



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 435 OF 2018**

**(CORAM: F. GIKONYO J.)**

**JOCELAN CONSULTANTS LTD.....APPELLANT**

**Versus**

**COUNTY DEVELOPERS LIMITED.....RESPONDENT**

**(Being an appeal from the ruling of the Hon. G. A Mmasi SPM delivered on 4.9.2018**

**on the Appellants Notice of Motion dated 12<sup>th</sup> April 2018)**

**JUDGMENT**

**Introduction**

1. The appellant herein was the plaintiff and the Respondent the Defendant in the trial court. The Appellant filed plaintiff dated 4/2/2016 in which they sought judgement against the defendant for Kshs. 4,144,612.33, interest at 0.055% per day from 23<sup>rd</sup> February 2015 and costs of the suit.
2. The facts of the case were that the plaintiff and defendant entered into an agreement for the provision of civil and structural design work, detailing supervision of construction of 20 apartments on title number Kiambaa/Ruaka/3718. The plaintiff diligently provided civil and structural services and fulfilled its obligations under the said agreement. On 23/2/2015 the plaintiff rendered to the defendant an invoice for Kshs. 4,144,612.33 but the defendant failed, refused, neglected to settle the claim.
3. The defendants filed their defence on 5/4/2016 denying the claims of the plaintiff and stated that the payment was to be made in intervals according to the progression of the project. They also averred that payment would also be made from proceeds of sale of the houses, and the final payments were to be made upon the completion of the project. On that basis, the Respondent denied that the payment was to be made 30 days after the receipt of the invoice.
4. This defence triggered the filing by the plaintiff of the Notice of Motion dated 14/6/2016 where they sought for orders that the defendants, statement of defence be struck off and judgement be entered in favour of the plaintiff. The application was heard and the learned magistrate allowed the motion, struck out the defendants statement of defence and entered judgement in favour of the Plaintiff/appellant.
5. On 12/4/2018 the plaintiffs filed a notice of motion seeking for orders that the directors of the defendant company be summoned for purposes of examination on oath as to the debts owing, means and assets of the defendant company or in default the directors be held personally liable to pay the plaintiff the decretal amount of 4,144,612.33 as well as taxed costs in the sum of Kshs. 256,915.30 plus interest. The defendant opposed the application vide their grounds of opposition and replying affidavit
6. In her ruling dated 4/9/2018 Hon G. A. Mmasi opined that there was no documentary evidence exhibited confirming that Martin Muchai Mbugua, George Wambugu Kimiti, Thomas Kibaki Wamwea and Catherine Kirubi are directors of the defendant company. Secondly if indeed they had a nexus with the decretal amounts they should have been sued as co-defendants and thirdly the applicants should have served a notice to produce at the time of the pretrial. Fourthly the question is how a default clause can apply to persons who are not party to the suit. She consequently found that it was not enough for the applicant to contend that they were not able to trace the company file at the registry. Therefore, their application was not viable lacked merit and was dismissed.
7. Being aggrieved by the said ruling the appellant has filed this appeal asking for orders that;

- a. *The ruling of the subordinate court be reversed and replaced with an order allowing the appellant notice of motion dated 12/4/2018*
- b. *The named directors of the respondent company be examined on oath as to the assets and the means of the company to satisfy the decretal sum*
- c. *In default the named directors be held personally liable to satisfy both jointly and severally the entire decretal amount due to the appellant.*
- d. *Costs of the appeal be granted to the appellant.*

## ANALYSIS AND DETERMINATION

8. I will perform the duty of first appellate court; re-evaluate evidence adduced, apply the applicable law and make own decision on the issues at hand.

9. From the arguments presented, the issue for determination is: -

**Whether, the persons named in the application should be ordered to appear in court and be orally examined as to what property or means of satisfying the decree.**

10. Rule 35 of the Civil Procedure Rules provides 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.**

11. Does the Appellant meet the test? The Appellant argued that the contract dated 25<sup>th</sup> January 2011 between the Appellant and the Respondent Company was executed by Martin Muchai as the director of the Respondent Company and also lists George Wambugu Kimiti as representative of the company. They submitted further that email correspondents between the parties lists all the directors of the Respondent Company. They added that payments were made by County Home Developers, which lays a basis for an inference that these are the directors of the Respondent Company. Moreover, Martin Muchai deposed in the affidavit in support of application to pay in instalments that he was the director of the Respondent Company. According to the Appellant, they proved that these individuals are in a position to provide information in the nature of discovery in aid of execution.

12. They did not stop there. They stated that despite frantic efforts to search the particulars of the Respondent Company, the file was not traced in the registry of companies. The cited directors of the said company had initially applied to liquidate the decretal sum in instalments but after their application was refused difficulties arose. Hence, the application under order 22 rule 35 of the Civil Procedure Rules to summon these individuals who say are directors of the company to appear in court for oral examination of the assets and means of the company to pay the debt herein which failing they be held personally liable for the debt.

13. The Respondent argued that the Appellants did not satisfy the threshold provided in order 22 rule 35 of the Civil Procedure Rules. Their main argument was that there was no proof that the individuals subject of the application are directors of the Respondent Company. They stated that Victoria Sompisha and John Joseph Tito are named directors of the Respondent Company in some documents in the Record of Appeal. They therefore wonder why these two have not been sought for purposes of order 22 rule 35 of the CPR. They also submitted on Salomon vs. Salomon and Valentine Opiyo [2014] eKLR on corporate separate personality of a company to emphasize that courts should uphold rather than lift corporate veil of a company, except where evidence is adduced to show fraud or improper conduct of directors or that the company was incorporated as a vehicle to commit crimes. To them the application was based on mere letter by the auctioneer.

14. What are the essential elements of the jurisdiction in order 22 rule 35 of the CPR? The court dealt with these issues in **POST BANK CREDIT LIMITED [2015] eKLR**. Ringera J (as he then was) also dealt with this subject in the case of **NBI HCCC NO. 1287 OF 2000 ULTIMATE LABORATORIES vs. TASHA BIOSERVICE LIMITED** and provided a splendid exposition of the pertinent elements of the jurisdiction in order 22 rule 35 of the CPR. Gathering from the judicial decisions on the subject, I should state the following.

**a. First, this provision is in the nature of discovery for purposes or in aid of execution of a decree against the defendant company. It would be inappropriate to invoke it where execution against the defendant company should be easy and direct.**

**b. Second, the applicant needs only to show that the person sought to be examined under the said rule is in a position to provide information in the nature of discovery for purposes of execution of the decree against the defendant company, more specifically; 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 standard therefore is not as high as that of proving the case.**

c. *Third, the person to be examined may be the judgment-debtor or officer, or other person.*

d. *Fourth, the court may order attendance of the person for purposes of examination, and for the production of any books or documents.*

15. I will apply the test above. The Respondents argued that the application is based on a simple letter by the auctioneer that the assets and offices of the defendant company could not be traced. This is the auctioneer- a person authorized by court to execute court process in this case. Nothing shows that the assets of the defendant company are readily available except that the auctioneer did not do his work. A judgment-holder in such situation is entitled to seek the help of order 22 rule 35 of the CPR. I find that the judgment-holder appropriately invoked the rule.

16. In this case, the Respondents seem to argue that there should be prove that they are directors of the defendant company. I think not as any person in a position to provided such information stated in the rule may be summoned under the rule. A director or officer or a former director or officer or other person may be subject of the order. Applying this test, Martin signed the contract in issue as a director. George and the other persons are also named in the contract and or in other documents presented. The nexus which is needed is that a person is in a position to provide information stated in the order above. Therefore, one need not be a director of the company for the rule to apply to him. These individuals are truly involved in the contract subject of these proceedings. Martin also applied to have the decretal sum paid in instalment and he did so as a director of the company-something he deposed under oath. The events of this case do not depict good faith on their part. Whether there are new or other directors of the defendant company will not circumvent application for discovery in aid of execution being made against a person who is in a position to provide information stated in the rule. The individuals stated in the application are in a position to provide the relevant information.

17. It is clear the direction the court is taking. But, before I close, I think that the court is not prohibited from lifting the corporate veil under order 22 rule 35 of the CPR if grounds for piercing the corporate veil exist. Consider the following on the subject of **Lifting corporate veil at paragraph 90 of Halsbury's Laws of England 4th Edition** that:

**90. Piercing the corporate veil.**

*Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced.*

18. See also the work of the court in the case of **Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Ano (2014) eKLR** that:

*It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.*

19. Whether the court will lift the veil shall be determined by the trial court after examination under order 22 rule 35 of the CPR. I am aware that there is a prayer for holding the individuals intended to be examined in the application personally liable for the debt; this is for the trial court to determine after the examination herein.

20. In the upshot, the trial court erred in not considering the evidence adduced and laying unduly emphasis on whether or not the individual named in the application are or are not directors of the defendant company. She also erred in finding that, if indeed they had a nexus with the decretal amounts they should have been sued as co-defendants and that the applicants should have served a notice to produce at the time of the pretrial. This latter finding forces me to state that, although the application in rule 35 of order 22 of the CPR is in the nature of discovery, it is however made at the stage of execution of the decree, and should not therefore be confused with discovery before or during trial. I therefore set aside the decision by the trial court and allow the application dated 12<sup>th</sup> April 2018. Each party shall bear own costs of the appeal. It is so ordered.

**Dated and signed at Meru on this 20<sup>th</sup> day of November 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 11<sup>th</sup> day of December 2019.**

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**L. NJUGUNA**

**JUDGE**