



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURT**

**CIVIL CASE NO. E033 OF 2018**

**STANBIC BANK KENYA LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**NETCASH LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The application for consideration is the Plaintiffs' Notice of Motion dated 26<sup>th</sup> March 2021 brought under **Section 1A, 1B and 3A** of the **Civil Procedure Act**, Cap. 21 Laws of Kenya, **Order 22 Rule 35** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010**, and all other enabling provisions of the Law. The Application seeks the following orders:

***1. THAT the Directors to the Defendant Company as herein listed below be summoned to attend court on a date to be fixed by the Court for purposes of oral examination, and for the production of any books or documents relating to the Defendant Company's finances or accounts;***

***a) DICK OKINYI ARUDO,***

***b) VINCENT BOB OKOTH.***

***2. THAT in default of compliance with Prayer 1 above, warrants of arrest in execution of the decree be issued as against the said directors namely DICK OKINYI ARUDO and VINCENT BOB OKOTH or either of them who fails to comply with the Order.***

***3. THAT the costs of this application be borne by the Defendant/Respondent.***

2. The application is based on the grounds on the face of it and supported by an Affidavit sworn on even date by **ELISHA NYIKULI**, a Legal Counsel at the Plaintiff's company. He deposed that by a Court Decree of 17<sup>th</sup> July, 2020 and issued on 26<sup>th</sup> August, 2020, the Plaintiff was awarded USD. 399,805.13 being damages plus interest therein, together with costs of the suit. He averred that there has been no Review or appeal pending in any court against the said judgment and consequential Decree and neither is there any order of stay of execution against the same.

3. He noted that the Defendant has not settled the Decretal sum in fulfillment of this Honourable Court's judgment and Decree of 17<sup>th</sup> July 2020. He also stated that the Plaintiff's Advocates on record have had difficulties tracing the premises as well as the whereabouts of the Defendant Company. Its place of business as indicated in their correspondences with the Plaintiff at the time of taking the facility does not host the said Defendant Company anymore.

4. He averred that in view of the inability to trace the Defendant, this Court vide an order issued on 19<sup>th</sup> February 2020 allowed the Plaintiff to effect service of summons and other court process via advertisement in the newspapers. He also posited that the Plaintiff's Advocates that managed to trace the contacts of the named directors who indicated that the Defendant had moved to a different location but declined to disclose neither the said location nor their whereabouts.

5. Further, he averred that the Defendant has no known assets that can be attached in realization of the Judgment and Decree of this Honourable Court as efforts to trace the same have all been futile. That the prevailing circumstances have frustrated the process of Execution of this Court's Judgment and Decree of 17<sup>th</sup> July, 2020 thus denying the Plaintiff the fruits of its judgment.

6. He stated that in order to realize the said judgment and Decree, the Plaintiff intends to lift the corporate veil of the Defendant company so as to execute the judgment and Decree against the directors of the Defendant company namely **DICK OKINYI ARUDO** and **VINCENT**

BOB OKOTH as the persons who executed the Merchant Agreement with the Bank in the said capacity. However, in order to lift the Corporate veil of the Defendant, there is need to first examine the accounts of the Company for this Honourable court to make a determination as to whether the Company is in a position to satisfy the Decree of this Honourable Court.

7. He argued that this Court is seized with the Powers to summon the Defendant's aforesaid Directors to attend court for purposes of oral examinations and production of any books or documents relating to the Company's books of accounts for purposes of ascertaining the Defendant's ability to satisfy the Decree of this Honourable Court. He also noted that no prejudice will be suffered by the Defendant if the orders sought herein are granted. That in any event, it is in the interest of justice and fairness to do so to enable the Plaintiff to realize the fruits of its judgment.

8. During the hearing of this application, Mr. Maondo, Counsel for the Plaintiff submitted that the Defendant has never entered appearance nor filed any Defence in this matter despite having been served with Summons to Enter Appearance. He also stated that they advertised the current application but there has never been a response to the same from the Defendant. In the circumstances, he urged that warrants of arrest do issue against the two directors.

### **Analysis and Determination**

9. I have considered the application, the supporting affidavit and the Plaintiff's brief submissions. The issue that arises for determination is whether the directors of the Defendant Company should be summoned for examination in respect to payment of the decretal amount.

10. It is not disputed that there is a valid decree that was issued against the Defendant herein on 26<sup>th</sup> August 2020. The decree emanates from a judgment entered against the Defendant in favour of the Plaintiff on 17<sup>th</sup> July, 2020 for the sum of USD. 399,805.13 being damages plus interest thereon, together with costs of the suit. It is also not in dispute that the decretal sum has not been settled by the Defendant whether wholly or in part.

11. **Order 22 Rule 35** of the **Civil Procedure Rules** under which this application was brought stipulates as follows:

*“35. 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.”*

12. The above provision grants the court power 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.* (See *Masefield Trading (K) Ltd v Rushmore Company Limited & Another [2008] eKLR*). 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".*

13. The Plaintiff stated that the present application did not elicit any response from the Defendant despite proper service. Indeed I have confirmed that there is a return of service on record showing that the application was duly advertised in the Daily Nation Newspaper of 4<sup>th</sup> June 2021. The court record also confirms that the Defendant has never participated in these proceedings despite being served with the relevant documents. I therefore find that this is a proper case for the summoning of the Defendant's directors to shed light on the company's credit worthiness. However, I find that it would be premature at this stage to issue a warrant of arrest. The Plaintiff can move the court for such an order in case the directors fail to attend court for purposes of being examined.

#### **Deposition**

14. Accordingly, I order that **Dick Okinyi Arudo** and **Vincent Bob Okoth** do attend court on 13<sup>th</sup> October, 2021 to be orally examined on whether the Judgment Debtor has any property or means of satisfying the decree herein. They will also be required to produce any relevant books of account and other documentary evidence relating to the Defendant Company's finances or accounts. The costs **of the application shall be borne by the Defendant. It is so ordered.**

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> JULY, 2021.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Ms Njuguna h/b for Mr. Maondo for the Plaintiff/Applicant.*
2. *No appearance for the Defendant.*