



**Lesinko Njoroge & Gathogo Advocates v Ikibii Limited (Commercial Miscellaneous Application E143 of 2018) [2023] KEHC 17665 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17665 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION E143 OF 2018**

**DO CHEPKWONY, J**

**MAY 12, 2023**

**BETWEEN**

**LESINKO NJOROGE & GATHOGO ADVOCATES ..... APPLICANT**

**AND**

**IKIBII LIMITED ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Notice of Motion application dated 2<sup>nd</sup> September, 2021 filed pursuant to Order 22 Rule 35 and Order 51 of the [Civil Procedure Rules](#). Therein, the Applicant seeks the following orders:
  - a. Spent;
  - b. Thumbi Kamau of P.O- Box 51350 G.P.O Nairobi; and Leah Wangari Thumbi of P.O. Box 51350 G.P.O Nairobi, being the Directors/Shareholders of the Respondent Company (Judgment Debtor) herein at the time of institution of this suit be summoned to attend to this Honourable Court for their examination on the Judgment Debtor's assets, bank accounts and to produce all its books of accounts including but not limited to the Judgment Debtor's annual financial statements;
  - c. Any other past or present Directors of the Respondent Company (Judgment Debtor) herein at the time of institution of this suit be summoned to attend to this Honourable Court for his/ their examination on the Judgment Debtor's assets, bank accounts and to produce all its books of accounts including but not limited to the Judgment Debtor's annual financial statements;



- d. In default of the said Directors complying with the above two (2) and/or three (3) orders, the Honourable Court be pleased to order that the said Directors be held personally liable to pay the Applicant the decretal sum of ksh 2,986,270/=;
- e. The costs of this Application be borne by the Judgment Debtor.

### **The Application**

2. The Application is based on the grounds set out on its and it is supported by the Affidavit of Wilson Gathogo an Advocate practicing in the Firm of Lesinko Njoroge & Gathogo, Advocates sworn on 2<sup>nd</sup> September, 2021. The Advocate holds that that the Judgment Debtor has not taken any step to satisfy the outstanding decretal sum of ksh 2,986,270 which arose from the Judgment entered on 9<sup>th</sup> June, 2021.
3. The Advocates seek to have the Directors cross-examined in order to trace their assets and bank accounts to aid in execution so that the advocate can enjoy the fruits of its Judgment. In default, the Advocate seeks the Directors of the client be held personally liable to pay the Advocate the decretal sum of ksh 2,986,270.00 together with costs of the application.

### **The Response**

4. The Application is opposed through the Affidavit of Thumbi Kamau on his own behalf and on behalf of Leah Wangari Thumbi sworn on 28<sup>th</sup> January, 2022. He states that the Company is not a Trading Company and has not been operational since its registration, thus it has never kept any Books of Accounts. He also contends that the company does not have any financial statements or known bank accounts or any assets whether current or noncurrent.
5. On 25<sup>th</sup> April, 2022, the parties were directed to canvass the application by way of written submissions. The Applicant's submissions are dated 10<sup>th</sup> May, 2022 while the Respondents are dated 2<sup>nd</sup> June, 2022. I have read through the said submissions in consideration of the application and response thereto filed by either party.
6. Having read through the application dated 2<sup>nd</sup> September, 2021 and the response dated 28<sup>th</sup> January, 2022 alongside the submissions filed by either side, this Court finds the issues for determination being:-
  - a. Whether Thumbi Kamau and Leah Wangari Thumbi, being the Director/Shareholders of the Respondent Company (Judgment-Debtor) or any other past or present Directors of the said Company at the time of instituting this suit should be summoned to attend court for their examination on the Judgment-Debtors assets, bank accounts and to produce all its books of accounts including but not limited to its annual financial statements.
  - b. Whether the said Directors can be held personally liable to pay the Applicant the decretal sum of ksh 2,986,270.00.
7. This application is premised under Order 22 Rule 35 of the [Civil Procedure Rules](#) which provides 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”.

From the wording of the said provision, the power to grant orders provided for therein is well within the law and the same is discretionary.

