



**Kimeto v Modern Scurity Holdings Limited (Employment and Labour Relations Cause 85 of 2013) [2023] KEELRC 1564 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1564 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 85 OF 2013**

**DN NDERITU, J**

**MAY 25, 2023**

**BETWEEN**

**JIMMY CHERUIYOT KIMETO ..... CLAIMANT**

**AND**

**MODERN SUCURITY HOLDINGS LIMITED ..... RESPONDENT**

**RULING**

**Introduction**

1. In a Notice of motion dated May 12, 2022 the Claimant prays for-
  1. That this Honourable Court be pleased to order one Ebel Ooko Mumbo, Leaky Onyango Okeyo, and Maxwell Otieno Auka, be summoned in court being the Shareholders and Directors of the Respondent do attend court and be examined as to whether the Respondent/ judgment debtor has any property or means of satisfying the decree herein and to produce the Respondent's books of accounts and other documentary evidence showing the same before the court.
  2. That in default of the said Directors complying with the above court order, they be ordered to personally pay the decretal amount due to the Claimant or to be imprisoned and committed to civil jail for a period not less than six(6) months.
  3. Costs of the application.
2. The application is expressed to be brought under Section 13 of the *Employment and Labour Relations Court Act*, 2011, Rule 32(2) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, Order 22 Rule 35 of the *Civil Procedure Rules* and any other enabling provisions of the law.
3. The application is based on the grounds on the face of the application and supported by the affidavit of the Applicant (Claimant) sworn on May 12, 2022 with several annexures thereto.



4. In opposition to the application two of the named directors of the Respondent filed replying affidavits. Maxwell Otieno Auko filed a replying affidavit sworn by himself on September 16, 2022 with several annexures thereto. Ebel Ooko Mumbo also filed a replying affidavit sworn on November 21, 2022 with several annexures thereto. The other named director Leakey Onyango Okeyo did not respond to the application.
5. On January 31, 2023 this court ordered that the application be heard by way of written submissions. Counsel for the Applicant filed submissions on March 3, 2023 but the Respondent and the directors named in the application did not respond to the written submissions.

## **II. Background**

6. As far as this court can gather from the record, this matter arose from an award by the Director of Occupational Health and Safety, Nakuru County, under the provisions of the [Work Injury Benefits Act](#) (WIBA). The Claimant filed this cause vide a Memorandum of claim dated January 15, 2013 seeking the following –
  - a. That the Honourable Court do issue orders compelling the Respondent to satisfy the entire award of compensation assessed at Kshs 192,230.50 by the Nakuru District occupation Health and Safety Officer.
  - b. That the Respondent do pay interest at 14% per annum on the above award calculated from September 9, 2010 to date of full payment.
  - c. Costs of this claim.
7. The Respondent entered appearance but did not defend the cause and on July 23, 2013 judgment was entered against the Respondent as prayed in the memorandum of claim.
8. Subsequently, a decree was issued on November 4, 2013 in the sum of Kshs 192,230.50 and a certificate of costs issued on even date in the sum of Kshs 89,925/=.
9. After several unsuccessful attempts to execute the decree the Applicant/decree-holder has filed the instant application for the named shareholders and directors to appear in court and explain how the Respondent shall satisfy the decree and more so, disclose where assets of the Respondent may be found and what means the Respondent has to satisfy the decree.

## **III. Applicant's/claimant's Case**

10. In the supporting affidavit, the Applicant has demonstrated the attempts made in executing the warrants of attachment in pursuit of the decree.
11. The Applicant deposes that as at the time of filing the cause and at all the material times the three named persons were directors of the Respondent and he has annexed a letter from the Registrar of Companies indicating that as at May 7, 2013 the following persons were shareholders of the Respondent – Ebel Ooko Mumbo, Leakey Onyango Okeyo, Maxwell Otieno Auka, Simon Onyango Ojuok, Mary Awuor Rangara, and Pamela Achieng Miruka, all of PO BOX 2944-40100, Kisumu, each holding one share.
12. However, the Applicant states that the first three named persons above were the directors of the Respondent and hence his choice to make the instant application that the three be summoned to appear in court as per the prayers in the application.
13. It is the Applicant's view that the three directors have a duty and indeed an obligation to inform the court where the assets of the Respondent may be found or are located.



14. It is on the basis of the foregoing, alongside the submissions by his Counsel, that the Applicant is seeking for the orders as prayed in the application.

#### **IV. Respondents' Case**

15. In his replying affidavit Maxwell Otieno Auka alleges that he and others became directors of the Respondent on May 21, 2013. He states that he resigned as director on October 1, 2014 and transferred his share to Mary Awuor Rangara.
16. He denies that the Applicant ever worked for the Respondent as alleged and hence prays that the application be dismissed with costs.
17. In his replying affidavit Ebel Ooko Mumbo deposes that all the six shareholders named above became directors of the Respondent on May 21, 2013.
18. He alleges that he resigned as a director and transferred his share to Mary Awuor Rangara on October 1, 2014 and on that basis he pleads that he has no relationship with the company and as such the application by the Applicant should be dismissed with costs.
19. As noted above, the Respondent and the concerned directors did not file any submissions as directed by the court.

