

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. 191 OF 2019

BRIAN NASICHE WALUCHIO.....
APPLICANT

-VERSUS-

MARVEL MEDIA SDN BND.....1ST
RESPONDENT

OXYGEN 8 EAST AFRICA LIMITED.....2ND
RESPONDENT

RULING

1. This matter comes up for a Ruling in respect to the Applicant’s application by way of a Notice of Motion dated 20th March, 2024. It seeks orders of setting the Court’s earlier orders made on 16th February, 2024.

Background Facts

2. The Applicant filed the Notice of Motion dated 20th March 2024 and sought the following orders;

a) *The Court to set aside the Orders issued on 16th February 2024 in so far as the name Mr. Brian Nasiche Waluchio is concerned.*

- b) Costs of this Application be provided for.*
3. The Application was supported by the grounds on the face of it and by the Affidavit of **Brian Nasiche Waluchio**. He stated that he was an employee and shareholder of the 2nd Respondent under an employment contract dated 1st April 2011, but his employment was terminated on 9th November 2018. He subsequently issued a demand and filed ELRC No. 124 of 2019 against the 2nd Respondent, which suit is still pending. In a separate matter, the 2nd Respondent obtained interim orders in **HCCOMM/E084/2019** barring him from accessing or dealing with the company's assets, and that case also remains unresolved. Since then, the Applicant has ceased involvement in the company's daily operations and has no access to its records.
 4. The Applicant stated that he was unaware of **HCCOM No. 191 of 2019** and was never served until 18th March 2024, when he received documents via WhatsApp while in Tanzania for work. He contended that he was therefore unable to comply with the impugned orders and argued that enforcing them would violate his right to a fair hearing under **Article 50 of the Constitution of Kenya, 2010**. He further alleged that the 1st Respondent obtained the orders through material non-disclosure and seeks an opportunity to be heard.
 5. In Response, the Respondents filed the Replying Affidavit sworn on 13th June 2024. The Respondent contended that the

present application is unmerited and intended to further delay the resolution of a matter pending since 2019. That judgment was entered in the Plaintiff's favour on 24th September 2019 for Kshs. 43,500,864.47 plus interest and costs, and a decree issued on 15th February 2020. Efforts to execute the decree have been unsuccessful due to the inability to trace the Defendant's assets. This has prompted the Plaintiff to apply under **Order 22 Rule 35 of the Civil Procedure Rules** for cross-examination of the Defendant's director and shareholder, namely the Applicant. This is for purposes of ascertaining the company's assets and liabilities. Although duly served, the Applicant and the director failed to attend court, and orders for cross-examination were consequently issued.

6. In addition, the Respondent argued that the Applicant is a former senior officer and current shareholder who signed the 2013 contract on behalf of the Defendant. That he is a relevant and necessary party in aiding execution of the decree, notwithstanding his alleged termination in 2018. It is further alleged that the Applicant's own exhibits suggest possible mismanagement and diversion of company funds, making his examination critical to uncovering the Defendant's assets. The Respondent therefore urges the Court to dismiss the application with costs to allow the cross-examination to proceed and enable the decree holder to pursue execution.

Issues for determination

7. The Court has carefully considered the Application, the response, the written submissions and the oral highlights by the Counsel for the parties. The Court frames a single issue for determination as follows;

a) Whether the Court should set aside the Orders issued on 16th February 2024 in so far as the name Mr. Brian Nasiche Waluchio is concerned.

Analysis

8. On 24th September 2019, judgment was entered in favour of the 1st Respondent for Kshs. 43,500,864.47 together with interest and costs. A decree was subsequently issued on 15th February 2020. Attempts by the 1st Respondent to execute the decree proved unsuccessful due to the inability to trace the assets of the 2nd Respondent. Consequently, on 16th February 2024, **Hon. Mr. Justice Alfred Mabeya** ordered one Mr **Keith Shane Leahy** and **Mr. Brian Nasiche Walucho**, (the Applicant herein), in their capacities as Directors and Shareholders of the 2nd Respondent/Judgment Debtor, to produce the company's books of account, audited financial statements, certified bank statements, cheque books, and other statutory records from 2018 to date. The Judge further directed that the said directors/shareholders be examined on oath regarding those documents.

9. Subsequently, the Applicant filed an application seeking that this Court set aside the orders issued on 16th February 2024 insofar as the name of the Applicant is concerned.
10. As already stated, **Order 22 Rule 35** provides 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.

