



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 677 "A" OF 2014

(Before Hon. Lady Justice Maureen Onyango)

FRANK SAENGER.....CLAIMANT/APPLICANT

VERSUS

AFRIKON LIMITED.....RESPONDENT

RULING

1. Before me for determination is the Claimant/Applicant's Notice of Motion Application dated 16th February, 2021 filed under Certificate of Urgency seeking the following orders:-

(1) **THAT** for reasons to be recorded the Application herein be certified urgent and service of the same be dispensed with in the first instance (Spent).

(2) **THAT** leave be granted to the Applicant to effect service of the Application upon the Respondent both through Counsel on record and by email to the Respondent's known email address - mike.jung@afrikon.net

(3) **THAT** summons do issue compelling **MIKE JUNG WOONSUN** the known Director of the Judgment Debtor's Company to attend Court on such date as may be ordered to be orally examined on oath as to the Judgment Debtor's means and assets.

(4) **THAT** taking into account the fact that the Director of the Respondent is a foreign National, to ensure and facilitate the appearance of the said Director and further to ensure that this Application is not rendered nugatory this Court do Order and direct that the Passport of the said Director **MIKE JUNG WOONSUN** be deposited with the Deputy Registrar of this Court pending the hearing and determination of the present Application.

(5) **THAT** consequent to the grant of Prayer (2) above the said Director **MIKE JUNG WOONSUN** be ordered to produce the Judgment Debtor's books, papers, documents and /or evidence showing the affairs of the Company.

(6) **THAT** in default of such attendance and/or providing suitable means and assets for the satisfaction of the decree of the Honourable Court, the said Director **MIKE JUNG WOONSUN** be held personally liable to satisfy the decree of the Court in full including, without limitation, the taking out of Warrants of Arrest against

the said Director and subsequent incarceration.

(7) **THAT** the costs of this Application be borne by the Respondent Judgment Debtor and/or its said Directors in any event.

2. The Application is premised on the grounds on the face of the notice of motion application in which the Applicant contends that judgment in this matter was entered against the Respondent in the sum of 68,000 Euros. Subsequently, a decree was issued by this Court.

3. That parties entered and recorded a consent on the 30th March, 2020 settling the issue of costs.

4. The Respondent has neither preferred an appeal to the decision of this Court nor has it settled the entire amount awarded to the Claimant who now seeks this Court's intervention as the whereabouts of the Respondent's directors remain unknown. The Claimant further maintained that he has no knowledge or information on the assets of the Respondent thus unable to execute for the amount owed.

5. He posits that the Respondent has no fixed physical abode and that its majority shareholder is a foreigner who may flee the country thereby hampering the Claimant's chances executing for the award.
6. The Application is further supported by the Affidavit of **FRANK SAENGER**, the Claimant herein sworn on 16th February, 2021 in which he reiterates the grounds on the face of the motion.
7. In response to the Application the Respondent filed a Replying Affidavit deponed to by **JUNG WOOSUN**, the former Managing Director at the Respondent on 16th June, 2021 in which he avers that parties entered a post judgment consent on 30th March, 2020 where it was agreed that the Respondent would pay the Claimant an all-inclusive sum of 75,000 Euros within a period of 8 months.
8. The Affiant averred that to date the Respondent has managed to pay the sum of Kshs.600,000/- with respect to the decree but due to financial difficulties it has been unable to settle the entire sum.
9. He averred that due to continued financial constraints the Respondent is facing Liquidation vide Petition No. 18 of 2020.
10. Mr. Woosun maintained that the Respondent and its directors are distinct and separate entities, arguing that the Respondent's directors are not liable for its debts.
11. He nonetheless maintained that he has since ceased to be a director of the Respondent and is therefore not in control and/or responsible for the management and the running of the Respondent.
12. In conclusion the Respondent urged this Court to find the instant application devoid of merit and dismiss it with costs to the Respondent.
13. Parties agreed to dispose of the Application by way of written submissions.

