

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. 669 OF 2013**

**DIANA WAITHERA MBUGUA (Suing as the next Friend  
and Representative of JAMES WAWERU  
MBUGUA..... CLAIMANT/DECREE HOLDER  
VERSUS**

**MARSHALLS (E.A) LIMITED.....RESPONDENT**

**AND**

**KETAN SURENDRA SOMAIA.....1<sup>ST</sup> INTERESTED PARTY**  
**MICHAEL LEWIS SOMEN.....2<sup>ND</sup> INTERESTED PARTY**  
**DEEPAK KANTILAL SHAH.....3<sup>RD</sup> INTERESTED PARTY**  
**MOOL JIVRAJ NATHWANI.....4<sup>TH</sup> INTERESTED PARTY**  
**JAYANTILAL KESHWAJI CHANDE.....5<sup>TH</sup> INTERESTED PARTY**  
**GERALD WACHIRA NYAGUTO.....6<sup>TH</sup> INTERESTED PARTY**  
**ARNOLD JOHN GRAYLAND.....7<sup>TH</sup> INTERESTED PARTY**  
**HASMUKK PRANFIRAN MAKKECHA.....8<sup>TH</sup> INTERESTED PARTY**  
**MUKESH VAYA.....9<sup>TH</sup> INTERESTED PARTY**  
**HARSHAD RANA.....10<sup>TH</sup> INTERESTED PARTY**  
**FRED OKIKI AMAYO.....11<sup>TH</sup> INTERESTED PARTY**  
**ARIF YUSUF HAFIZ.....12<sup>TH</sup> INTERESTED PARTY**  
**GARWHAL ABHIMANYU.....13<sup>TH</sup> INTERESTED PARTY**

**Ruling**

The Notice of Motion dated 3/9/2025 by the Claimant/Decree Holder is brought under Order 22 Rule 35 of the Civil Procedure Rules seeking the court to **summon the named persons before court for examination in order to ascertain the judgment debtor is in a position to settle the decretal amount.**

In the present matter the named persons are: (1) Ketan Surendra Somaia, (2) Michael Lewis Somen (3) Deepak Kantilal Shah (4) Mool

Jivraj Nathwani, (5) Jayantilal Keshwaji Chande (6) Gerald Wachira Nyaguto (7) Arnold John Grayland (8) Hasmukk Pranfiran Makkecha, (9) Mukesh Vaya, (10) Harshad Rana (11) Fred Okiki Amayo (12) Arif Yusuf Hafiz (13) Garwhal Abhimanyu.

**The alternative prayer sought is that if the aforesaid named persons fail to provide the necessary information required to satisfy the decree herein in full, then the Directors/Former Directors aforesaid be ordered to personally pay the decretal amount in full within 14 days of the order.**

**That the court be pleased to provide the costs of the application.**

The application is premised on grounds (a) to (j) set out on the face of the notice of motion whose gravamen is that judgment was entered in favour of the Claimant against the Respondent in the sum of Kshs. 1,878,038.00 with interest at court rates from 30/4/2012 till payment in full and costs of the suit.

That while the Applicant has sought to execute as against the assets of the judgement debtor, Marshalls (E.A) Ltd, it has learnt that all its movable assets have been transferred to 3<sup>rd</sup> party companies related or beneficiary owned by the Directors/Former Directors of the company.

Further, the Applicant has learnt that the immovable assets of the company include but not limited to:- (i) L.R. No. 209/4926, (ii) L.R. No. 7752/60, (iii) L.R. No. 209/2000 (orig. no. 430/1/1), (iv) L.R. No. 209/2001(org. no. 430/1/2), (v) L.R. No. 209/4870, (vi) L.R. No. 209/4976, (vii) L.R. No. 209/4977, (viii) L.R. No. 209/6625 (orig. no.

209/4240/ii), (ic) L.R. No. 2116/528, (x) L.R. No. 2787/476, (xi) L.N. No. 2787/IX/18, (xii) L.R. No. 631/IV/59, (xiii) L.R. No. 9695/17 and (xiv) L.R. No. 1870/X/19.

