



Bamburi Special Products Limited v Remax Construction Limited (Civil Case 431 of 2014) [2023] KEHC 17380 (KLR) (Commercial and Tax) (15 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 431 OF 2014**

A MSHILA, J

MAY 15, 2023

BETWEEN

BAMBURI SPECIAL PRODUCTS LIMITED APPLICANT

AND

REMAX CONSTRUCTION LIMITED RESPONDENT

RULING

Background

1. The Notice of Motion dated July 12, 2021 was brought under Order 22 Rule 35; Order 51 Rule 1 of the *Civil Procedure Rules of Kenya (2010)* and Section 1A, 1B, 3A of the *Civil Procedure Act* of Kenya for the following orders;
 - a. Summons be issued by the Court to Mr Bulent Gulbahar and Mr Washiba Abdalla Abdul of PO Box No 7046 City Square ("the Directors") to be orally examined as to whether any debts are owed by the Judgment Debtor and whether the Judgment Debtor has any and what property or means in its possession or in possession of third parties to satisfy the sum of Kes 5, 426, 061.08 ("the Decretal Sum").
 - b. The Directors herein be ordered to produce all books of audited accounts, bank statements of accounts, cheque books and all other documents relating to the financial affairs of the company for the period between 2017-2021, or any other period as may be directed by the Court.
 - c. Upon default of orders (a) or (b), the Court to lift the corporate veil of the Judgment Debtor and the Directors be held personally liable to pay the Decretal Sum.
 - d. Costs of this Application be borne by the Judgment Debtor and/or its Directors.



2. The Application was supported by the grounds on the face of it and by the sworn Affidavit of Joy Impano.
3. In response the Respondent filed Grounds of Opposition and Preliminary Objection dated June 20, 2022. The Preliminary Objection was raised on the following grounds:-
 - a. The Application was not properly served as the directors are not within the Court's jurisdiction. The Application ought to have been served on the directors by diplomatic means as required by Order 5 Rule 29 as read with Order 5 Rule 30 of the [Civil Procedure Rules, 2010](#)
 - b. The Application is supported by a defective affidavit sworn by an advocate on contested matters of fact contrary to Rule 9 of the [Advocates Practice Rules](#).
 - c. The Application is similar to hence sub judice the Decree Holder's Notice to Show Cause dated September 23, 2020 which they have not yet marked as abandoned or withdrawn. This offends the provision of Section 6 of the [Civil Procedure Act](#).
4. The Grounds of Opposition were based on the following grounds;
 - a. The Application, dated July 12, 2021, is supported by a fatally defective affidavit sworn by the advocate on record, Ms Joy Impano, on contested matters of fact contrary to Rule 9 of the [Advocates Practice Rules](#) and thus must be struck out.
 - b. The Application, dated July 12, 2021, is sub judice since it seeks similar prayers as the Decree Holder's Notice to Show Cause, dated September 23, 2020, which they have not yet marked as abandoned or withdrawn. This offends the provision of Section 6 of the [Civil Procedure Act](#).
 - c. The Application was also not properly served on the directors as the directors are not within the Court's jurisdiction. The Application ought to have been served on the directors by diplomatic means as required by Order 5 Rule 29 as read with Order 5 Rule 30 of the [Civil Procedure Rules, 2010](#) The Applicant/Decree Holder was fully aware of the fact that the directors were not within the Court's jurisdiction. (paragraph 8 of the supporting affidavit and annex marked JI6)
 - d. The Application is premature as the Decree Holder has not demonstrated that they have taken steps to execute by other means or independently ascertaining the assets of the Judgment debtor as envisaged by Order 22 Rule 35 of the [Civil Procedure Rules](#) before resorting to the application which is disproportionately intrusive and prejudicial.
 - e. The Applicant has not shown that there has been any fraud or illegal conduct on the part of the directors so as to warrant lifting of the corporate veil in breach of the Rule in [Salomon Co Ltd v Salomon](#) (1897)
 - f. On the contrary, Bamburi Special Products Limited – Applicant/Decree Holders – submissions, witness statements and testimony in the suit herein confirmed that the directors of Remax Construction had not contracted the Applicant/Decree Holder or in any other form or shape ordered or received the alleged supply of concrete. The Applicant/Decree Holder's witness, one Titus Rex stated during his testimony among others as follows.

“I was dealing with Mr Ebu Bekir Sahin. He was their representative of the defendant.
I only dealt with the said Bekir.” (see page 2 of the typed proceedings).