Claimant's Submissions

14. In his submissions the Claimant/Applicant contends that he has satisfied the threshold for grant of the Orders sought in his application as provided under Order 22 Rule 35 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
15. He further submitted that given that the identity of the Respondent's Director is known and that the decree remains unsatisfied, his application now before this Court is merited and ought to be allowed as prayed.
16. He further argued that no serious effort has been made towards satisfying the decree by the Respondent and is therefore just and fair that the Respondent's director be summoned before this Court to state under oath what assets the Judgment Debtor holds that can satisfy the Decree. To buttress this argument the Claimant relied on the case of **Tropical Wood Limited v Samilis International Investments (2017) eKLR** where the Court held that it had power under Order 22 rule 35 to summon a person to be examined on whether the Judgment Debtor has means to satisfy a decree.
17. In the interim the Claimant urged that this Court allows its application in terms of prayer 4 of the Application in terms of Order 39 Rule 1 and Order the Respondent's Director to either furnish security for his appearance or deposit his passport in Court to secure his attendance in Court.

Respondent's Submissions

18. The Respondent on the other hand submitted that the orders sought by the Applicant cannot be issued against **MIKE JUNG WOOSUN** as he ceased to be a director of the Respondent as evidenced by Form CR12 attached and marked as "JW1" in the Replying Affidavit sworn on 16th June 2021.
19. It is therefore argued that **MIKE JUNG WOOSUN** cannot be in a position to fulfill the orders sought if granted. It is further the Respondent's contention that the Applicant has failed to demonstrate that the Respondent is in a position to provide the information required and as such the Application must fail.
20. The Respondent further submitted that in light of the insolvency Petition Number 18 of 2020, which the Claimant/Applicant has since joined as a creditor allowing any form of execution against the Respondent would be void by dint of Section 430 of the Insolvency Act. It is further argued that the only remedy available to the Claimant/Applicant is to make an application in the Petition to be joined as a creditor.
21. The Respondent further submitted that the Order that in default of his attendance, **MIKE JUNG WOONSUN** be held personally liable to satisfy the decree cannot issue for the reason that a former director cannot be held liable for debts of the Respondent. For emphasis the Respondent relied on the case of **Salomon v Salomon (1897) AC**.
22. Further, that no formal request for lifting of the corporate veil has been made by the Claimant/Applicant for consideration by this Court. The Respondent therefore urged this court to disregard the issue of lifting the corporate veil as suggested by the Claimant/Applicant. For emphasis the Respondent relied on the case of **Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited (2015) eKLR**.

23. The Respondent concluded that the Claimant/Applicant has not shown good grounds for the invocation of the jurisdiction of this Court under Order 22 Rule 35 and therefore urged this Court to dismiss the Application in its entirety with costs to the Respondent.

Claimant/Applicant's Supplementary Submissions

24. In a brief rejoinder the Claimant/Applicant maintains that this Court has power under Order 22 Rule 35 to summon present or past directors of a company for purposes of examination in order for it to make a determination on whether the corporate veil ought to be lifted. To buttress this argument the Claimant/Applicant relied on the findings in the cases of **Multichoice Kenya Limited v Mainkam Limited & Another (2013) eKLR** and **Peter Mucha Gachoka v Protocol Solutions Limited (2019) eKLR**.

25. It is further the Claimant's contention that the changes at the Company registry with regard to the Respondent's directorship has been made in bad faith as the same was done post judgment. He argues that on this basis he has a right to move this Court to seek leave to examine the Respondent's directorship for purposes of determining the assets of the Respondent firm.

Analysis and Determination

26. Judgment in this matter was delivered on 27th September, 2019 and decree issued on 12th June, 2020 in the terms of the consent dated 30th March, 2020.

