



REPUBLIC OF KENYA



**Wainaina v Adrian Company Limited (Cause 1390 of 2014)
[2023] KEELRC 1178 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1178 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1390 OF 2014**

**K OCHARO, J
MAY 18, 2023**

BETWEEN

ANTHORNY KARANJA WAINAINA APPLICANT

AND

ADRIAN COMPANY LIMITED RESPONDENT

RULING

Introduction

1. The Claimant/Applicant through a Notice of Motion dated 14th December 2021 expressed to be brought pursuant to the provisions of sections 1A, 1B and 3A of the 3 *Civil Procedure Act* 2010, Order 22 Rule 35 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010, seeks the following orders:-
 - a. That the Application be certified urgent and heard on priority basis.
 - b. That Samuel Njoroge Mwangi, of P.O Box 9808 G.P.O, Nairobi, Bernard Wachai Njoroge of P.O Box 9808 G.P.O, Nairobi and Gladys Waruguru Wachai P.O Box 9808 G.P.O Nairobi, being the Directors/Shareholders of the Respondent Company (Judgment Debtor) herein at the time of the institution of this suit be summoned to attend to this honourable court for their examination on the judgment debtor's assets, bank accounts and to produce all its books of account including but not limited to the judgment Debtor's annual financial statements.
 - c. That any other past or present Directors of the Respondent's Company (Judgment Debtor) herein at the time of the institution of this suit be summoned to attend to this Honourable Court for his/their examination on the Judgment debtor's assets, bank accounts and to produce all its books of account including but not limited to the Judgment Debtor's annual financial statements.



- d. That in default of the said Directors complying with the above Orders two (2) and or three (3), the Honourable Court be pleased to order that the said Directors be held personally liable to pay the Applicant the decretal sum of Ksh.2,926,666.70 plus costs of Ksh.293,347.000 totalling to Ksh.3,220,013.70.
 - e. That the Costs of this Application be borne by the Judgment Debtor.
2. The Application is anchored on the grounds obtaining on the face of the same and those brought out in the supporting affidavit sworn by the Applicant on the 14th December 2021.
 3. The Respondent opposes the Application upon basis of the grounds set out in the Preliminary Objection dated the 23rd March 2022.

The Claimant' Application.

4. The Claimant/Applicant contends that the Judgment Debtor has not taken any step to satisfy the outstanding decretal sum plus taxed costs of Ksh.3, 220,013.70 despite being aware of the same.
5. The Applicant avers that it shall be prudent that the Directors of the Judgment Debtor be cross-examined to enable him get information on whether the Judgement debtor has any property or means to satisfy the decree. The cross examination shall provide information that aid, trace its assets and consequently execution of the decree herein.
6. It is the Applicant's position that Samuel Njoroge Mwangi, Bernard Wachai Njoroge and Gladys Waruguru Wachai of P.O Box 9808 Nairobi respectively being the Directors/Shareholders of the Respondent Company herein at the institution of this suit be summoned to attend to this Court for their examination on the Judgment Debtor's assets, bank account and the production of the books of account including but not limited to the Judgment Debtor's annual financial statements.
7. Finally, the Applicant contends that it is in the interest of substantive justice that this Application be allowed to allow him realise the fruits of his judgment.

The Respondent's response.

8. The Respondent/Judgment Debtor contends that the Claimant/Applicant has failed to show any attempts to recover the decree from the Respondent.
9. It is averred that the Claimant /Applicant has failed to illustrate any form of fraud, criminal activities deliberate on the part of the Directors individually to warrant the lifting of the veil.
10. It is the Respondent's position that that the Claimant/Applicant is on a fishing expedition and the present Application is thus mischievous, frivolous and an abuse of the Court process.
11. The Application was canvassed by way of the written submissions.

The Claimant/Applicant's submissions.

12. The Claimant/Applicant filed his submissions on the 30th March 2022 distilling two issues for determination thus:
 - i. Whether the Respondent's Directors ought to be examined.
 - ii. Whether the examination of the Respondent's Directors is procedural.



