



Republic v Director of Public Prosecution & 3 others; Patel & 2 others (Exparte Applicants); Tufflas Manufacturers Limited (Interested Party) (Judicial Review 357 of 2019) [2024] KEHC 14628 (KLR) (Judicial Review) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW 357 OF 2019
JM CHIGITI, J
NOVEMBER 21, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT

DCIO, DCI EMBAKASI POLICE STATION 3RD RESPONDENT

CHIEF MAGISTRATE COURT, MAKADARA 4TH RESPONDENT

AND

MANSUKHLAL SHANTILAL PATEL EXPARTE APPLICANT

PERRY MANSUKH KANSAGRA EXPARTE APPLICANT

LAWI KIGEN KIPLAGAT EXPARTE APPLICANT

AND

TUFFLAS MANUFACTURERS LIMITED INTERESTED PARTY

RULING

1. The Application that is before this court is the Notice of Motion dated 30th March, 2023 wherein the Applicant seeks the following orders;
 - i. The directors of the interested party, namely, Sunit Jayantilal Shah, Joanita Wendy Pujara and Digvijay Bansidhar Mehta be summoned and examined under oath as to the Interested Party's



means and assets and to produce relevant documents and accounts showing the status of the company.

- ii. In default of the above prayer, this Honourable court be pleased to order that the said directors be held personally liable to pay the decretal sum of Kshs. 6,272,287/= (Six Million Two Hundred and Seventy-Two Thousand Two Hundred Eighty-Seven).
 - iii. The Ex-parte applicants be at liberty to execute against the directors of the interested party named hereinabove.
 - iv. Costs of this application be provided for.
2. The Application is supported by a Supporting Affidavit sworn by Lawi Kigen Kiplagat dated 20th March, 2024.
 3. It is The Ex-parte Applicants case that they taxed their bill in this suit after which a ruling dated 25th May 2022 was delivered and a decree on record against the Interested Party issued.
 4. It is their case that they have made attempts to execute the decree unsuccessfully.
 5. They argue that attempts to attach the assets of the company and have been unsuccessful.
 6. It is their submission that Article 48 of *the constitution* of Kenya, 2010 guarantees right to access to justice which includes the right to enforce and perfect orders and decrees of the court including orders for costs and cite the case of Joseph Nyamamba & 4 Others -vs- Kenya Railways Corporation [2015] eKLR, where the court held:

“The scope of access to justice as so enshrined is very wide – it includes ability of a party to file suit in court ...enforcement of decrees and orders issued by a court and prompt and fair compensation by Government upon compulsory acquisition of one’s property for public use...” (emphasis added)”
 7. The individuals named in the first prayer are directors of the interested party and it is not disputed that the sum of Kshs. 6,272,287/= (Six Million Two Hundred Seventy-Two Thousand Two Hundred Eighty-Seven) was taxed and certified as costs due and payable by the interested party to the applicants herein.
 8. According to the Applicants, these were efforts made towards the execution of the decree.
 9. They argue that the objective of Order 22 Rule 35 is essentially to ensure that decrees issued against corporate bodies are perfected and executed. Where the assets of a limited liability company cannot be traced or where execution against a company is otherwise frustrated, the court has jurisdiction to summon the directors of the company to be taken through scrutiny/examination to ensure that the ends of justice are achieved.
 10. They invoke Section 1A (3) of the *Civil Procedure Act* in arguing that the directors of Tuffplas Manufacturers Limited are bound by law to assist the court and to comply with the orders and directions of the court. The said section provides that:

“A party to civil proceedings.....is under a duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.”
 11. The foregoing informs the basis of the Application.



The Interested party's case;

12. In opposition to the Ex- parte Applicants' Application, the Interested Party filed a Replying Affidavit sworn by Sunit Jayantilal Shah dated 19th December 2023 and written submissions dated 22nd July 2024.
13. They argue that on 25th January 2024, a Ruling was delivered dismissing the Notice of Motion Application dated 5th April 2023, for lack of merit thereof and that the said Application is similar to the present Application dated 20th March 2024 by the Ex-Parte Applicants herein.
14. It is their case that Judgment was entered against the 1st, 2nd and 3rd Respondents and the Interested Party on 31st March 2021 by Hon. Lady Justice P. Nyamweya for costs. A Bill of Costs was taxed and a Ruling thereupon delivered on 25th May 2022 and an order for costs was as against 1st, 2nd and 3rd Respondents and the Interested Party.
15. They argue that the ex-parte Applicants have consistently and persistently targeted the Interested Party in their attempt to execute the taxed costs to the exclusion of the other Respondents who were also condemned to pay the costs of the case actions which are illegal, done in bad faith, and not grounded on a proper understanding of the Judgment delivered by Hon. Lady Justice P. Nyamweya, and therefore their Application lacks merit.
16. They argue that Tuffplas Manufacturers Limited, the Interested Party, is a legal person, duly registered limited liability Company separate and distinct from the directors of the company and that the applicants herein have not provided any evidence to justify lifting the veil of incorporation to execute as against the Directors of the Interested Party.
17. According to them, the application lacks merit.

