



REPUBLIC OF KENYA



**Ng'ang'a v Spero Africa Limited (Civil Case 140 of 2014)
[2024] KEHC 12608 (KLR) (Civ) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12608 (KLR)

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

**CIVIL
CIVIL CASE 140 OF 2014**

**CW MEOLI, J
OCTOBER 17, 2024**

BETWEEN

PIUS KAMAU NG'ANG'A PLAINTIFF

AND

SPERO AFRICA LIMITED DEFENDANT

RULING

1. Pius Kamau Ng'ang'a (hereafter the Applicant) took out the Notice of Motion dated 27.07.2023 (the Motion) expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); and Order 22, Rule 35 and Order 51, Rule 1 of the Civil Procedure Rules (CPR) and seeking the following orders:
 - " 1) The Directors of the Defendant namely; Anthony Gitari Karimi and Lilian Wanjiku Gitari of Windsor House, University Way and of P.O. Box 2090-00100 Nairobi be summoned to attend on a date to be determined by the court and
 - a. Directed to produce for inspection all books and accounts, cheque books, audited accounts and all other relevant documents of the Defendant Company for the period 31st August, 2010 – 31st July, 2023; and
 - b. Be examined under oath as to the Defendant's/Judgment Debtor's assets or other means of satisfying the decree issued against the Defendant on 13th May, 2022.
 1. In default of complying with the orders of the court issued in terms of prayer 1) above, the court do direct that the decree issued in favour of the Plaintiff dated the 13th May, 2022 be executed personally as against the directors of the Defendant/Judgment-debtor.



2. Any other or further orders that the court may deem fit and just to grant.
3.”

2. The Motion is premised on the grounds on its face and the depositions in the affidavit of the Applicant. To the effect that he obtained judgment in the present suit, against Spero Africa Limited (hereafter the Respondent), in the sum of Kshs. 5,400,000/- plus costs and interest thereon. The Applicant further stated that his attempts at executing the resultant decree have borne no fruit since the Respondent’s assets and physical address are unknown, and that several demands made to the Respondent’s advocates to ensure settlement of the decretal sum have been ignored. He averred that at one point, one of the Respondent’s Directors, Anthony Gitari Karimi, approached him and his advocates and presented them with purported original title documents to be pledged as security for the decretal sum, which title documents later turned out to be fake. That it is therefore apparent from the above turn of events, that neither the Respondent nor its Directors are keen on settling the decretal sum, necessitating the instant Motion; and that unless the orders sought therein are granted, the Applicant stands to suffer irreparable loss arising from his inability to obtain the fruits of his judgment.
3. To oppose the Motion, the Respondent filed the Grounds of Opposition dated 21.06.2024 to the effect that application is premature; the application has been brought in bad faith; the application has no merit; and that the application is misconceived and no proper basis has been laid in support.
4. The parties were directed to file and exchange written submissions on the Motion. To support the Motion, counsel for the Applicant anchored her submissions on the decision in Ramaben Ramnikal Patani, Ashit Patani & Selina Patani v Garden Chambers Limited [2019] KEHC 12340 (KLR) and Order 22, Rule 35 of the CPR, on the power of a court to summon a judgment debtor or other person to attend the court for purposes of examination and/or production of relevant documentation in respect of a judgment debt and ability or otherwise to satisfy the same. Counsel reiterated the averments earlier made in the supporting affidavit that a judgment exists in favour of her client and against the Respondent, which judgment remains unsettled. That in the circumstances, it would be necessary for the above named Directors of the Respondent to appear before the court in order to give a detailed account of the Respondent’s means of satisfying the decree.
5. Counsel for the Applicant further reiterated the averments that should the said Directors fail to comply, it will become imperative to lift the corporate veil of the Respondent, in order for the decree to be executed against the Directors in their respective personal capacities. Reference was made to the decision in Jepkemoi v Zaburi Enterprises Company Ltd & 2 others [2024] KEHC 2343 (KLR) regarding the principles for consideration in lifting the corporate veil of a company. That in the present instance, viable reasons have been given to necessitate the lifting of the corporate veil; namely, the disappearance of the subject motor vehicle while in the hands of the Respondent, and the pledging of a fake title document by Anthony Gitari Karimi, one of the Respondent’s Directors. The latter actions connoting fraud on the part of the Respondent and its Directors. For those reasons, the court was urged to exercise its discretion by granting the orders sought in the Motion.
6. In urging the court to dismiss the Motion, the Respondent’s counsel based his submissions on the decision in Jayden Limited v Bradley Limited [2021] KEHC 127 (KLR). In support of his argument that the Motion is premature since the Applicant has not demonstrated that he has exhausted all means available to him, in executing the decree against the Respondent. According to the submissions by counsel, the Respondent remains willing and intent on satisfying the decree as demonstrated by the surrender of a total of six (6) title documents by one of its Directors towards realization of the said decree. Counsel further submitted that only one (1) out of the six (6) title documents was purported to be a fake, namely Title No. Kajiado/Kaputiei-North/10139. That the Applicant has not disclosed the