That it is apparent that the assets of the company have been decapitated or willfully taken off the books for nefarious purposes, including the need to defeat any decrees issued by the court.

That the judgment debtor's product fund has been run down and the company willfully and negligently did not make contributions to the same during the last years of the deceased employment. That the deceased was not paid his terminal benefits as at 30/4/2012. That the actions of the Directors indicate a failure to exercise good faith and due care leading to the near insolvency of the company.

That it is untenable that a company in existence since the year 1952, being company No. 19 of 1952, no longer has immovable and movable assets and clearly points to a concerted effort to strip the company.

That the Applicant is entitled to the fruits of his judgment and given their actions the Directors/Former Directors should be deemed liable for the same having conived in the removal of the assets from the coffers of the company.

That the application be granted.

The 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties filed replying affidavit sworn to by the 4<sup>th</sup> Interested Party on 9/10/2025 who deposes that the judgment dated

13/7/2023 which directed the Respondent to pay Kshs. 1,878,038.00 with interest at court rates from 30/4/2021 until payment in full and costs of the suit relates to a redundancy exercise conducted by the Respondent around April 2012 and concerns the non-payment of terminal dues and product fund contribution.

That the Applicant having been frustrated from executing against the Respondent vide objection proceedings, dated 30/5/2025 filed this application on the basis set out herein before in the Notice of Motion.

That the 3<sup>rd</sup> Interested Party resigned from the Board of the Respondent on 3/9/2004 while the 4<sup>th</sup> Interested Party ceased to be a director of the Respondent on 27/2/2006.

That the application is defective in that it offends Rule 47 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as read with Order 19 Rule 37 of the Civil Procedure Rules 2010(CPR) in that the supporting affidavits are sworn by Kevin Michuki, on 16/10/2025, who is the Advocate on record for the Claimant.

That Order 19 Rule 3 of the CPR provides that affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. This provision is to be read with Rule 9 of the Advocate Practice Rules which prohibit an Advocate from giving evidence on any contentious matters of fact in any matter which he appears.

That the Claimant's application is predicated upon contentious matters of fact including but not limited to the assertions;

- a) Immovable assets belonging to the Respondent have been transferred to the Interested Parties and/or third parties that are intrinsically linked to the Interested Parties, with the intention to defeat execution proceedings instituted by the Claimant.
- b) During the period of transfers referenced above, the Respondent's directors included the Interested Parties which Interested Parties were "privity to and sanctioned" the alleged unlawful and illegal transfers;
- c) There has been "systematic" removal of assets from the Respondent and transfer to related entities, comprising an "elaborate scheme" to strip the Respondent company of its assets for nefarious reasons and to defeat the decree; and,
- d) There is evidence which links the Respondent's properties to the Interested Parties suggesting an illegal intention by the interested Parties to defeat execution and supporting the claim to have the Interested Parties summoned to court and examined on the Respondent's books of account.

That these averments are substantive and go to the heart of the disputed facts in this matter.

The 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> Interested Parties filed grounds of opposition dated 13/10/2025. The said Directors opposed the joinder to the suit since there are no grounds for lifting the veil of the judgment – debtor.

Mr. Banji, Advocate for the 9<sup>th</sup>, 10 and 13<sup>th</sup> Interested Parties argued that the application is fatally defective in that the Applicant cannot sustain the twin prayers of examining the directors at the same time and in the same

application seek to have the corporate veil lifted and the directors be made to personally pay the judgment debt. That the two applications must be made separately and in two different applications.

The Advocate in his written submissions cited the case of **ELC Civil No. 1554 of 2014 Oni Properties Limited vs Sigal Investments Limited** in support of this proposition. The counsel emphasized that it is for the Applicant to demonstrate that the assets named in the application belong to the cited persons and that the same were transferred to them fraudulently to defeat the payment of the judgment debt.

That the Court of Appeal in the case of ***Kamlesh Mansukhlal Damji Pattni v. Nasir Ibrahim Ali and 2 others [2005] eKLR*** held:

***“Advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence Rule and in view of the provisions of Order XVII Rule 2, with common sense. It would otherwise be embarrassing to apply those provisions to an Advocate who may have to relinquish his role as one, to become a witness.”***

The position was reiterated by the Court of Appeal in ***Salama Beach Hotel Ltd vs Mario Rossi [2015] KECA 411 (KLR)*** where the court emphasized that counsel should refrain from swearing affidavits on contentious issues, particularly where the counsel may be subjected to cross-examination.