Issues for Determination;

18. I have considered the Application and response thereto, and I find the following issue arising for determination:
Whether the application is merited to grant the reliefs sought;

Analysis and Determination;

19. Order 22 Rule 35 of the Civil Procedure Rules provides that:
 35. Examination of judgement-debtor as to his property (Order 22, rule 35.)
Where a decree is for the payment of money, the decree-holder may apply to the court for an order that –
 - a) the judgement-debtor;
 - b) in the case of a corporation, any officer thereof of
 - c) any other person be orally examined as to whether any or what debts are owing to the judgment-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' (Emphasis added).
20. In the instant matter, the Applicants are the decree holders against the Interested Party. The Interested Party does not dispute the existence of the decree, and also the attempted execution against it.



21. In order to establish whether it is justifiable to have the directors of the Interested Party summoned so as to be examined on the IPs property this court will be required to get into a merit analysis of the case.
22. On the issue of the directors being held personally liable to pay the decretal sum owed by the Interested Party would require the lifting of the corporate veil which similarly means getting into the merit of the case.
23. Ordinarily this is a processes that calls for in depth cross examination. These are matters of the Commercial and Tax Division.
24. In the Apex court’s decision in the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) where the court held as follows: -

“81. The entrenchment of judicial review in *the Constitution* has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opine that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.

84. More recently in Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) Praxedes Saisi case this court stated that: 'It is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.'

85. It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.”

25. This court is further guided by the finding in Republic v Registrar of Companies & 2 others; Waterfront Outlet Limited (C.147966) (Interested Party); Waterfront Outlets Limited (CPR/2015/214503) (Exparte) (Miscellaneous Application E059 of 2022) [2023] KEHC 227 (KLR) (Judicial Review) (19 January 2023) (Ruling) wherein the court held: -

“Suffice to note that even with the expanded scope of judicial review under the new constitutional dispensation, judicial review still remains a special jurisdiction that is majorly restricted to examination of whether an administrative decision conforms to the requirements of legality, rationality and procedural propriety. It is opportune to add that the judicial review process cannot be a substitute to statutorily provided for jurisdiction of other courts or bodies and the judicial review court cannot and should not assume jurisdiction where statute clearly places jurisdiction at the door of another court or body. To echo the words of the Supreme Court in Samuel Kamau Macharia v Kenya Commercial Bank & 2



Others (supra), “ A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.” It is this court’s finding and I so hold that this court lacks the jurisdiction to determine this suit”

26. This court lacks jurisdiction to preside over the instant application since the matter revolves around the provisions of The Companies Act No 17 of 2015 (herein after referred to as the Act) and the practice directions issued by the Chief Justice on the 18th November 1997.
27. Section 3 of the Company Act defines court as "the Court" means (unless some other court is reproduced hereunder provide as follows; The following matters shall be deemed to be Commercial matters, suitable for trial Courts, Upper Hill Nairobi.
 1.
 2. All company matters and applications including winding-up, excluding cases in which a Company is suing or being sued as an entity.
28. This court is further guided by the finding in Republic v Registrar of Companies & 5 others ExParte Midlands Company Limited [2019] eKLR the court while faced with a similar matter and in dismissing the application held that;
 - “ 38. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review”.
29. Although the judicial review division is a court with the status of the High Court under Article 165 of The Constitution, I take the humble view that the Commercial division of the High Court is best suited in the circumstances to hear the matter.
30. Section 11(1) of the High Court (Organization and Administration) Act provides that for purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions—
 - a. The Family and Children Division;
 - b. The Commercial Division;
 - c. The Admiralty Division;
 - d. The Civil Division;
 - e. The Criminal Division;
 - f. The Constitutional and Human Rights Division;
 - g. The Judicial Review Division; and
 - h. Any other division as the Chief Justice may, on the advice of the Principal Judge determine.



Disposition:

31. From the foregoing, I find that the prayers sought by the Applicants to summon the directors of the Interested Party to be examined as to the status of the company and to produce relevant documents and accounts showing the status of the company, to hold the directors of the IP personally liable to pay the decretal sum and to be at liberty to execute against the directors of the interested party is unattainable.

Order:

This matter is hereby transferred to the Commercial and Tax Division of the High Court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024

.....

J. CHIGITI (SC)

JUDGE

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