status of the remaining five (5) titles which remain in his custody to date. Moreover, the Respondent never received any prior communication of the purported forgery as concerns the alleged fake title document.

7. On whether the court ought to lift the corporate veil of the Respondent, it is the contention by counsel that as a general principle, a company is a separate and independent entity from its directors and shareholders, hence the corporate veil of such company should not be lifted unless special circumstances have been demonstrated. Counsel here citing the decision in Peter O. Ngoge T/A O P Ngoge & Associates v Ammu Investment Company limited [2012] KEHC 1133 (KLR) where the court restated the above legal principle. It is therefore the contention by counsel that the Applicant has not satisfied the requirements for lifting the corporate veil of the Respondent herein. He relied on the case of China Wu Yi Co. Ltd v Edermann Property Ltd & 2 Others [2013] KEHC 3684 (KLR) in which the court held that the corporate veil of a company should not be lifted simply on the basis that the company has no known assets. Consequently, counsel urged the court to dismiss the Motion with costs.
8. The court has considered the material canvassed in respect of the Motion. Two key prayers are in the Motion. The foremost seeks to have the Directors of the Respondent namely; Anthony Gitari Karimi and Lilian Wanjiku Gitari summoned to attend court for the purpose of producing for inspection all books, accounts and other relevant documents belonging to the Respondent for the period dated 31.08.2010 to 31.07.2023; and for examination under oath as to the Respondent's assets or means of satisfying the decree issued in the suit.
9. The Applicant invoked Order 22, Rule 35 of the CPR which states:

“Where a decree is for the 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.”
10. Under the above provision, the court has the discretionary power to summon any of the mentioned persons to attend the court for purposes of examination on the nature and extent of debts owing by a judgment debtor, as well as the ability by such judgment debtor to satisfy the decree in question.
11. No authorities from the Court of Appeal on the provision were brought to the attention of the court. There are however enough decisions of the High Court. In the case of Ultimate Laboratories v Tasha Bioservice Ltd-Nbi HCCC NO 1287 OF 2000 (unreported), Ringera, J (as he then was) reasoned as follows:

“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”,

...



“ While I agree with the defendant’s/judgment debtor’s advocate that the objective of an examination of a company’s director or officer under Order XX1 Rule 36 is to obtain discovery, for the purpose of execution of a decree against the company, 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, I don’t agree that the court does not have the power in an application in execution which is grounded under the above provisions as well as the inherent power of the court and all other provisions of the law to lift the corporate veil of the company and order the director to personally discharge the debts of the company”.

Two things emerge from the above proposition. One, the power of the court to summon a person to attend and be examined under Order 22 Rule 35 is circumscribed with the purpose set out in the rule. That is;

.....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.