The Interested Parties submit therefore that in accordance with Order 19 Rule 6 of the CPR, the court ought to strike out paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the supporting affidavit sworn by Kevin Michuki on 3/9/2025 and paragraphs 7 and 10 of the supplementary affidavit sworn by Kevin Michuki on 16/10/2025 on the basis that these paragraphs contain contentious matters of fact.

The Interested Parties posit that in terms of Order 22, Rule 35 of the CPR, a decree holder is allowed to apply for the oral examination of any officer of a corporate, judgment -debtor, or any other relevant person, regarding debts owed to the judgment-debtor and the judgment debtor's assets. The court may order such persons to attend, be examined and produce any relevant books or documents. Therefore, the said power of the court to summon a person to attend and be examined is circumscribed within the purpose set out in the Rule.

Therefore, the Applicant must establish that a Respondent is in a position to provide information in the nature of discovery, as to whether any or what debts are owing to a judgment debtor and whether the judgment debtor has any and what property or means of satisfying the decree. See ***Ameer Shaker T/A/ Esnad General Trading Limited v. Pundberry Limited [2024] KEHC 4133 (KLR)***.

The position so summed under Order 22 Rule 35 of the CPR is required to produce any relevant documents on the assets of the company in his possession and which he may have obtained as a director of the judgment-debtor in order to demonstrate the assets (if any) available to satisfy the debt.

In this regard, the Claimant rely on a letter from the Assistant Registrar of companies dated 2/8/2012 which show who the Directors of the Respondent were as of 13/9/2002 whereas the 3<sup>rd</sup> Interested Party has placed information before court which post-dates the information relied upon by the Claimant showing that the 3<sup>rd</sup> Interested Party resigned from the Respondent's Board of Directors on 27/2/2006 while the 4<sup>th</sup> Interested Party resigned on 3/9/2014.

That he who alleges must prove in terms of section 107, 108 and 109 of the Evidence Act Cap 80 laws of Kenya as settled in **CMC Aviation Ltd v. Kenya Airways Limited (Cruisair Limited) KECA 9 (KLR)** where the Court of Appeal held that while pleadings confer the averments of parties concerned, they are not evidence and no decision could be founded on them.

That section 204 of the Companies Act allows the court to order disclosure of a director's "protected information" being the director's usual residential address by the company or by the Registrar where the court is satisfied that service at a service address other than the director's usual residential address is the effective way to bring documents to the Director's notice.

The 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties concludes that the application is frivolous, vexatious, malicious and serves to intimidate the Interested Parties only and no other useful purpose there being no evidence of siphoning, dissipation or diversion of the Respondent's assets attributable to the 3<sup>rd</sup> or 4<sup>th</sup> Interested Parties. That the application be dismissed as regards the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties.

## **Failure to respond**

The 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Interested Parties have not responded to the application and the application remains unopposed as against all of them. There is however lacking in the application critical information as to whether the named persons are still resident in Kenya and/or if they are still alive or deceased. It would not serve any useful purpose for the court to issue summons in the dark and in vain. Specific information as to the whereabouts of the targeted persons, which is lacking, is critical in this regard.

## **DETERMINATION**

The court has considered the application, the supporting affidavit and annexures thereto and the supplementary affidavit of Kevin Michuki Advocate and the replying affidavit by the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties. The court has further considered the grounds of opposition and submissions filed by the 3<sup>rd</sup>, 4<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> Interested Parties and submissions filed by all parties and the issues for determination are: -

- (a) Whether the affidavits by Kevin Michuki offend Order 19, Rule 3 of the Civil Procedure Rules by deponing to matters of fact, not in the knowledge of the Advocate.
- (b) Whether the application has merit as against the Interested Parties.