11. In the case of **Masifield Trading Company Ltd & Another v. Rushmore Company Limited [2008] eKLR** the Court when referring to the provisions of **Order 22 rule 35 of the Civil Procedure Rules, 2010** stated as follows,
- “I think the above rule grants this Court jurisdiction 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. By examining such an officer, the Court may or may not lift the veil of incorporation.”

12. It is undisputed that the Applicant was an officer and is a shareholder of the company. On this, the Applicant has taken the position that, being a former officer of the company, he is not required to be orally examined over the affairs of the company since he ceased being an employee of the company.

13. The Court in **Abdul Razak Khalfan & Another V Pinnacle Life & General Assurance Company Ltd V Pinnacle Tours & Travel Ltd & Another** [2009] KEHC 823 (KLR) faced with a similar issue held;

“As regard the complaint by the 1st defendant to the effect that the 2nd defendant was being left off the hook yet at the material time she was the managing director of the 1st defendant, I hold that the Deputy Registrar fell in error when he excused the 2nd defendant from being required to attend court to be so cross-examined. It was clear from the pleadings filed by the parties herein, that the 2nd defendant was the managing director of the 1st defendant when the debt was incurred. She cannot therefore raise the plea that

she is no longer a director of the 1st defendant when she was an active director at the time the debt was incurred.

In the premises therefore, I find that the appeal of the 1st defendant lacks merit and is hereby dismissed to the extent that the non-executive directors of the 1st defendant wish to be excused from attending court for the purpose of cross-examination in accordance with Order XXI Rule 36 of the Civil Procedure Rules is disallowed. I set aside the part of the decision of the Deputy Registrar that excused the 2nd defendant from court attendance. The 2nd defendant, just like the other directors, shall attend court for the purpose of being cross-examined on the assets of the 1st defendant company with a view to ascertaining means of the 1st defendant company to satisfy the decree herein issued in favour of the plaintiffs. The plaintiffs shall have the cost of this appeal.”

14. Similarly, in **Maina t/a Bill Consult v Bobmil Properties Limited [2025] KEHC 11486 (KLR)** the Court held;

“The court takes 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.

The court does not agree with the Defendant that the rule places such a high and onerous standard as it has been argued by the defendant 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.

In the courts view, that approach will defeat the entire purpose of the rule because the rule enables an applicant to seek for information in the nature of discovery to assist the decree - holder to follow through on the execution.

Further 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 mentioned above."

15. Guided by the above decisions, the Court finds that the Applicant is a necessary party in helping the decree holder determine whether the judgment-debtor has any property or means of satisfying the decree. Furthermore, the above-mentioned provision of **Order 22 Rule 35 (c)** provides that any other person may be orally examined. Therefore, in this case, the Applicant fits in the any other person category and should thus be examined. To this Court the provisions of **Order 22 Rule 35** are a useful tool to the Judgement Creditor. It is a post Judgement process. It assists a Judgement Creditor carry out a precision discovery by way of cross examination of a Debtor or its Officials or employees. Such discovery is meant to assist the Creditor trace the missing or hidden or unknown assets of the Judgement Debtor. It can also be a useful tool in establishing the fraudulent activities of the Judgement Debtor's Directors. This can open a path or establish the grounds for lifting or piercing the corporate veil.
16. Notably, the Applicant also raised the issue that the Order issued on 16th February 2025 was obtained unlawfully. That the 1st Respondent failed to serve the Applicant with the Application dated 24th August 2023, thereby depriving the Applicant of the opportunity to respond to the said Application. That this is in clear violation of **Article 50 of the Constitution** of Kenya. This failure to notify the Applicant not only denied him the right to be heard but also

resulted in the issuance of adverse orders against him. Consequently, the Applicant was condemned without having been allowed to present his case.

17. Based on the 1st Respondent's Affidavit of Service sworn on 30th October, 2023, it is confirmed that the Applicant was duly served with the application dated 24th August, 2023 on 19th October, 2023, together with a hearing notice. The Court is not persuaded by the submissions by Applicant of the unlawfulness of its orders of 16th February, 2025.
18. The Applicant's application is hereby dismissed.
19. As to costs, the same lie at the discretion of this Court. Costs ordinarily follow the event. To this Court, taking into consideration all the facts of this case, the proper order is that the costs of the Motion are awarded to the Respondent.

Determination

20. The Applicant's Application by way of a Notice of Motion dated 20th March, 2024 is dismissed for lack of merits.
21. The costs of the Motion are awarded to the Respondent.
22. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS
15TH DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of;

Mr. Kevin Mwalo Applicant.

Miss Mary Munjogu 1st Respondent.

N/A 2nd Respondent.

Mr. John Paul - Court Assistant.