#### **V. Issues For Determination**

20. Flowing from the foregoing as read alongside the pleadings and submissions filed by Counsel for the Applicant, the issues for determination by this court flow from the prayers in the application –
- a. Should this court issue an order summoning Ebel Ooko Mumbo, Leakey Onyango Okeyo, and Maxwell Otieno Auka being shareholders and directors of the Respondent to attend court and be examined as to whether the Respondent/Judgment Debtor has any property or means of satisfying the decree herein and produce Respondent's books of accounts and or any other relevant evidence?
  - b. In the event of the above-named persons failing to comply or in default should this court lift/pierce the corporate veil and order the said persons to settle the decree personally, individually, jointly and or severally? And,
  - c. Who should meet the costs of this application?
21. The evidence on record is that the above-named persons were shareholders and directors of the Respondent as at May 7, 2013. There is a letter exhibited by the Applicant to that effect and the same is not disputed. This cause was filed in court on May 28, 2013.
22. The allegation in the replying affidavit by Maxwell Otieno Auka to the effect that he became a shareholder and director of the Respondent on May 21, 2013 is therefore false. Also, the allegation that he resigned as director and transferred his shareholding to Mary Awuor Rangara on October 1, 2014 is false as the form of transfer of share, the affidavit, and the resignation letter are not stamped as received by the Registrar of Companies. In any event, he has not availed a search from the Registrar of Companies confirming the said resignation and transfer of share as alleged.
23. Ebel Ooko Mumbo in his replying affidavit alleges that he became a shareholder and director of the Respondent on May 21, 2013 and that he remained as such director until October 1, 2014 when he resigned. This is false and cannot possibly be true.



24. The official letter from the Registrar of Companies confirms that the above person was a shareholder and a director of the Respondent as at May 7, 2013. His alleged resignation and transfer of his share is not authenticated from the Registrar of Companies and the documentation that allegedly effected the resignation and transfer of his share has not been stamped as received by the Registrar of Companies. He has not availed a search from the Registrar of Companies in confirmation of his wild allegations.
25. It is the finding of this court that all the shareholders and directors named above are and were at all material times such directors and shareholders of the Respondent without exception. They were thus responsible for the running and operations of the Respondent. They are thus seized of the information regarding the assets of the Respondent and this court has powers to summon them to give such information pursuant to Sections 3 and 13 of the [Employment and Labour Relations Court Act](#), Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, and Order 22 Rule 35 of the Civil Procedure Rules.
26. Counsel for the Applicant has ably and at length submitted on the above issues for determination. There is no dispute that a lawful judgment was entered against the Respondent and a decree issued. The decretal sum plus costs continue to earn and accumulate interest thereon and yet attempts to execute the same against the Respondent has yielded nothing as no assets of the Respondent have been traced.
27. The power of this court in summoning the directors of the Respondent is not in dispute and Counsel for the Claimant has cited a multitude of decisions including [Robert Khamala Situma V Afrikon Limited \(2022\) eKLR](#), [Post Bank Credit Limited \(In liquidation\) V Nyamunga Holdings Limited \(2015\) eKLR](#), and [Justine Nyambu V Jaspa Logistic \(2017\) eKLR](#).
28. While *Salmon V Salmon* remains the greatest innovation and or discovery in company law, subsequently, it was followed by an equally magical innovation of lifting or piercing the corporate veil. It is common knowledge that corporate or juridical persons or entities cannot act by themselves and there is always a human face behind every act by such legal entities. It is not uncommon, in the very human nature, for the directors, shareholders, managers, officers, officials, or others, to act in a careless, negligent, reckless, fraudulent, or in any other undesirous manner resulting in loss, damage, or injury to the entity itself or third parties. It is in those circumstances that a court must go beyond the corporate veil, piercing the same and unveiling the real human faces behind the unlawful or injurious acts and hold them to account – see the classic decision and reasoning of Gikonyo J in *Post Bank Credit Limited (In Liquidation) V Nyamunga Holdings Limited (Supra)*.
29. While I have not discerned the reasoning by the Claimant for not summoning all the named directors and shareholders, as per the search presented from the Registrar of the Companies, this court is satisfied that the Claimant has made out a case for summoning of all the directors of the Company, present and past, and more so those named in the application, to appear in court for examination under oath to explain where the assets of the Respondent are to be located, present books of accounts of the Respondent, and or explain how the Respondent shall settle the decretal sum plus costs.
30. In case the said directors fail to comply with the foregoing, to the satisfaction of the court, the Applicant shall be at liberty to move the court to lift or pierce the corporate veil paving the way for the directors to be held personally liable, individually, jointly and severally, for settlement of the decretal sum plus costs.
31. The Applicant is awarded costs of this application.
32. For all the foregoing, this court in disposal of the notice of motion dated May 12, 2022 issues the following orders –



- a. That an order be and is hereby issued summoning EBel Ooko Mumbo, Leakey Onyango Okeyo, and Maxwell Otieno Auko, shareholders and directors of the Respondent, to attend court and be examined on oath as to whether the Respondent/Judgment debtor has any property or means of satisfying the decree herein and to produce books of accounts showing the financial status of the Respondent.
- b. That in default of (a) above the Applicant shall be at liberty to move the court to pierce/lift the corporate veil to hold the said directors personally, individually, jointly and or severally liable to settle the decree.
- c. The Claimant is awarded costs of this application.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 25 DAY OF MAY 2023**

**DAVID NDERITU**

**JUDGE**

