

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 1399 OF 2018

RUTH NYAMBURA.....CLAIMANT/DECREE HOLDER

VERSUS

EAST AFRICA SAFARI

**AIR EXPRESS LIMITED.....RESPONDENT/JUDGMENT
DEBTOR**

RULING

1. Through the instant Notice of Motion dated 3rd May 2025, the Claimant/Decree Holder seeks orders compelling the attendance of the Directors of the Respondent/Judgment Debtor, namely **Donald Earle Smith** and **George Kivindyo**, for examination regarding the Judgment Debtor's assets and/or means, and requiring the production of its annual financial statements along with all other books of accounts. The Claimant further prays that, in the event the said Directors fail to comply with these orders, the Court be pleased to lift the corporate veil and hold them personally liable for satisfaction of the decree.

2. The Motion is anchored on the grounds set out on its face and is further supported by the averments in the Supporting Affidavit of **Ruth Nyambura**, the Claimant. The Claimant avers that this Court delivered judgment in her favour on 8th March 2024, yet the Judgment Debtor has failed to take any steps to satisfy the outstanding decretal sum, despite being fully aware of it. That in her attempts to execute the decree, she has been unable to locate any assets of the Judgment Debtor to satisfy the judgment.
3. Upon conducting a search at the Companies Registry, the Claimant discovered that the Directors of the Judgment Debtor are Donald Earle Smith and George Kivindyo.
4. It is further averred that, notwithstanding the Claimant's diligent efforts, attempts to trace the Judgment Debtor have proved futile.
5. In response to the Application, the Respondent filed a Replying Affidavit sworn on 28th July 2025 by **Donald Earle Smith**, who describes himself as a Director of the Respondent. Mr. Smith avers that he only became aware that Judgment in this matter was delivered on 8th March 2024, with a decree issued on 21st June 2024, when he was served with the Application on 13th July 2025. He contends that the Respondent's previous Advocate on record failed to inform them of

these developments and maintains that any oversight on the part of the former Advocates should not be visited upon the Respondent.

6. Mr. Smith further avers that the Respondent ceased transport operations in 2022 due to several debilitating challenges, chief among them being: the freezing of the Respondent's bank accounts by the Kenya Revenue Authority and the grounding of the Respondent's aircraft at Wilson Airport and Jomo Kenyatta International Airport pursuant to a court order issued on 1st March 2023 in ***High Court Commercial Suit No. E360 of 2022 (Wells Fargo Trust Company National Association & Another v. Five Forty Aviation Limited, East Africa Safari Air Limited & Others)***.
7. Mr. Smith avers that at no time has the Respondent received any warrants of attachment, notices to attach, or visits by auctioneers at their premises. He adds that the Respondent's physical address remains unchanged at Watermark Business Park, Ndege Road, Nairobi, rendering the Claimant's assertion that they could not locate the Respondent false and unsubstantiated.
8. He contends that the Claimant has not demonstrated any elements of fraud, dishonesty, or abuse of corporate personality on the part of the Directors to justify lifting the corporate veil, with assertions amounting only to unverified industry gossip, contrary to settled legal principles.

9. Mr. Smith avers that, based on advice from his Advocate on record, which he verily believes to be true, the Claimant has not discharged the burden of proof on allegations of fraud, as the legal requirements for such a claim have not been satisfied. He contends that the company is a separate legal entity, distinct from its Directors, and the liabilities of the company cannot be arbitrarily transferred to the Directors without proper legal justification.

10. Mr. Smith avers that, on the advice of his Advocate, the Claimant has not demonstrated that all statutory modes of execution of the decree have been exhausted before seeking to commit the Respondent's Directors to civil jail. Compliance with Section 38 of the Civil Procedure Act is a precondition, yet the Claimant has not provided evidence of issuing warrants of attachment and sale.

11. He avers further, on the same advice, that committal to civil jail is unlawful in this instance, as the Claimant seeks such orders without first exhausting other statutory modes of execution.