27. There is no dispute that the Respondent has only settled the sum of Kshs.600,000/- forcing the Claimant/Applicant to proceed to execute for the balance of the decretal sum. According to the Claimant/Applicant his efforts execute for the balance of the decretal sum have been rendered futile as he is unable to trace the Respondent's directors and/or assets. The issues for determination are:

- (i) Whether the Respondents' director, Mr. **MIKE JUNG WOONSUN** should be orally examined on the state of affairs of the Respondent;
- (ii) Whether the Respondent's corporate veil should be lifted and the said director be held personally liable to pay the judgment debt herein.

Examination of the Director

28. Order 22 Rule 35 of the Civil Procedure Rules provides 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.”

29. The above provisions were considered in **NBI HCCC No. 1287 of 2000 Ultimate Laboratories v Tasha Bioservice Limited (Supra)** wherein the Court observed as follows: -

(a) “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;

(b) ...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.

(c) 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.”

30. Having regard to the clear provisions of Order 22 Rule 35 of the Civil Procedure Rules, and owing to the fact that the Judgment Debtor's indebtedness to the Applicant for the decretal sum herein is not disputed, the Applicant is justified and well within his rights to seek the orders of this court to summon the Judgment Debtor's Director and/or former director to be examined on oath over the state of affairs of the Company. It is not for the defendant to determine the mode of execution for the decree holder and the filing of insolvency proceedings against the company is just one among the many avenues available for such execution.

31. With respect to the Respondent's position that there is a pending insolvency petition being Petition Number 18 of 2020 that is ongoing in which the Claimant/Applicant ought to raise his debt. I find no basis to hold that the Insolvency Petition against the Respondent precludes the defendant's director(s) from being examined on the state of affairs of the company.

32. The purpose of summons under Order 22 Rule 35 of the Civil Procedure Rules is to enable the court establish the company's true financial position and not to penalize any party. In the decision in **Postbank Credit Limited (in Liquidation) v Nyamangu Holdings Limited (Supra)**, where the court held that: -

“A person to be summoned under Order 22 Rule 35 (c) of the Civil Procedure Rules, to provide information on the property of the Company will also be required to produce any relevant documents or copies thereof on the assets of the Company or books of accounts including but not limited to the Judgment Debtor's annual financial statement, documents of title property of the Company in his possession and which he may have obtained as a director and/or shareholder of the judgment-debtor.”

33. With regard to the change in directorship, this Court has examined the CR12 of the Respondent as at 11th February, 2021 and the second one attached to the Respondent's Replying Affidavit as at 7th April, 2021 which this Court finds curious. It appears to be a deliberate attempt by **MR MIKE JUNG WOONSUN** to change directorship after the filing of this application with the intention of evading responsibility which this Court cannot entertain as was held in the case of **Peter Mucha Gachoka v Protocol Solutions Limited (Supra)**. It is on record that the said **MIKE JUNG WOONSUN** did testify at the hearing on behalf of the Respondent and further swore the Replying Affidavit on its behalf.

34. Consequently, Mr. **MIKE JUNG WOONSUN**, is directed to attend court on a date to be fixed by the parties, to be orally examined as to whether the judgment-debtor has any and/or what property and/or what means of satisfying the decree herein; and to produce books of accounts or documents, for purposes of satisfying the decree herein.

35. The Court further directs that summons be issued to **Mr. SAMMY MAINA KAMAU** whose names appears in the CR12 for the Respondent as at 7th April, 2021 to attend Court to further assist the Court in ascertaining the Respondent's liquidity.

Lifting the veil

36. On whether or not the corporate veil should be lifted and the Judgment Debtor's Director be held personally liable for debt, I find that this is an issue that the court can only determine after the examination, under oath, of the Debtor's Director and after considering the documentary evidence tendered on the affairs of the company.

37. In the circumstances the Claimant/Applicant's application dated 16th February, 2021 succeeds part. The Court directs the **MIKE JUNG WOONSUN** and **SAMMY MAINA KAMAU** to be summoned to appear in Court to be examined to tender evidence on oath as to the Judgment Debtor's means and assets for purposes of satisfying the decree in this suit.

38. The costs of this application shall be borne by the judgment debtor.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

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 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.

MAUREEN ONYANGO

JUDGE