In answer to issue (a) above, the court is satisfied that the matters deposed to in paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 in the supporting

affidavit and paragraph 7 and 10 in the supplementary affidavit concern matters of facts, relating to steps taken by the Advocate for the judgment-creditor Kevin Michuki, personally in an effort to establish from official records at the Registrar of companies office and other sources born out of research by the diligent counsel to establish who were the directors of the company, the judgment-debtor during the material time, being the period before and after the Applicant obtained judgment against the Respondent company dated 13<sup>th</sup> July 2023.

That information is clearly within the knowledge of the Advocate Kevin Michuki for the judgment – creditor.

The conclusion made by the learned counsel, in paragraph 7, 8, 9, 10, 11 and 12 are tangible, probable and reasonable conclusions made by Learned Counsel based on the findings of fact from his research and industry as counsel for the judgment-creditor. No other person, other than counsel acting for a party, has the means and ability to obtain objective information that would assist his client to realize the fruits of his judgment more so in this particular case, where the Claimant is deceased and is being assisted by a next friend, being the wife of the deceased claimant and decree holder.

Accordingly, the supporting and the supplementary affidavits sworn by Kevin Michuki do not offend the provision of Order 19 Rule 3 of CPR and the application by the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties to have the same struck out, lack merit and are dismissed.

This court relies on the case of ***Post Bank Lt (In liquidation) v. Nyamangu Holding Limited [2015] eKLR*** where the court cited with

approval the holding in *Ultimate Laboratories v Tasha Bioservice Limited (unreported) Nairobi HCCC. No. 1287 of 2001* that: -

*“Two things emerge from the above proposition. One, the power of the court to summon a person to attend and be examined under Order 22 Rule 35 is circumscribed within the purpose set out in the Rule. That is...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.*

*I therefore, take 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.”*

## **Digest of Authorities**

The Respondent equally rely on the same decision to support the view that a person summoned under Order 22, Rule 35 of the CPR will be required to produce any relevant document on the assets of the company he may have obtained at the direction of the judgment – debtor in order to demonstrate the assets (if any) available to satisfy the debt.

The purpose of Order 22 Rule 3 of is not to intimidate and/or to vex the directors or persons summoned. The objective of the provision is to

cause a genuine and objective search for persons and places objectively and probably believed to have useful information that may hold the decree/holder to realize the fruits of his judgment.

At this point, the corporate veil has not been lifted as it were, but the information provided and/or not provided to the court by persons summoned and the conduct by the said persons or directors discerned by the court in the process of examination, may result in the lifting of the corporate veil by the court, if there is deception or bad faith detected by the court in that process.

In this matter, the court is satisfied that the 3<sup>rd</sup> and 4<sup>th</sup> interested Parties, ceased to be directors of the Respondent company before this suit was filed and judgment obtained and the court finds that summoning the two former directors who resigned from the Respondent company on 27/2/2006 and 3/9/2024 respectively may not serve any useful purpose.

However, the rest of Interested Parties, if still resident in Kenya and not deceased are likely to provide information that may help in the just and fair conclusion of this suit by helping the judgment-debtor realize the fruits of his judgment.

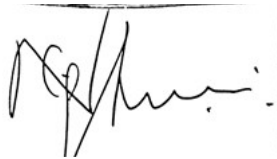
Accordingly, the application is granted as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Interested Parties in terms of prayer 3 and 4 of the Notice of Motion dated 3/9/2025 and the named persons are directed: -

- (a) To attend court for examination on the judgment Debtor assets and to produce the Judgment – debtor' books of accounts and

(b) Should the named persons fail to provide the necessary information required to satisfy the decree herein in full, then the Directors/Former Directors may be ordered to personally pay the decretal amount in full within 14 days of the order.

(c) Costs of the application are provided.

Dated at Nairobi this **12<sup>th</sup> day of March 2026**



**Mathews Nduma**

**JUDGE**

Dated, signed and delivered in open court at Nairobi this **9<sup>th</sup> day of April 2026**

**Dr. Jacob Gakeri**

**JUDGE**

**In presence of:**

Mr., Kevin Michuki for Claimant

Ms. Orona for 3<sup>rd</sup> 2<sup>nd</sup> and 4th Inter-parties at Mbaji Mbasii for Respondent

Mr. Kemboi – Court Assistant