12. Mr. Smith further contends that summoning the Directors to show cause why they should not be committed to civil jail is premature, oppressive, and violates their constitutional rights to fair administrative action and due process.

13. In Mr. Smith's view the Application seeks draconian measures against the Respondent, portraying it unfairly as a recalcitrant judgment debtor.

14. In a rejoinder, the Claimant filed a Further Affidavit dated 18th September 2025, in which she avers that the Director of the Judgment Debtor has acknowledged that the company ceased operations in 2022 due to various challenges. She avers that this explains why the auctioneers were unable to locate any of the Judgment Debtor's assets, prompting her to file this Application to obtain information on whether there are any assets available for execution.

15. She further avers that the Judgment Debtor could not have received any warrants of attachment, notices to attach, or visits by auctioneers at their premises, as they do not possess any traceable assets.

16. She adds that while the Judgment Debtor does not dispute owing the decretal sums, they provide no explanation regarding any steps taken to settle the outstanding amount.

Submissions

17. On 16th July 2025, the Court directed both parties to file written submissions with respect to the Notice of Motion. Both parties complied and the Court has duly considered their written submissions.

Analysis and Determination

18. In my view, the issue for determination at this juncture is whether the Court should order the attendance of the Respondent's/Judgment Debtor's Directors, **Donald Smith** and **George Kivindyo**, for examination regarding the Respondent/Judgment Debtor's assets and/or means, and compel the production of the Judgment Debtor's annual financial statements along with all other books of accounts.

19. Examination of judgment debtors under Order 22 Rule 35 of the Civil Procedure Rules forms part of the process of execution of decrees. The order is couched as follows;

“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.”

20. Fundamentally, the foregoing rule confers on this Court the jurisdiction to summon any officer of a company to attend court for examination regarding the company's assets and means, with a view to satisfying a decretal sum. Through such examination, the Court may, if warranted, decide whether to lift the corporate veil.

21. Contrary to the assertions in the Respondent's Replying Affidavit, the examination of Directors does not equate to lifting of the corporate veil or imposing personal liability on the Directors for the Respondent's obligations. As rightly held by the Court in **Vintage Liquor & Wine Limited v Winadmellant (Wama) Limited [2025] KEHC 15811 (KLR)**, the purpose of such an examination is limited to obtaining information regarding the company's means and, at this stage, does not amount to imposing personal liability.

22. In the present case, it is undisputed that the decree of this Court remains unsatisfied. Coupled with the foregoing, the Respondent's/Judgment Debtor's Director, Mr. Donald Smith, has deposed under oath that the company ceased operations in 2022 following the freezing of its bank accounts by the Kenya Revenue Authority and the grounding of its aircraft at both Wilson Airport and Jomo Kenyatta International Airport.

23. In view of the foregoing, the Court finds no reason to doubt the Claimant's assertion that she has been unable to trace any assets of the Judgment Debtor to satisfy the decree.

24. Accordingly, the Court finds merit in the Claimant's Application, as sufficient grounds have been established to warrant summoning the Directors of the Respondent/Judgment Debtor to appear before the Court and provide information regarding the company's assets, if any, and the status of its books of accounts.

25. Accordingly, the Directors of the Respondent/Judgment Debtor, namely Donald Earle Smith and George Kivindy, are hereby ordered to appear before this Court for examination under oath regarding the means and assets of the Respondent/Judgment Debtor. They shall also be required to produce all

relevant documents or copies thereof pertaining to the company's assets and books of account, including but not limited to its annual financial statements and any documents of title to the company's property in their possession or obtained in their capacity as Directors of the Judgment Debtor.

26. Costs of this application shall be borne by the Respondent/Judgment Debtor.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of November 2025.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Ochieng for the Claimant/Decree Holder

Mr. Kimanzi instructed by Mr. Kihara for the Respondent/Judgment Debtor

Elijoy Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that

judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE