



Katko Investments Limited v Right Angle Directional Limited
(Commercial Miscellaneous Application E137 of 2023)
[2024] KEHC 13088 (KLR) (Commercial and Tax) (14 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13088 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E137 OF 2023

MN MWANGI, J
OCTOBER 14, 2024

BETWEEN

KATKO INVESTMENTS LIMITED APPLICANT

AND

RIGHT ANGLE DIRECTIONAL LIMITED RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated September 20, 2023 pursuant to the provisions of Sections 635 & 1002 of the [Companies Act](#), No. 17 of 2015, Order 51 & Order 22 Rule 35 of the Civil Procedure Rules, 2010, and all enabling provisions of the law seeking orders inter alia, that this Court issues Summons to Mr. Smith David Rodney the current Director/Shareholder of the respondent and Mr. Charles Peter Njendu the former Director of the respondent to attend Court to be orally examined as to the respondent’s business and affairs, property, and/or means of satisfying the decretal sum, an order directing Mr. Smith David Rodney to produce the respondent’s books of accounts relating to the day to day running of the company, audited financial statements, certified company’s bank statements, cheque books and other statutory documents relating to the respondent’s operations and transactions and its affiliates from 2018 to date, and the said Directors be examined on oath on the said documents, and that in default of such attendance and producing the aforesaid documents, and/or in the event that upon compliance with Orders I & II as prayed, there is evidence of intent to defraud creditors and/or misuse company funds, this Court be pleased to lift the respondent’s veil of incorporation and order that Mr. Smith David Rodney and Mr. Charles Peter Njendu be held personally liable to settle the decree of the Court obtaining from this application together with other sums expressed and/or implied therein or be imprisoned and committed to civil jail for a period of not less than six months.



2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Mr. Shamji Keshra Jesani, a Director of the applicant company. He averred that on 3rd July 2023, this Court adopted the Arbitral Award made on 17th January 2023 and entered judgment in favour of the applicant against the respondent. That despite efforts made, the applicant has been unable to locate the respondent's assets sufficient to satisfy the decree and has repeatedly requested the respondent to settle the decretal sum, with no success. He emphasized that the respondent is still legally existing, with Mr. Smith David Rodney as the current Director, and that Mr. Charles Peter Njendu who is now a former Director was the Kenyan Director when the debt was incurred.
3. Mr. Jesani stated that the Directors have relocated the company to an unknown location to evade creditors including the applicant, and have acted fraudulently to defraud creditors. He averred that he believes that the respondent's corporate veil has been used to hide fraud and improper conduct by the company's controllers. He claimed that the respondent's actions suggest wrongful or fraudulent trading, or reckless management by its Shareholders, and that the company may have been a scheme to commit financial fraud, leaving debts unpaid. Further, he averred that the respondent's only Director is a foreigner, the applicant has no way to recover the decretal sum hence it is in the interest of justice that the orders sought in the instant application be granted.
4. From the record, it is evident that despite service of the instant application upon the respondent, it did not file any response.
5. The application herein was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of CM Advocates LLP on 14th May 2024. The respondent on the other hand never filed any written submissions nor made any oral submissions in opposition to the application herein.
6. Ms. Kendi, learned Counsel for the applicant cited the provisions of Order 22 Rule 35 of the Civil Procedure Rules, 2010 and relied on the decisions in *Jocelan Consultants Ltd v County Developers Limited* [2019] eKLR, and *Mathew Wandera Akwiri v Habo Group of Companies Ltd* [2020] eKLR and submitted that the applicant has met the requirements for being granted the orders sought by showing that the respondent has an unpaid debt, and that attempts to execute against it have failed. Further, that the individuals sought to be cross-examined are the respondent's current and former Directors, both of whom have knowledge of the transactions related to the dispute and can provide the necessary information.
7. Counsel relied on the case of *Jiang Nan Xiang v Cok Fas-St Company Limited* [2018] eKLR, and submitted that although the respondent is legally separate from its Directors, the corporate veil can be lifted in certain circumstances. She stated that would occur in situations where there is no real separation between the company's and shareholders' personal financial affairs, the company is a sham, the company's actions are wrongful or fraudulent, or the Shareholders/Directors act recklessly in managing the company. She added that if the company engages in schemes to perpetrate financial fraud or leaves creditors with unpaid bills or Court judgments, the veil of incorporation may be lifted. She stated that in this case, the applicant has an unpaid decree that the respondent is attempting to avoid payment of. Ms Kendi argued that the respondent company is a sham used to hide from legitimate creditors, including the applicant. She urged this Court to lift the respondent's corporate veil, and for its Directors to held personally liable for the decretal sum.

Analysis And Determination.

8. I have considered the application herein, the grounds on the face of the Motion and the affidavit filed in support thereof, together with the written submissions filed by Counsel for the applicant, the issues that arise for determination are-



- i. Whether the respondent's current & former Directors should be summoned to attend Court for examination on oath and production of inter alia, the respondent's books of accounts, and audited financial statements from 2018 to date; and
- ii. Whether the said Directors should be held personally liable for the respondent's debt to the applicant.

Whether the respondent's current & former Directors should be summoned to attend Court for examination on oath and production of inter alia, the respondent's books of accounts, and audited financial statements from 2018 to date.

9. The instant application is unopposed. From the record, it is evident that on 3rd July 2023, this Court adopted the Arbitral Award made on 17th January 2023 and entered judgment in favour of the applicant against the respondent. The applicant's case is that despite efforts, it has been unable to locate the respondent's assets sufficient to satisfy the decree and has repeatedly requested the respondent to settle the decretal sum, with no success.
10. Order 22 Rule 35(b) of the Civil Procedure Rules, 2010 provides for examination of Judgment debtors, officers or any other persons. It states that-

Where a decree is for the payment of money, the decree-holder may apply to the court for an order that in the case of a corporation, any officer thereof 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 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.

11. Pursuant to the above provisions, I have the jurisdiction to summon the respondent's current and former Directors to attend Court to be examined on whether any or what debts are owing to the decree-holder/applicant, and whether the judgment-debtor has any and what property or means of satisfying the decree. See *Masefield Trading (K) Ltd v Rushmore Company Limited & another Civil Suit No. 1794 of 2000*; [2008] eKLR.
12. The applicant averred that Mr. Smith David Rodney and Mr. Charles Peter Njendu are the current and former Directors of the respondent company, respectively. In support of this allegation, the applicant annexed to its affidavit in support of the instant application the respondent's CR-12 which shows that as at 30th November 2021, the respondent had two Directors being Mr. Smith David Rodney and Mr. Charles Peter Njendu, whereas as at 11th August 2023 the respondent had only one Director/ Shareholder being Mr. Smith David Rodney. The applicant then averred that in as much Mr. Charles Peter Njendu is no longer a Director of the respondent company, he was the respondent's Director at the time the debt that led to the dispute between the parties herein was incurred.
13. The Court in the case of *Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited* [2015] eKLR, when allowing an application made pursuant to the provisions of Order 22 Rule 35 of the Civil Procedure Rules, 2010 held as follows –

Order 22 Rule 35(c) of the Civil Procedure Rules allows the court to order any other person to attend court and be orally examined as to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein. A former director could also be called upon to attend court and be examined under Order 22 Rule as long as it is shown he is appropriate in an inquiry



to establish to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein.

14. The applicant herein has demonstrated by producing a copy of the Surrender of Lease Agreement dated 5th December 2020 and the respondent's CR-12 as at 30th November 2021 that at the time the said Agreement was entered into, Mr. Charles Peter Njendu was still a Director of the 1st respondent. For that reason, I am persuaded that the attendance of Mr. Charles Peter Njendu in Court for examination on the respondent's affairs is necessary as his evidence will help the Court in making a determination on whether or not the respondent's corporate veil should be pierced and/or lifted.
15. In the premise, I am satisfied that the applicant has made out a case to warrant this Court to exercise its discretion and order that Mr. Smith David Rodney and Mr. Charles Peter Njendu in their capacities as the current and former Directors of the respondent company, respectively, be summoned to attend Court for examination on oath and production of inter alia the respondent's books of accounts, and audited financial statements, from the year 2018 to date.

Whether the current and former Directors of the respondent should be held personally liable for the respondent's debt to the applicant.

16. In determining whether or not the respondent's former and current Directors should be held personally liable for the respondent's debt to the applicant, the Court has to first determine whether there are sufficient reasons for piercing and/or lifting the respondent's corporate veil. This issue however, cannot be determined without first giving the said Directors an opportunity to be examined on oath as to the respondent's business and affairs, property, and/or means of satisfying the decretal sum, and for them to produce the respondent's books of accounts relating to the day to day running of the company, audited financial statements, certified company's bank statements, cheque books and other statutory documents for the period in dispute. Therefore, this Court is of the view that this issue will be best determined after cross-examination of the respondent's former and current Directors.
17. This Court finds that the application herein is merited to the extent specified in the following orders –
 - i. Summons shall issue to Mr. Smith David Rodney the current Director/Shareholder of the respondent and Mr. Charles Peter Njendu, the former Director of the respondent to attend Court to be orally examined as to the respondent's business and affairs, property, and/or means of satisfying the decretal sum;
 - ii. An order is hereby issued directing Mr. Smith David Rodney to produce the respondent's books of accounts relating to the day to day running of the company, audited financial statements, certified company's bank statements, cheque books and other statutory documents relating to the respondent's operations and transactions and its affiliates from 2018 to date;
 - iii. Messrs Smith David Rodney and Mr. Charles Peter Njendu, the respondent's current and former Directors, respectively, shall be examined on the contents of the said documents at a date to be set by this Court;
 - iv. Prayers III & IV of the application dated 20th September, 2023 are held in abeyance and shall be determined after examination on oath of Messrs Smith David Rodney and Mr. Charles Peter Njendu, the respondent's current and former Directors, respectively, and production of inter alia the respondent's books of accounts and audited financial statements from the year 2018 to date; and



v. Costs of the application are awarded to the decree-holder/applicant.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF OCTOBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Kendi for the decree-holder/applicant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

