



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 155 OF 2010

CHARLES MATU KIBOI (Suing as the legal representative

of the estate of **CATHERINE WAMBUI MATU (deceased)**.....**PLAINTIFF**

VERSUS

1. DEANSBROOK SCHOOL LIMITED

2. HAKIKA TRANSPORT SERVICE LIMITED.....**DEFENDANT**

AND

1. ALICE GITHERE

2. MARTIN WAHOME

3. JAYNE GITHERE.....**RESPONDENTS**

RULING

1. The decree holder application dated 13/5/2019 seeks that three persons, the Respondents be summoned to attend court and be cross examined on whether the 1st defendant/judgment debtor has any property or means to satisfy the balance of the decree, costs and interests in the sum of Kshs.8,116,793.65 and that in the event of default to comply with the said orders, when given, the three respondents be ordered to personally make good the said judgment debt.

2. The reason given for the application is that the 1st defendant has not attached (sic) assets. The connection between the said judgment debtor and the Respondent sought to be cross examined is that the three are directors of the 1st defendant. The evidence of such directorship was sought to be paid by a Memorandum and Articles of Association of the Company at Incorporation and made on an undeclared date in May 2005.

3. When served the 1st judgment debtor filed a Replying while asserting that the company was sold to new shareholders with the Respondents taking responsibility for all the existing liability. That same party attended court and announced that it supported the application. However the three respondents did file a Replying Affidavit sworn by the Alice Githere in which it is asserted that the three respondents ceased to be directors of the 1st judgment- debtor and to prove the point exhibited a certificate of official search dated 19/7/2019 and an agreement of sale of company and its shares dated 20/4/2016. The three then contended that being neither directors nor shareholders of the company in judgment debt, they were not subject to be summoned nor cross examined on the means of the company to pay a debt. It was contended further that the application was granted upon falsehood as much as it was evident that nothing was availed to show that the judgment-debt has not attachable assets. Finally it was contended that the same plaintiff had filed Mbsa HCC No. 81 of 2018 seeking the security of the same judgment from the insurers of the 1st judgement debtor.

4. When the matter came up for hearing, the submissions, I must comment, were very brief without ado nor the niceties of having to file or offer any elaborate submissions. Mrs Kariuki for the Decree-holder applicant was contend to identify her application and state what the application sought without more. As said before, the 1st judgment-debtor was also comfortable not opposing the application as presented and prosecuted by Mrs. Kariuki.

5. For the three respondents, however, Mr. Hamisi filed a list of two decisions on when to lift the corporate veil and reiterated the fact that the application was grounded on false grounds including the lack of evidence on the company's inability to pay. Counsel also cited to court

the pre-requisites of Order 22 Rule 32 Civil Procedure Rules.

6. In response to the Respondents submissions, counsel then submitted that indeed the respondents were not the director as asserted in the application but had been directors when the liability arose and upon sale of their shares assumed liability under clause 9 of the agreement for sale of the company and its shares.

7. Order 22 Rule 35 of the Civil Procedure Rules provide:-

Examination of judgment-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)...

(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.

(Emphasis provided)

8. The law is clear that only an officer or any other person in the corporate may be summoned for cross-examination on the means and assets of the corporation. In this matter there is uncontroverted evidence that respondent were indeed directors and shareholders of the 1st judgment debtor but ceased being such directors and shareholders once they sold their shares and interests in the company by a sale agreement dated 20/4/2016 which was exhibited by the parties. That agreement clearly shows that by the time this application was filed, the respondents were not officers of the corporate so as to be possessed of information as to the property or means of the corporate to settle the decree. Without that capacity to access and control the company's affairs, the mundane pre-requisite of grant of orders to summon and cross-examination is lost and not established and there would be no basis for this court to consider granting such orders.

9. This however is not to say that the said respondents cannot be held to their bargain under the sale agreement dated 20/4/2016. That agreement remains for enforcement between the parties thereto but the decree holder herein having been not a party has not right to seek to acquire benefit under the agreement just like he cannot be called upon to shoulder any obligations under the same.

10. This to me is a cardinal rule on the privity of contract. Based on this finding, I do not think I need to interrogate whether or not there has been met the threshold to lift the corporate veil. The application lacks merits and is hereby dismissed.

Dated and delivered at Mombasa this 16th day of December 2019.

P.J.O. OTIENO

JUDGE