miscellaneous Application E847 of 2023) [2024] KEHC 3551 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E847 OF 2023**

MN MWANGI, J

MARCH 8, 2024

BETWEEN

BMG HOLDINGS LIMITED APPLICANT

AND

JOMAX GROUP LIMITED 1ST RESPONDENT

DENNIS KILATYA KALUKU 2ND RESPONDENT

MAGDALENE MBESA KATEMBU 3RD RESPONDENT

RULING

1. For determination by this Court is the applicant's Notice of Motion application dated 21/9/2023 brought under the provisions of Sections 1A, 3A, 6 and 34 of the Civil Procedure Act, Order 22 Rule 35 of the Civil Procedure Rules, 2010 and Sections 148, 787, 996 and 1002 of the Companies Act, 2015. The applicant seeks the following orders-
 - i. That the above named herein (*sic*) Dennis Kilatya Kaluku and Magdalene Mbesa Katembu judgment debtor/respondent's Directors do appear personally before this Honourable Court to be orally examined as to whether the judgment debtor have (*sic*) any property or means of satisfying the decree herein;
 - ii. That the said judgement debtor/respondents' (*sic*) Directors, be compelled to attend and appear before this Honourable Court and produce such all and any book of accounts and documents relating to the current operations of the respondents' enterprise (*sic*) to date and be orally examined as to its means to satisfy the decree herein;



- iii. That in default of appearance and/or in failure to such reasonable circumstances as may be deemed fit, the above named Directors be deemed personally liable to settle the claim herein and warrants of attachments do issue against them personally; and
 - iv. That the costs of this application be provided for.
2. The applicant averred that it filed a suit against the 1st respondent for failing to pay for goods supplied in the sum of Kshs.436,546.00 and judgment was obtained on 1/12/2021 against the 1st respondent herein, in the sum of Kshs.436,546.00 together with interest and costs of the suit all amounting to Kshs.567,947.00
 3. The applicant further averred that the 1st respondent was served with the decree but failed to honour the decretal sum which led it to instruct Mackys Auctioneers to execute by selling the assets of the 1st respondent. That the said Auctioneers have not been able to recover any amount from the judgment debtor owing to the fact that the directors are keen on defeating the wheels of justice.
 4. The applicant deposed that the 1st respondent no longer has a physical address and efforts to trace the judgment debtor's properties have proved futile.
 5. The respondents did not oppose the instant application despite proof of service of the application and directions for highlighting of written submissions on 24th January, 2024, vide an affidavit of service sworn on 8th December, 2023 by one Isaac Makau Malonza, a licensed Process Server.

Analysis and Determination.

6. This Court has considered the application, the affidavit in support thereof and the applicant's written submissions dated 15/1/2024. The issue for determination is whether the 2nd and 3rd respondents, as directors of the 1st respondent, should be summoned to appear before this Court to be orally examined on the means of the 1st respondent to satisfy the decretal sum owed to the applicant.
7. Order 22 Rule 35 of the *Civil Procedure Rules*, 2010 provides that-
 - “where a decree is for payment of money, the decree-holder may apply to the court for an order that –
 - (a) the judgement debtor;
 - (b) In the case of a corporation, any officer thereof; or
 - (c) Any other person, be orally examined as to whether any or what debts are owing to the judgement-debtor, and whether the judgement-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 judgement debtor or officer, or other person, and for the production of any books or documents.” (emphasis added).
8. In the case of *Masifield Trading (K) Ltd vs Rushmore Company Limited & another* [2008] eKLR, the Court when referring to the provisions of Order 22 Rule 35 of the *Civil Procedure Rules*, 2010 stated as follows-
 - “I think the above rule grants this court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle



the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation.”

9. Vide a judgment delivered on 30/9/2021, the Small Claims Court ordered the 1st respondent to pay the sum of Kshs.436,546.00 plus interest from the date the suit was filed.
10. The 1st respondent failed to pay the decretal sum which led the Court to issue a warrant of sale of movable property in execution of the decree issued on 4/11/2022.
11. The Auctioneers instructed by the applicant have been unable to execute the said warrants and to recover any amounts from the 1st respondent to date. The said Auctioneer has been unable to trace any assets belonging to the 1st respondent thus efforts to execute the judgment have been futile.
12. Under Order 22 Rule 35 of the *Civil Procedure Rules*, 2010, a Court may summon any Officer of a company to attend Court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company.
13. It will therefore be in the interest of justice to grant prayers 1 and 2 of the application herein as this will aid in the execution of the decree issued in this matter.
14. It is upon examination of the directors of the company that the Court will consider lifting of the corporate veil in order to hold the 2nd and 3rd respondents herein, namely, Denis Kilatya Kaluku and Magdalene Mbesa Katembu, respectively, personally liable to satisfy the amount decreed to be paid.
15. The upshot is that I hereby grant the following orders-
 - i. That Dennis Kilatya Kaluku and Magdalene Mbesa Katembu, judgment debtor/1st respondent’s directors do appear personally before this Court to be orally examined as to whether the judgment debtor has any property or means of satisfying the decree herein;
 - ii. That the said judgment debtor/1st respondent’s directors be compelled to attend and appear before this Court and produce such all and any book of accounts and documents relating to the current operations of the 1st respondent to date and be orally examined as to its means to satisfy the decree herein; and
 - iii. Costs are awarded to the applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF MARCH, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mkamburi h/b for Mr. Kibathi for the decree holder/applicant

No appearance for the respondents

Ms B. Wokabi- Court Assistant.