“After sometimes Mr Bekir advised us to prepare invoices in the name of Remax Construction Limited. This was sometime in July 2011.” (see page 3 of the typed proceedings)

“I would confirm the identity of the people I met by asking for their identity or business card. I have no document to show that Abu Bekir was acting for and on behalf of the defendant.” (see page 4 of the typed proceedings)

“We have not shown any evidence that the said orders were delivered.” (see page 5 of the typed proceedings)

“we had an oral contract All the orders were signed and acknowledged by Abu Bekir as Remax” (see page 6 of the typed proceedings)

- g. It is *prima facie* evident, from the Applicant/Decree Holders submissions, witness statement and testimony, that the Directors have not acted in any fraudulent manner. Consequently, there is nothing before this Court that would justify or warrant the orders sought by the Applicant/Decree Holder under paragraph 1 and 2 of its application.
- h. Furthermore, the Application does not disclose any grounds in law or fact to justify the grant of the orders it seeks as envisaged under Order 22 Rule 35 of the *Civil Procedure Rules, 2010*.
- i. The Application is predicated on a Judgment that was obtained through deliberate misrepresentation of facts and fraud contrary to national values and principles under Article 10 of the *Constitution of Kenya, 2010*.
- j. In the unlikely event that the Court grants the Applicant/Decree Holder the orders sought under paragraph 1 and 2 of its Notice of Motion, dated 12 July 2021, I, Bulent Gulbahar hereby confirm that I shall comply with any such orders of the Court.

Issues For Determination

- 5. Having considered the Application, Grounds of Opposition and the Preliminary Objection, the court frames the following issues for determination;
 - a. Whether the Preliminary Objection is merited;
 - b. Whether summons be issued to Mr Bulent Gulbahar of and Mr Washiba Abdalla Abdul to be orally examined;

Analysis

Whether the preliminary objection is merited;

- 6. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696.
- 7. Rule 9 of the *Advocates (Practice) Rules* which the objection relied on provides as follows: -

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he



will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit in formal or non-contentious matter of fact in any matter in which he acts or appears.”

8. The advocate having been in conduct of the matter only deposed on facts that are within her knowledge with regard to the execution of the decree a process which the advocate has been handling and thus well versed with facts deposed.
9. On the issue of service, the Applicant served the Respondents through the email addresses that were provided in their correspondences a fact that has not been disputed by the Respondents who only argue against the substituted service.
10. Without delving further, the Preliminary Objection as is requires the investigation of facts such as ascertaining the residence of the Respondent and thus cannot be a Preliminary Objection properly so called. This court is satisfied that the Preliminary Objection does not meet the threshold.

Whether summons be issued to Mr Bulent Gulbahar of and Mr Washiba Abdalla Abdul to be orally examined;

11. Order 22 Rule 35 of the *Civil Procedure Rules, 2010*, which the Applicant premised its Application empowers the Court to order for attendance of an officer of a Judgment debtor’s Company to be examined orally on whether any or what debts are owing to the Company and any means or property the Company may have to satisfy the Applicant’s decree.
12. Order 22 Rule 35 of the *Civil Procedure Rules* states that:

“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”.

13. The duty of the court in this respect was also aptly stated by Ringera J as he then was in *Ultimate Laboratories V Tasha Bioservice Ltd*: Nairobi HCCC No 1287 of 2000 (unreported) 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 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”.

14. It was the Applicant's case that the Decretal Amount herein remains unsatisfied to the tune of Kes 5,426,016.08. Despite constant effort, the Decree holder's advocates and/or its appointed agents are unable to find any attachable assets of the Judgment Debtor company in order to satisfy the Decree.
15. It is notable that the judgment in this case was entered on May 3, 2018 and 5 years down the line the decree remains unsatisfied.
16. In the case of *Postbank Credit Limited (in Liquidation) Vs Nyamangu Holdings Limited* (2015) eKLR, that: -

“A person to be summoned under Order 22 Rule 35 (c) of the Civil Procedure Rules, to provide information on the property of the Company will also be required to produce any relevant documents or copies thereof on the assets of the Company or books of accounts including but not limited to the Judgment Debtor's annual financial statement, documents of title property of the Company in his possession and which he may have obtained as a director and/or shareholder of the judgment-debtor.”

17. This court is satisfied that this is a proper case for the summoning of the Defendant's directors to shed light on the company's credit worthiness.

Findings and Determination

18. For the forgoing reasons this court makes the following findings and determinations;



- i. This court finds the Preliminary Objection to be devoid of merit and it is hereby over-ruled;
- ii. This court finds the application dated July 12, 2021 to be partially meritorious and it is hereby allowed as follows.
- iii. Summons be issued to Mr Bulent Gulbahar and Mr Washiba Abdalla Abdul of PO Box No 7046 City Square ("the Directors") to be in attendance in court so as to be orally examined as to whether any debts are owed by the Judgment Debtor and whether the Judgment Debtor has any and what property or means in its possession or in possession of third parties to satisfy the sum of Kes 5, 426, 061.08 ("the Decretal Sum").
- iv. The Directors herein are hereby ordered to produce all books of audited accounts, bank statements of accounts, cheque books and all other documents relating to the financial affairs of the company for the period between 2017-2021;
- v. Costs of this Application to be borne by the Respondent.
- vi. Mention on May 18, 2023 before the Deputy Registrar for directions on fixing of a hearing date.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 15TH DAY OF MAY, 2023.

HON. A. MSHILA

JUDGE

Ataka – pray for leave to appeal.

Gulant – pray for leave to appeal on preliminary objection.

Court

Leave to the objector and judgment debtor to the respondent to appeal.

HON. A. MSHILA

JUDGE

