



Kabco Contractors Limited v Unity Court Limited & another (Miscellaneous Application 322 of 2014) [2021] KEHC 423 (KLR) (Commercial and Tax) (14 December 2021) (Ruling)

Neutral citation: [2021] KEHC 423 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 322 OF 2014
WA OKWANY, J
DECEMBER 14, 2021

BETWEEN

KABCO CONTRACTORS LIMITED APPLICANT

AND

UNITY COURT LIMITED 1ST RESPONDENT

PATRICK KOMEN 2ND RESPONDENT

RULING

1. This case was previously handled by different judges before it was allocated it to this court on 20th January 2021.
2. The matter first came up before me for directions on 3rd March 2021 when parties agreed to proceed with the case from where it had reached. Directions were also issued that the proceedings so far taken in the matter be typed after which the case was listed for hearing on 28th June 2021 for further cross examination of the directors of the Company.
3. When the matter came up for hearing on 25th June 2021, Mr. Njenga, learned counsel for one Mr. Patrick C. Komen, a Director in the 1st respondent company, objected to the cross examination of Mr. Komen on the basis that he, Mr. Komen, had ceased to be a director of the 1st respondent company. Mr. Njenga argued that this court, differently constituted, had on 28th September 2016 ordered the 1st respondent's current directors to file the company's statement of affairs and other documents which order was complied with.
4. According to Mr. Njenga, since Mr. Komen had ceased to be a director in the company, he should not be cross examined over the said company's affairs.



5. Mr. Kararia, advocate for the applicant, on the other hand argued that Mr. Komen still remains a person of interest in these proceedings in view of the fact that the application seeking his cross examination was brought under Order 22 Rule 35 of the Civil Procedure Rules which does not confine examination of a judgment debtor as to his property to directors. He maintained that since Mr. Komen was the Managing Director of the 1st respondent at the time the tender on construction and arbitral award was made, he was responsible for making the payments due to the claimant. Counsel noted that Mr. Komen also failed to comply with the order for security which was issued when he was still in office.
6. Counsel argued that the applicant is entitled to cross examine Mr. Komen on the issues that arose when he was still the Managing Director and added that at no time did this court dispense with its directions for the cross examination of Mr. Komen.
7. Miss Ndong, learned counsel for the 3 Directors of the 1st respondent associated herself with the submissions made by Mr. Kararia and added that the issue of the cross examination of Mr. Komen had arisen before this court on numerous occasions and that in all the instances, orders have been issued that he be cross examined. Miss Ndong urged the court to order that the matter proceeds for cross examination.
8. I have considered the submissions by counsel over the issue of whether or not Mr. Komen should be cross examined over the affairs of the 1st respondent company.
9. A perusal of the proceedings so far taken indicate that the issue of the cross examination of Mr. Komen did not arise recently but has been the subject of discussion ever since the court ordered for the cross examination of the Directors of the Company over the company's statement of affairs.
10. It was not disputed that the said Mr. Komen at some point swore an affidavit over the company's assets as can be seen from the proceedings of 6th October 2016. On the said date, Ochieng J. issued the following orders: -

“ Mr. P.C. Komen is to serve the current directors of the respondents with summons requiring them to attend court on 8th December 2016 to be cross examined on the whereabouts of the respondent's assets, and also on the question as to why the respondents had not paid to the Claimant, its dues;

On 8th December 2016, Mr. Komen is also to be present in court for cross examination if necessary.”
11. I note that the said orders of Justice Ochieng have not been set aside.
12. The applicant has indicated that the cross examination of Mr. Komen will be limited to the period that he was the Managing Director of the 1st respondent.
13. My finding is that the parties herein having agreed to proceed with the matter from where it had reached and the court having already directed that Mr. Komen could be cross examined if need arose, nothing should stand in the way of such cross examination.
14. Consequently, I order that Patrick C. Komen be cross examined on the affairs of the company during his tenure. It is so ordered.

Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of December 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 of: -

Mr. Barassa for Ndong for Directors of Kabco

Court Assistant: Margaret

