



Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Ltd (Miscellaneous Civil Application 606 of 2017) [2024] KEHC 12275 (KLR) (Civ) (15 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 606 OF 2017
JN MULWA, J
OCTOBER 15, 2024**

BETWEEN

NGAYWA NGIGI & KIBET ADVOCATES APPLICANT

AND

INVESCO ASSURANCE COMPANY LTD RESPONDENT

RULING

(On Notice of Motion Dated 30/10/2023)

1. Before this court is the Decree Holder's Notice of Motion dated 30/10/2023 brought under section 3A of the *Civil Procedure Act* and Orders 22 Rule 35, 51 Rule 1 of the *Civil Procedure Rules 2010*.
2. The Decree Holder prays for the following Orders;
 - i. Spent
 - ii. That the Honourable court be pleased to summon in court Joseph Njogu Mungai, Stephen Wamukoya, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani and Henry Ng'ang'a for oral examination as to the assets and liabilities of the judgment debtor
 - iii. That this Honourable Court be pleased to order Joseph Njogu Mungai, Stephen Wamukoya, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani and Henry Ng'ang'a the judgement debtor's directors to produce in court audited books of accounts and all bank statements of the judgement debtor herein.
 - iv. That the court be pleased to grant leave to the applicant/Decree holder to serve summons to attend court and court orders to the directors of judgement debtor namely Joseph Njogu



Mungai, Stephen Wamukoya, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani and Henry Ng'ang'aby way of substitute service by advertising in a daily newspaper.

- v. That the corporate veil on INVESCO Assurance Company Limited be lifted so that execution proceedings can proceed against the judgement debtor's directors in their personal capacities.
 - vi. That in default, the Honourable court be pleased to order Joseph Njogu Mungai, Stephen Wamukoya, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani and Henry Ng'ang'a and/or any other director of the judgement debtor company to satisfy the decree herein amounting to Kenya Shillings Seventy-Eight Thousand Seven Hundred and Fifty one shillings (Kshs 78,751) together with accrued interest and execution to issue against them personally in the case of default.
 - vii. That Costs of this application be borne by the judgement debtor.
3. The application is anchored on the grounds on its face and upon an affidavit sworn by the proprietor of the applicant firm on even date.
 4. In response the legal manager of the respondent filed a replying affidavit filed on 23/1/ 2024.
 5. In addition, the parties were on 24/1/2023 directed to file written submissions.
 6. The decree holder submitted that the court issued a decree on 14/2/2022 following taxation of the Advocate/ Client bill of costs and a certificate of taxation issued for Kshs 78,751/= and a decree drawn which has not been settled. The judgment debtor has totally neglected, ignored and or refused to settle the same.
 7. The decree holder relies on provisions of order 22 rule 35 of the [Civil Procedure Rules 2010](#) and argues that the conduct of the judgement debtor warrants their corporate veil to be lifted. It was argued that the judgement debtor's assets are unavailable for execution purposes and invited the court to find that these circumstances warrant lifting of the corporate veil.
 8. The decree holder further indicated that order 22 rule 35 of the [Civil Procedure Rules 2010](#) expressly provides not only summons to the directors for oral examination but also compels them to produce audited books of account before court for scrutiny and urged the court to grant the same.
 9. The judgment debtor did not refute that a decree was issued in favor of the applicant. They indicated that they are in a position to pay the said decree but time is what they asked for. The Judgment debtor was put under receivership two times in one year and only resumed business and has been able to pay some monies to the applicant. The judgement debtor has acted in good faith by paying the applicant in matters of the same nature a total sum of Kshs 1,748,558/= despite resuming business a few months ago.
 10. This court has considered and analysed the application affidavits and submissions.
 11. Order 22 Rule 35 of the [Civil Procedure Rules 2010](#) provides 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.”

12. In Masifield Trading (K) Ltd v Rushmore Company Limited & another HCCC No 1794 of 2000; (2008) eKLR it was held:-

“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 or may not lift the veil of incorporation”.

13. It is undisputed that the court issued a decree dated 24/9/2019 and that the judgment debtor has not paid the same to date. Order 22 Rule 35 of the Civil Procedure Rules 2010 the 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.

14. It will therefore be in the interest of justice to grant prayer 5, 2, 3, and 4 of the application as this will aid in the execution of the decree issued in this matter.

15. As for prayer 5, 6 the court will not grant the same as brought in this application as such a remedy cannot be sought under Order 22 Rule 35 of the Civil Procedure Rules 2010. This was held in the case of Peter O. Ngoge T/A O P Ngoge & Associates v Ammu Investment Company Limited [2012] eKLR, where Justice G. V. Odunga rendered himself as follows:

“...It is however my view that the lifting of a corporate veil is not the same thing as an application under Order 22 rule 35 of the Civil Procedure Rules 2010. In the latter, an officer is examined as an agent of the Company while in lifting the corporate veil, the mask of incorporation is lifted with the result that the shareholders are no longer agents of the company but are treated in their own rights and liability attaches to them not in their capacity as agents of the company but in their personal capacity.”

16. The upshot is that prayer 5, 2, 3 and 4 are granted. Summons shall be issued to the named Directors and served by advertising in the Daily Nation Newspaper to attend court for examination on a date to be taken in court.

Costs of the application to be borne by the Judgment Debtor, the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF OCTOBER, 2024.

JANET MULWA

JUDGE