8. In this case, it has not been disputed that there exists a decree for payment of ksh 2,986,270.00 issued on 16<sup>th</sup> July, 2021 as per the Certificate of Costs dated 3<sup>rd</sup> July, 2020.
9. According to the Applicant/Advocate, the Judgment-Debtor has not made/taken any step to satisfy the outstanding decree for the sum of ksh 2,986,270.00 which arose from the Judgment entered on 9<sup>th</sup> June, 2021. The Advocate/Applicant seeks to trace the assets and bank accounts of the Respondent Company by having its Directors or Shareholders and or part Directors examined as this will aid and enable it enjoy the fruits of its Judgment. Further, it is the Advocates contention that if the Directors and or Shareholders of the Respondent cannot be examined as to its assets and bank accounts, then they be held personally liable to pay them the said decretal sum together with costs of the application.
10. In response, the Respondent is said not to be a Trading Company and has not been operational since its registration hence it has never kept any books of accounts or have any financial statements or known accounts or any assets whether current or deposit. According to the deponent of the affidavit, the only asset the Directors have is the property no LR 1/1085 which is subject to litigation in Nairobi ELC Petition no 25 of 2020, *Ikkibi Limited v Kenya Railways Corporation & Others*. They also contend that they are separate entities from the company and are not personally liable to the debts of the Company, hence the corporate veil cannot be lifted against them.
11. In response, the Advocates argues that the clients’ explanation in response for a Company which has been in existence since being registered on 3<sup>rd</sup> March, 1996 is not satisfactory. According to the Advocate, there is need for the Company to furnish the court with its Articles of Association and Memorandum of Association for its purpose and objectives to be ascertained and for the Directors to be interrogated to determine the company’s status and or whether they have other means of satisfying the decree. According to the Advocate, their aim in doing this is to trace the Respondent’s Company’s assets to enable them execute the decree but not lift the corporate veil of the Company which is a later recourse.
12. In this Court’s view the provisions under Order 22 Rule 35 is otherwise known as discovery in aid of executions and is meant to assist Decree-Holders whose efforts to execute a decree have failed, get information from officers of a corporation whose assets are unknown, also known as tracing. Having gone through the pleadings filed herein, it is not been disputed that Thumbi Kamau and Leah Wangari Thumbi are Directors of the Respondent Company, hence are in a position of responsibility as far as the Advocate’s claim is concerned.
13. In the case of *Ultimate Laboratories v Tasba B. Loservice Limited* (NBI HCCC no 1287 of 2000), Justice Ringera as he then was, had this to state:-

“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 owing to the Judgment-Debtor, and whether the Judgment-Debtor has any and what



property or means to satisfy the decree, the court should summon the person to attend and be examined in relation to the purpose stated in the rule.....”

14. Also, the Judgment-Debtors indebtedness to the Advocate/Applicant for the decretal sum is not disputed hence it is within the Advocate’s/Applicant’s right to seek orders of this Court to aid in execution of a decree by whichever means be it by tracing or filing of insolvency proceedings against the Company (See the case of *Koninklijke Luchtvaart Maatschappij N. V. v Africair Management & Logistics Limited* [2021]eKLR).
15. Further, from the response filed on behalf of the Respondent’s Company, it is not enough for its Directors to state that they do not have assets, books of accounts or financial statements on the basis that the Company is not a Trading Company. They ought to have provided sufficient proof of this or stated whether or not the Company is insolvent hence unable to pay its debts.
16. This Court therefore finds the Company’s response unsatisfying to warrant the dismissal of the application as against the Advocate’s entitlement to the fruits of the Judgment as a successful litigant.
17. As for whether the Directors can be held personally liable to pay the Applicant the said decretal sum, just like the prayer for lifting of the corporate veil, which is not part of the prayers, this is an issue that is usually determined after the examination of the Directors. In the *Koninklijke* case, the court stated as follows:-

[20] On whether or not the corporate veil should be lifted and the Judgment-Debtor’s Director be held personally liable for debt, I find that this is an issue that the court can only determine after the examination, under oath, of the Debtor’s Director and after considering the documentary evidence tendered on the affairs of the Company”.

18. On account of the foregoing, it is clear that the application dated 2<sup>nd</sup> September, 2021 partially succeeds, and for avoidance of doubt is allowed in the following terms:-
  - a. Summons to issue upon Thumbi Kamau of P.O. Box 51350 G.P.O Nairobi and Leah Wangare Thumbi of P.O. Box 51350 G.P.O Nairobi being the Directors/Shareholders of the Respondent Company (the Judgment-Debtor) at the time of instituting the suit to attend this Honourable Court for the examination on the Judgment-Debtor’s assets, bank accounts and to produce all its books of accounts including but not limited to the Judgment-Debtor’s annual financial statement.
  - b. Mention on 29<sup>th</sup> May, 2023 before the Hon. Deputy Registrar of the Commercial Division, Milimani for parties to take directions or further mention before the Presiding Judge of the Division.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 12<sup>TH</sup> DAY OF MAY , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Botany counsel for Applicant

No appearance or and by Respondent



