



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCC NO. 431 OF 2018

KONINKLIJKE LUCHTVAART

MAATSCHAPPIJ N.V.....PLAINTIFF/DECREE HOLDER

VERSUS

AFRICAIR MANAGEMENT

& LOGISTICS LIMITED.....DEFENDANT/JUDGMENT DEBTOR

RULING

1. The Plaintiff/ Decree Holder herein, **Koninklijke Luchtvaart Maatschappij N.V.** sued the Defendant/Judgment Debtor, Africair Management & Logistics Ltd. through the Plaintiff dated 6th November 2018 seeking the payment of the sum of USD 558,291.69 being the arrears on the air freight charges for services rendered to the defendant in the years 2015 and 2016.
2. The Defendant did not enter appearance or file a defence to the Plaintiff's claim and on 14th March 2019, default judgment was entered against the defendant for the claimed sum after which the Plaintiff filed the application that is the subject of this ruling.

Application

3. Through the application dated 29th June 2020 the Plaintiff seeks the following orders: -

- i. **THAT** the Honourable Court do order GUY JAN MERTENS a Director/Shareholder of the Defendant to attend for the purpose of being orally examined on oath in regard to the Defendant company's means and assets and/or his means and assets in as far as the payment of the decretal amount is concerned.*
- ii. **THAT** at the time of examination the said Director/Shareholder be and is hereby ordered to produce books, papers, documentary evidence showing the affairs of the company.*
- iii. **THAT** in default of providing suitable means and assets for the satisfaction of the decree of this Honourable court dated the 14th day of March 2019, the corporate veil of the Defendant Company be lifted and the said director GUY JAN MERTENS, be held personally liable to satisfy the decree of the court in full.*
- iv. **THAT** cost of this Application be borne by the Judgement Debtor and/or the officers of the Judgement Debtor in any event.*

4. The application is supported by the affidavit of **PIER LUIGI VIGADA** and is premised on the grounds that: -

- i. **THAT** upon conducting a search at the Registrar of Companies, it has been discovered that the following are the officers of the Judgment Debtor: -*
- i. GUY JAN MERTENS – DIRECTOR/SHAREHOLDER-50,000 shares ii)AFRICAIR AERO LIMITED – SHAREHOLDER - 1000 shares*

ii. THAT the Decree Holder's attempts to recover judgment sum from the Judgment Debtor have failed.

iii. THAT the said officers have all along known about the existence of the suit herein and have willingly neglected to participate in the same. The said officers are also aware of the outcome of the suit herein and the subsequent decree awarded.

iv. THAT the said officers have used the Defendant company as an instrument to accumulate excessive debts which they had no intention to pay and which they have subsequently defaulted on.

v. THAT the Director Mr. Guy Jan Mertens has in December, 2019 and during the pendency of this suit filed a bankruptcy petition in this court on account of large debts owed by the Judgment Debtor on account of mal-governance.

vi. THAT if the orders sought are not granted there is a real risk that the assets of the Judgment Debtor and the Director and Shareholder Mr. Guy Jan Mertens will be intermingled and depleted through the bankruptcy proceedings thereby denying the Decree Holder the fruits of the judgment in this suit

vii. THAT in the event the said Director is incapable of providing suitable means and assets for the satisfaction of the decree of this Honourable court, the only recourse available will be the lifting of the corporate veil to enable execution against the Director personally.

5. The defendant opposed the application through the replying affidavit of **Guy Jan M. Mertens** who avers that he is aware of the Decree Holder's attempt to execute the decree of USD 558,291.69 plus costs and interest at court rates. He adds that the Judgment Debtor, who previously carried out the business of shipping and logistics, has since collapsed, is no longer operating as a going concern and is thus unable to satisfy any of its debts.

6. Mr. Mertens further states that owing to financial tumultuous times, inflation and collusion between employees of the Judgment Debtor and Suppliers, the Judgment Debtor was run down thereby rendering it inoperable, insolvent and without any asset base capable of satisfying its debts. He avers his efforts to turnaround the Judgment Debtor and seek the restructuring of debts from creditors was not successful due to the Judgment Debtor's continued lack of business activities, inability to recover its debts and continued incurrence of high sustenance costs which forced the defendant to cease operations.

7. He further states that consequent to the Judgment Debtor's inability to service its debts, two of its main creditors, (a) Bank of Africa (Kenya) Limited and (b) the Applicant/Decree Holder instituted debt recovery proceedings against it thereby obliterating all its chances of recovery.

8. He suggests that there are various routes for the Applicant/Decree Holder to pursue in recovering its debt that includes but is not limited to filing a creditor's insolvency of the Judgment Debtor and observes that the instant application is frivolous, vexatious, and an abuse of the court process for the reasons that:

i. If the purpose of the oral examination is to obtain the status of the means and assets of the Judgment Debtor as couched in prayer 2 of its Application, the same is already captured in the Supporting Affidavit deponed under oath on 26 November 2019 as contained in Insolvency Cause E025 of 2019 and which the Applicant/Decree Holder has due notice of having annexed it to his Application as marked ARD06.

ii. The legal outcome sought under prayer 3 remains unavailable as at no time did he issue a personal guarantee with respect to the debt owed to the Applicant/Decree Holder, in his capacity as Director of the Judgment Debtor, and therefore cannot be considered a surety within the meaning of section 92 of the Civil Procedure Act.

iii. Further, this Application does not plead any instances of fraud, dishonesty, or related activities on my part that would justify lifting of the veil of incorporation.

iv. Moreover, this Application does not plead any facts or give any evidence to support the allegation of fraud.

