



**Laborex Kenya Limited v Kileleshwa Pharmaceuticals Limited (Civil Appeal  
289 of 2018) [2024] KEHC 12934 (KLR) (Civ) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12934 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 289 OF 2018**

**JN NJAGI, J**

**OCTOBER 24, 2024**

**BETWEEN**

**LABOREX KENYA LIMITED ..... APPELLANT**

**AND**

**KILELESHWA PHARMACEUTICALS LIMITED ..... RESPONDENT**

*(Being an appeal from the ruling of Hon. M. W. Murage (Mrs), Resident  
Magistrate, in Nairobi CMC Civil Case No. 2071 of 2014 delivered on 2/10/2017)*

**JUDGMENT**

1. The Appellant herein is a decree-holder against the respondent after the lower court delivered judgment in favour of the appellant on 21<sup>st</sup> October 2016. Efforts by the appellant to execute a decree of Ksh.1,790,967.00 through issuance of warrants of arrest and sale by public auction of the respondent's movable assets did not bear fruit.
2. The Appellant then made an application dated 2<sup>nd</sup> March 2017 before the lower court pursuant to the provisions of Section 3A of the *Civil Procedure Act* and Order 22 Rule 35 of the *Civil Procedure Rules* for the examination of the directors of the Respondent on the affairs of the Company and whether the Respondent was in a position to settle the decretal sum. The trial magistrate upon consideration of the application held that the application was one for lifting of corporate veil disguised as an application for examination of the Respondent's officials. The court consequently dismissed the application with costs. The appellant was aggrieved by the ruling and lodged the instant appeal.
3. The grounds of appeal are that:
  1. That the learned magistrate misdirected herself in law and in fact when she relied on the wrong principles of law when determining the application.



2. That the learned trial magistrate erred in law and in fact in holding that the plaintiff/appellant had not proven acts of fraud on the side of the defendant's directors.
3. That the learned trial magistrate erred in law and in fact in stating that the application was for lifting the veil of corporation, yet the application was one under Order 22 Rule 35 for examination of the directors on the affairs of the company.
4. That the learned trial magistrate erred in law and in fact by finding that the plaintiff had not satisfied the grounds to warrant the orders for examination of directors.
4. The appellant consequently sought that the ruling of the trial magistrate be set aside and that the matter be referred back to the Chief Magistrate's Court for issuance of orders directing the directors of the judgment debtor to appear for examination on the affairs of the company.
5. The appeal was disposed of by way of written submissions of counsels appearing for the parties.

### **Appellant's submissions**

6. The appellant submitted that section 3A of the *Civil Procedure Act* under which the application was brought gives the court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Further that Order 22 rule 35 of the *Civil Procedure Rules* allows examination of directors of a company.
7. The Appellant submitted that it had met the threshold set for the examination of company's officials as provided for under Order 22 Rule 35. The Appellant to that end relied on the pronouncement of the court in the case of *Ultimate Laboratories v Tasha Bioservices Limited* NBI HCCCNo. 1287 of 2000 cited with approval in the case of *Tropical Wood Limited v Samilis International Investments* (2017) eKLR where the court held that the court has power under Order 22 Rule 35 to summon a person for examination in order to ascertain whether the judgment debtor owes the decree-holder the amount in question and if the judgment debtor is in a position to settle the decretal amount.
8. The case of *Robert Khamala Situma v Afrikon (K) Limited* [2022] eKLR was also cited where it was held that:

Having regard to the clear provisions of Order 22 Rule 35 of the *Civil Procedure Rules*, and owing to the fact that the Judgment Debtor's indebtedness to the Applicant for the decretal sum herein is not disputed, the Applicant is justified and well within his rights to seek the orders of this court to summon the Judgment Debtor's Director and/or former director to be examined on oath over the state of affairs of the Company.
9. The court went on to explain the purpose of summons under Order 22 Rule 35 of the *Civil Procedure Rules* is to enable the court to establish the company's true financial position and not to penalize the party. Further, vide the cross-examination, a decree-holder is able to discern as to how to proceed with the execution of a decree.
10. Reference was also made to the case of *Post Bank Limited (In liquidation) v Nyamangu Holding Limited* [2015] eKLR where Gikonyo J. cited the holding in *Ultimate Laboratories (supra)* where Ringera J. (as he then was) stated that:

"The court's duty under the Order and Rule in question is limited to ensuring that the person being examined answers all the questions which are fairly, pertinent and properly



asked and it is thereafter up to the decree-holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree”.

11. The Appellant submitted that it was erroneous for the lower court to conflate an application for examination under Order 22 Rule 35 with that of lifting a corporate veil. The appellant faulted the trial court in jumping the gun in its holding as an application to lift the veil could only come after examination of a director where examination discloses reason to seek for such an application. In this respect the appellant relied on the case of *Masefield Trading (K) Limited v Rushmore Company Limited & Another* [2008] eKLR where Kimaru J. (as he then was) held that:

The 1<sup>st</sup> defendant and the interested party jumped the gun when they reached the premature conclusion that the veil of incorporation of the company was being lifted before the said director of the 1<sup>st</sup> defendant was orally examined by the court. It is upon examination of the interested party that this court may, if the circumstances warrant, lift the veil of incorporation and hold the directors of the company personally liable to satisfy the amount decreed to be paid by the 1<sup>st</sup> defendant.