13. On the first issue, the Applicant submits that the Respondent has not taken any step to satisfy the outstanding decretal sum plus the taxed costs arising from the judgment delivered herein on 15th March 2019 despite being aware of the same. That it is prudent for the directors to be cross-examined to enable trace it assets and the disclosure whether the judgment debtor has any property and the means of satisfying the decree. Reliance is placed on the case of *Samuel Ojwang Juma vs Sapphire Collections Limited* (2021)eKLR where it was held:

“Order 22 Rule 35 to provide that:

Where a decree is for 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.”

14. Similarly, the Applicant has placed reliance on the case of *Macdonald Charo & 36 others vs Bofa Maweni Limited* (2021) eKLR where it was held:

“I have looked at the pleadings filed in the claim leading to the unsatisfied judgment and it would appear that during the Claimants’ employment with the Respondent, Khan was a Director. This therefore places him in a position of responsibility as far as the Claimants’ claim is concerned.

31. In holding this view, I am persuaded by the decision in *Ultimate Laboratories v Tasha B Loservice Limited* (NBI HCCC No 1287 of 2000) where Ringera J (as he then was) stated the following:

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 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 second thing; any person may be summoned under the rule, and such person need not have any direct connection with issues in the case whatsoever.....”

15. On the second issue, the Claimant/Applicant submits that this is not a fishing expedition as purported by the Respondent in its preliminary objection but a lawful process within the confines of the law in situations where the Applicant cannot trace the assets of the Respondent. Reliance is placed on the case of *Koninklijke Luchtvaart Maatschappij N.V vs Africair Management & Logistics Limited* (2021) eKLR.
16. The Applicant further submits that the Respondent’s Contention that he has not demonstrated that he made attempts to execute the decree, is misleading. The record is will reveal the contrary.



17. The Claimant/Applicant submits that a keen look at his application leaves no doubt that it makes not any prayer for lifting of the corporate veil as the issue of lifting the corporate veil as alleged by the Respondent. That he is aware that orders for cross-examination of directors of a company cannot be sought contemporaneously with those of lifting of the veil. On this legal position, he places reliance on the holding in the case of *Oni Properties Limited vs Signal Investments Limited* (2021) eKLR where it was held:

“The Applicant has made an omnibus application which seeks deposit of Kshs.10, 000,000/ = within 14 days of the grant of an order, examination of the directors of the Respondent, jailing of the Respondent’s directors for 6 months and lifting of the corporate veil. I must say at the outset that a party invoking the court’s jurisdiction under Order 22 Rule 35 should not again invoke the lifting of the corporate veil in the same application. One has to choose whether to come under Order 22 Rule 35 or apply for lifting of the corporate veil or any orders of depositing money in court. It is assumed that for one to invoke the provisions of Order 22 Rule 35 of the Civil Procedure Rules, attempts to trace the assets of the company for purposes of execution have failed. That is why the Applicant is at liberty to ask the court for an order under Order 22 Rule 35 to assist in the execution process. If this does not work out, it is after this that an applicant can then ask for lifting of the corporate veil. One cannot seek the two at the same time.”

The Respondent’s Submissions.

18. The Respondent filed its written submission on 29th May 2021.
19. The Respondent submits that since the Applicant obtained the decree of this Honourable court sometime in 2019, he has not attempted to recover the said sum of the decree from the Respondent. That the only time he attempted was when he commenced execution proceedings, however, against a wrong party.
20. Prayer D of the Application, cannot be granted as if it were, it shall have the implication of holding the directors of the Respondent liable to satisfy the decree. This Court cannot sanction that. To support this point, reliance is placed on the case of *Electrowatts Limited vs Countryside Supplier Limited & Another* (2014) eKLR.
21. Finally, it is submitted that that the Claimant/Applicant’s Application herein is defective in law and the same should be dismissed with costs.

The Claimant/Applicant’s Supplementary submissions.