I, therefore, take the view that, as long as the applicant has shown that the respondent is in a position to provide information in the nature of discovery.....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, the court should summon the person to attend and be examined in relation to the purpose stated in the rule. Accordingly, I do not think, the rule places such a high and onerous standard as it has been argued by the respondent, that the applicant must establish; 1) the debtor’s debts and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment-debtor’s identified debts and properties which are subject of investigation. That kind of approach will defeat the entire purpose of the rule because the rule enables the applicant to seek for information in the nature of discovery to assist the decree - holder to follow through on the execution. If the decree- holder already has such definite information of the debts and properties of the judgment debtor, there will be no need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment-debtor’s known properties. The second thing; any person may be summoned under the rule, and such person need not have any or direct connection with the issues in the case whatsoever as urged by the respondent. What needs to be satisfied is the threshold I have mentioned above, and the person shall be summoned under the rule”.

12. Additionally, the court in the case of *Masefield Trading (K) Ltd v Rushmore Company Limited* ⁶⁹ *Another Civil Suit No. 1794 of 2000*; [2008] eKLR stated on the subject:

“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.”

13. Returning to the instant case, it is apparent from the record that the Applicant’s grounds for seeking the summoning order are that the assets belonging to the Respondent are unknown to him, thus impeding his attempts at executing the decree; and that his attempts at demanding settlement of the decree through the Respondent’s advocates have been unfruitful. That in the circumstances, it would be necessary for the Directors of the Respondent to appear before the court to give a detailed account of the Respondent’s means. The Respondent through its advocates, views the instant Motion



as premature, whilst maintaining that the Respondent has at all material times been ready and willing to settle the decretal amount.

14. From a perusal of the record, it is not in dispute that the Applicant has in place a judgment against the Respondent, to the tune of Kshs. 5,400,000/- plus costs and interest thereon. From the record, it is apparent that the decretal amount was yet to be settled by the Respondent as at the time of filing the instant Motion and hearing thereof. As seen in “Annexure PK 4” to the supporting affidavit of the Applicant which constitutes the Company records pertaining to the Respondent as held by the Companies Registry as at 16.01.2023, it is equally apparent that Anthony Gitari Karimi and Lilian Wanjiku Gitari are the directors of the Respondent. Going by the record, the said directors have not tendered any credible material to disclose the assets and means of the Respondent, in order to enable the court, ascertain its ability to satisfy the decree.
15. In the circumstances, the court finds that there is reasonable basis for summoning the named directors to attend court for the purpose of examination. The court is therefore inclined to grant prayer 1) of the instant Motion.
16. As concerns the second prayer seeking to have the corporate veil of the Respondent lifted so that the directors of the Respondent are held personally liable for its undischarged debt to the Applicant, the court is of the view that it is premature and preemptive, and therefore declines to consider or grant it at this stage. In the court’s opinion, this issue can only be adequately ventilated upon examination of the directors of the Respondent.
17. The upshot therefore is that the Notice of Motion dated 27.07.2023 partially succeeds. Consequently, the following orders are made:
 - a. The Directors of the Defendant/Respondent namely, Anthony Gitari Karimi and Lilian Wanjiku Gitari of Windsor House, University Way and of P.O. Box 2090-00100 Nairobi be and are hereby summoned to attend the court on the date to be fixed immediately hereafter for purposes of producing for inspection all books and accounts, cheque books, audited accounts and all other relevant documents of the Defendant/Respondent Company for the period 31st August, 2010 – 31st July, 2023; and for examination under oath as to the Defendant/Respondent-Judgment Debtor’s assets or other means of satisfying the decree issued against the Defendant/Respondent on 13th May, 2022.
 - b. In the circumstances, the Plaintiff/Applicant is awarded the costs of the Motion.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 17TH DAY OF OCTOBER 2024.

C. MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Tambo

For the Respondent: Mr. Kabue

C/A: Erick