9. He states that from the contents of his Insolvency Petition No 025 of 2019 he does not have any personal debts and that all the debts enumerated in the said Insolvency Petition are debts owed by the Judgment Debtor save for the personal guarantee he issued with respect to the debt obtained from Bank of Africa (Kenya) Limited which bank executed against him personally thereby leaving him with no option but to submit himself to the jurisdiction of this Honourable Court by filing for bankruptcy.

10. He avers that the Applicant/Decree Holder is well aware of and has been served with his Bankruptcy Petition under Insolvency Cause E025 of 2019 but has deliberately declined to participate in the said proceedings which participation will allow it sufficient opportunity to prosecute its legal rights against him, if there are any.

11. He further states that through a newspaper advertisement placed in the Standard Newspaper of 8th May 2020, notice was issued to all his creditors to the effect that he had filed a bankruptcy petition in the High Court Commercial and Tax Division in Nairobi.

12. He maintains that in the circumstances of this case, it would be draconian and unjust to hold him personally liable for the Decree Holder's debt in view of the pendency of his Bankruptcy Petition which is yet to be heard and determined on its merits.

13. Parties canvassed the application by way of written submissions which I have considered. The main issues for determination are follows:

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i. Whether the director/shareholder Mr. Guy Jan Mertens should be summoned to be orally examined in respect to the Judgment Debtor's means and assets.

ii. Whether the corporate veil of the Defendant Company should be lifted and Mr. Guy Jan Mertens held personally liable to satisfy the decree of the court in full.

Oral Examination of Director

14. Order 22 Rule 35 of the Civil Procedure Rules, 2010, 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.

Order 22 Rule 35 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.

15. The above provisions were considered in *NBI HCCC No. 1287 of 2000 Ultimate Laboratories vs Tasha Bioservice Limited (Unreported)* wherein the Court observed as follows: -

“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 within 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.”

16. In the present case, it is not disputed that **Mr. Guy Jan Mertens**, is the Director and shareholder of the Judgment Debtor/Company. It is also not disputed that the court issued a decree against the Judgment Debtor in favour of the Applicant for the sum of USD 558,291.69 on 29th May 2019 and that the decretal sum has not been satisfied.

17. The Judgment Debtor's deponent and Director however explained, in the replying affidavit, that Judgment Debtor who previously carried out the business of shipping and logistics has collapsed which means that it is no longer operating as a going concern and is thus unable to satisfy any of its debts. He faulted the applicant for filing the present application and suggested that the applicant should have pursued other debt recovery options that include the filing of a creditor's insolvency of the Judgment Debtor. He further averred that the Applicant/Decree Holder is well aware of the existence of his Bankruptcy Petition under Insolvency Cause E025 of 2019 but has deliberately declined to participate in the said proceedings which participation will allow it sufficient opportunity to prosecute its legal rights against him, if there are any.

18. Having regard to the clear provisions of Order 22 Rule 35 of the Civil Procedure Rules, and owing to the fact that the Judgment Debtor's indebtedness to the Applicant for the decretal sum herein is not disputed, I find that the Applicant is justified and well within its rights to seek the orders of this court to summon the Judgment Debtor's Director to be examined on oath over the state of affairs of the Company. My take is that it is not for the defendant to determine the mode of execution to be taken by the decree holder and that the filing of insolvency proceedings against the company is just one among the many avenues available in such execution.

19. Turning to the respondent's deponent's position that he has filed a bankruptcy petition that is ongoing in which the debt herein has been included in the statement of affairs, I find that the mere fact that the respondent's deponent has filed for bankruptcy does not preclude the defendant's director(s) from being examined on the state of affairs of the company more so considering the fact that the company is a distinct and separate entity from its directors. In my considered view, the purpose of summons under Order 22 Rule 35 of the Civil Procedure Rules is to enable the court establish the company's true financial position and not to penalize any party. I am guided by the decision in **Postbank Credit Limited (in Liquidation) vs Nyamangu Holdings Limited (2015) eKLR**, where the court held 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.”

Lifting of the Corporate Veil

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.

21. Having regard to the findings and observations that I have made in this ruling and given the circumstances of this case, I find that, it is in the interest of justice that the prayers sought in the application dated 29th June 2020 be granted in terms of prayers i), ii) and iv) only.

Dated, signed and delivered via Microsoft Teams at Nairobi this 8th day of July 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence

Mr. Mbatia for Decree Holder.

Mr. Lubeto for the Judgment Debtor/Respondent

Court Assistant: Sylvia.