22. The Claimant/Applicant filed supplementary submissions on 14th June 2022 ventilating only one issue for determination thus:

a. Whether the Preliminary Objection ought to be upheld

23. The Applicant submits that the preliminary objection is not one properly taken as it is not on pure points of law. It is blurred with factual details. To buttress the point that a preliminary objection has to be on a pure point of law, reliance has been placed on case of *Jitendra Liladhar Nagda & 3 others vs Willis Ouma Ondiek & Another* (2021) eKLR where it was held:

“The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 laid down the principle as to what constitutes a Preliminary



Objection. For a Preliminary Objection to be valid it must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable.”

In the *Mukisa Biscuit case* (supra) Law, JA stated as follows: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

24. In the case of *Oraro v Mbaja* 2005 KLR 141 Ojwang J (as he then was) observed as follows:

“A preliminary Objection correctly understood is now well defined and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

Analysis and determination.

25. I have carefully considered the Application, affidavits and the submissions by both Counsel and the following issues present themselves for determination thus:-

- a. Whether the Preliminary Objection is merited.
- b. Whether the Respondent’s Directors should be summoned to attend this court for cross-examination.
- c. Who should bear the costs of this Application

Whether the Respondent’s Preliminary Objection is merited.

26. The case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 is the locus classicus on the issue of what constitutes a preliminary objection. The Court rendered itself;

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

27. In the same case Sir Charles Newbold, P. stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.



28. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

29. In view of the foregoing, this Court shall seek to establish whether the grounds outlined in the Preliminary Objection herein, meet the threshold set out in the aforementioned cases.

30. I have keenly considered the Respondent’s Preliminary Objection dated 23rd March 2022, the grounds therein are not anchored on pure points of law but on facts. A preliminary objection legally and properly taken cannot be anchored on facts which are contested and which shall require to be ascertained by taking evidence, under the rules of evidence. I find the Preliminary Objection dated 23rd March 2022, without merit.

Whether the Respondent’s Directors should be summoned before this court for examination.

31. No doubt, judgment was entered in favour of the Claimant against the Respondent herein. A decree was issued and later warrant of attachment of moveable property in execution of Decree issued. The Applicant contends that the Decretal sum has never been satisfied to date. The Judgment debtor has not made any attempts to satisfy the same despite being aware of the decree. It is the Applicant’s position that the efforts to trace the Respondent/Judgment Debtors’ assets have failed and it is proper for this honourable court to summon the Directors of the Respondent Company for the purposes of examination.

32. Order 22 Rule 35 provides for the calling of persons for the purposes of examination as far as the satisfaction of decrees are concerned. It states:

“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.”

33. I must say at the outset that a party invoking the court’s jurisdiction under Order 22 Rule 35 should not invoke the same contemporaneously with that for lifting of the corporate veil. One has to choose whether to come under Order 22 Rule 35 or apply for lifting of the corporate veil or any orders of depositing money in court. It is assumed that for one to invoke the provisions of Order 22 Rule 35 of the Civil Procedure Rules, attempts to trace the assets of the company for purposes of execution have failed. That is why the Applicant is at liberty to ask the court for an order under Order 22 Rule 35 to assist in the execution process. It is if this does not work out, that the Applicant can move the Court



for lifting of the Corporate fail. See the case of *Oni Properties Limited vs Signal Investment Limited* (2021) eKLR.

34. The Respondent has firmly opposed the orders sought for cross examination of the Directors, arguing that such order[s] amount to holding Directors liable to satisfy a decree against the company, and lifting of the Respondent company's veil. I have considered the grounds upon which the Application is based and I have gained undoubtable impression that it only seeks the examination of the Respondent's directors and in default. Therefore, the Respondent's objection is not well founded.
35. By reason of the foregoing, the Applicant's Application dated the 14th December 2021 is hereby allowed in terms of prayer (b) and (c).
36. The Cost of this Application to be borne by the Respondent.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MAY 2023

.....
OCHARO KEBIRA

JUDGE

In the presence of

Mr. Botany For the Applicant.

Mr. Okonji For the Respondent.

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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