12. The appellant submitted that the trial court ought to have first summoned the directors for examination so as to establish whether there was need to lift the corporate veil and hold them personally liable after cross-examination. It was submitted that through cross-examination exercise, the court will be able to establish the actual state of affairs of the company and issue appropriate directions.
13. It was submitted that the appellant only seeks to enjoy the fruits of its judgment and seeks the assistance of the court to that end while the respondent has engaged in acts of frustrating the appellant in doing so. The appellant urged the court to exercise its discretion in its favour.

### **Respondent's Submissions**

14. The respondent on the other hand submitted that it has not refused to pay the decretal sum. That the respondent on several times reached out to the appellant to set out the modalities on how to settle the decretal sum but the appellant has refused to engage with the respondent. That the respondent sent Ksh.80,000/= to the appellant and offered to settle the decretal amount by instalments but the same was refused.
15. It was submitted that no case has been made to warrant summoning of directors. That the company is a distinct entity and has not indicated that it is unable to settle its debts. It was submitted that summoning of directors is not an application as of right, the same must be justified taking into consideration that the company is a separate and distinct entity from the directors and its shareholders. That the conditions precedent must be established before the court issues the summons.
16. That the limited occasion when the special jurisdiction of the court can be called to summon the directors is when the court finds by the way of evidence that the directors have exercised improper conduct such as fraud or the company is acting as an agent of the shareholders. That none has been shown in this case.
17. It was submitted that the application is disguised as one to examine the directors when the actual intention is to lift the corporate veil. It was submitted that the applicant has not laid out sufficient grounds to warrant lifting of the corporate veil hence the prayers sought are misplaced. Making reference to the decision by Justice Mabeya in *Multichoice Kenya Limited v Mainkam Limited & Another* [2013] eKLR, the respondent submitted that the Appellant has not made a case for lifting of corporate veil as fraud has not been pleaded and proved sufficiently.



18. The respondent submitted that the appellant has not exhausted all remedies available under the law. That there is no evidence that the respondent removed the proclaimed items from their premises. That the respondent is willing to pay the decretal sum and to negotiate with the appellant on how to settle the debt. The respondent urged the court to dismiss the appeal with costs.

### **Analysis and Determination**

19. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

20. Examination of judgment debtors under Order 22 Rule 35 of the [Civil Procedure Rules](#) forms part of the process of execution of decrees. The order provides as follows:

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

- a. The judgment-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 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.”

21. Therefore, Order 22 Rule 35 is categorical and states the essence of the application for examination of any officer of a corporation. Such examination is therefore anchored in the law. I am therefore of the finding that it was erroneous on the part of the learned magistrate to conflate the same with an application for lifting of corporate veil. More so, it was premature on the part of the learned magistrate to dismiss the application on the basis that its purpose was to lift the Respondent’s corporate veil without granting the Appellant an opportunity to exercise the avenue under Order 22 Rule 35. If there was fraud or attempt by the Respondent’s directors or officials of removing any of the Respondent’s properties from the premises in order to frustrate the Appellant in execution of the decree, that is an issue to be dealt with during the examination of the Directors upon which it would be discernible if lifting the Respondent’s corporate veil is feasible.



22. The emphasis on examining the directors first then thereafter making an application for lifting the corporate veil was elucidated by Justice Kimaru in the Masefield's case (*Supra*) as follows:

“It is upon examination of the interested party that this court may, if the circumstances warrant, lift the veil of incorporation and hold the directors of the company personally liable to satisfy the amount decreed to be paid by the 1<sup>st</sup> Defendant.”

23. In the premises, I find the appeal to be merited and the same is allowed. Consequently, I will grant prayers 1 and 2 as sought in the Notice of Motion application dated 2<sup>nd</sup> March 2017 for examination of the Respondent's directors. It is thereby ordered that:

- (1) Mr. Paul Nganda Mwaniki and Mr. Goodeves K. Mwaniki who are directors of the judgment debtor shall attend court on a date to be appointed by the trial court and be orally examined as to the business and affairs of the Judgment debtor herein and the property of the judgment debtor or the judgment debtor's/ Respondent's means and assets of satisfying the decree sum.
- (2) Mr. Paul Nganda Mwaniki and Mr. Goodeves K. Mwaniki in their capacity as directors of the judgment debtor herein do produce before the trial court any books of accounts, cheque books and statutory documents relating to the operations and transactions of the judgment debtor from the year 2012 to date and the said directors be examined on oath on the said documents.

24. It is trite that costs follow the event. As the appeal has succeeded, I grant the costs of the appeal to appellant.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr Gachoka for Appellant

Mr Mokaya for Respondent

Court Assistant - Amina

30 days Right of Appeal.

