



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 947 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

GEORGE K. KANGETHE.....CLAIMANT

VERSUS

ZIWA GARMENTS AND APPARELS LIMITED.....RESPONDENT

RULING

1. The application before me for determination is dated 1st December 2020 and is filed by the Decree Holder. He seeks the following orders –

(i) THAT summons do issue compelling one Michael Oddenyo and Ambrose Anguka the Directors of the Judgement Debtor's Company to attend Court on such date as may be ordered or allocated, to be orally examined as to the Judgement Debtor's means and assets in satisfying the decretal sums and costs herein in the sum of Kshs.382,524/=.

(ii) THAT the court makes an order for the attendance in court and examination of Michael Oddenyo and Ambrose Anguka the Directors of the Judgement Debtor's Company, for production of any books of accounts, documents and or evidence showing the affairs of the company for purposes of satisfying the decretal sums and costs herein in the sum of Kshs.382,524/=.

(iii) THAT in default of the said directors complying with the above orders, this Honourable Court be pleased to order that the said directors be held personally liable to pay the Decree Holder the decretal sums and costs in the sum of Kshs.382,524/=.

(iv) THAT costs of this Application be borne by the Judgement Debtor and/or its said Directors in any event.

2. The grounds in support of the application are that –

a) That this court entered judgment on the 5th June 2020 in favour of the Applicant herein against the Judgement Debtor for the award of Kshs.258,667/= with costs taxed at Kshs.123,857/= which decretal sums attract interest at court rates from the date of judgement.

b) That as of today the Judgement Debtor is still indebted to the Applicant in the decretal sums with costs in the sum of Kshs.382,524/=.

c) That the Judgement debtor herein has subsequently closed operation and relocated to an unknown place in order to fraudulently defeat the execution of the said decree.

d) That Michael Oddenyo and Ambrose Anguka are the known and registered Directors of the Judgement Debtor's Company.

e) That the said Directors are vicariously liable for the acts and omission on the Respondent/judgment debtor.

f) That unless this Court allows the orders thus sought, the Judgment debtor will continue to do everything in its power to deprive the Applicant of what is rightfully his.

g) That it is in best interest of justice that the orders herein sought be granted.

3. The application is supported by the affidavit of GEORGE K. KANGETHE.

4. The Respondent filed grounds of opposition to the application as follows –

(1) The Application does not meet the legal threshold to warrant summoning of directors, production of documents and books of accounts, and cross examination thereon.

(2) There is no any shred of evidence for fraudulent activities to defeat execution on part of the said Directors to warrant lifting of the veil by cross examination of Directors. The is Claimant mere allegation, and bare statement of fraud is not sufficient as fraud is a serious allegation that requires proof above balance of probabilities - such as transferring funds or assets as to avoid a judgment or any prove that the corporate veil is being used for fraud or to defeat execution.

(3) The order for cross examination of Directors is not automatic fiat unless sufficient material basis is placed before the honorable court.

(4) The orders are sought as a way of fishing materials from the Directors.

(5) No evidence of attempted execution has been demonstrated by the Claimant, and in any event unsuccessful execution does not automatically entitle a decree holder to cross exam of directors and documents production.

(6) Directors are not automatically vicarious liable for a company as separate legal entity in law.

5. The application was disposed of by way of written submissions. Only the Decree Holder/Applicant filed submissions. The Respondent opted to rely entirely on the grounds of opposition.

6. The Applicant submits that the Respondent has closed operations and relocated to an unknown place in order to evade and/or frustrate the execution of the decree against.

7. The Applicant seeks that the directors Michael Oddenyo and Ambrose Anguka be summoned to appear in Court for discovery in Aid of Execution and in default of attendance for discovery, an order lifting the veil of incorporation do issue to hold the Respondent's directors liable to satisfy the decree.

8. The Applicant relies on the decision in **Ramaben Ramnikal Patani & 2 others v Garden Chambers Limited [2019] eKLR** where Ringera J. (retired) opined as follows:

“The court’s duty under the Order and Rule in question is limited to ensuring that the person being examined answers ail the questions which are fairly, pertinent and properly asked and it is thereafter up to the decree-holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree.

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 with 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. Accordingly, I do not think, the rule places such a high and onerous standard as it has been argued by the respondent, 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.

That kind of approach will defeat the entire purpose of the rule because the rule enables the applicant to seek for information in the nature of discovery to assist the decree - holder to follow through on the execution. If the decree- holder already has such definite information of the debts and properties of the judgment debtor, there will be need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment-debtor’s known properties. The second thing; 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 I have mentioned above and the person shall be summoned under the rule”.

9. The Applicant submits that the present Applicant is on all fours with the circumstances in the circumstances in the above suit. That it is not controverted that Michael Oddenyo and Ambrose Anguka are directors of the Respondent and are well placed to explain the operations and current status of the Respondent.

10. The Applicant further submits that notwithstanding the principles of legal personality of an incorporated company, there are instances when the Court deems it necessary to pierce the veil of incorporation which are alive to the fact that a company is an entity that is run for the

benefit of living persons as the Court held in **Ramaben Ramnikal Patani & 2 others v Garden Chambers Limited [2019] eKLR** where the Court cited the Ringera J. in **Nairobi HCCC No. 1287 of 2000 finding in Jones and Another v Lipman & Another [1962] IWL 833** stating as follows:-

“Whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity....”

11. It is proposed that should the judgment debtors fail to submit to the jurisdiction of the Court for examination, they be found to be in contempt and that the Court lifts the veil of incorporation to prevent the Respondent’s directors from hiding from the eyes of equity.

Analysis and Determination

12. The only issue for determination is whether the Applicant merits the orders sought in the application.

13. Order 22 Rule 35 of the Civil Procedure Rules upon which the application is anchored provides as follows –

[Order 2, rule 35.] Examination of judgment-debtor as to his property.

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.

14. In the grounds of opposition filed by the Respondent, it has not been denied that Michael Oddenyo and Ambrose Anguka are directors of the judgment debtor (JD).

15. It is further not denied that the Respondent no longer operates in its registered address that it has relocated to an unknown address.

16. As was stated in the case of **Nairobi HCCC 1287 of 2000: Ultimate Laboratories v Tasha Bioservice Limited** (unreported). The Court has power to summon any person who is in a position to provide information in the nature of discovery as to the debts owing to the judgment debtor and whether the judgment debtor has any and what promptly or means of satisfying the decree to attend Court and be examined.

17. I am satisfied that the Applicant meets the threshold under Order 22 Rule 35 of the Civil Procedures Rules.

18. I accordingly order that MICHAEL ODDENYO and AMBROSE ANGUKA do attend Court on 24th February 2022 to be orally examined, as to the judgment debtors means and assets in satisfying the decretal sum and costs herein in the sum of Kshs.382,524/-. They will be required to produce any books of accounts, documents and other documentary evidence relating to the judgment debtor’s finances or accounts.

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

20. It so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST 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