



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 781 OF 2015

MCDONALD CHARO & 36 OTHERS.....CLAIMANTS

VS

BOFA MAWENI LIMITED.....RESPONDENT

RULING

1. The Claimants' Notice of Motion, dated 30th August 2018 seeks the following orders:

- a) That the Directors of the Respondent namely Shahbaz Khan and Muhammad Faisal be examined on oath as to the Judgment Debtor's means and assets and to produce account and other documentary evidence showing the same;
- b) That in default of the said Directors complying with above order, the Court be pleased to order that the said Directors be held personally liable to pay the decretal sum in the decree dated 19th May 2017, taxed costs plus interest at court rates.

2. The Motion is supported by an affidavit sworn by the 1st Claimant, McDonald Charo and is based on the following grounds:

- a) The Claimants obtained judgment against the Respondent herein;
- b) The Claimants extracted the decree and the bill of costs was taxed;
- c) The Claimants have been unsuccessful in attempts to attach assets of the Respondent;
- d) The Directors, Shahbaz Khan and Muhammad Faisal, were fully aware that the Respondent could not fulfil its legal obligations, without liability attaching to them, as Directors;
- e) It is obvious that the Directors are using the Company to evade compliance with the judgment herein;
- f) The Claimants ought to be allowed to execute against the said Shahbaz Khan and Muhammad Faisal, as Directors of the Respondent;
- g) It is in the interest of justice that the orders sought do issue.

3. In response to the Claimants' Notice of Motion, a replying affidavit sworn by Shahbaz Khan was filed on 21st June 2019.

4. In his affidavit, Khan depones that he is not a Director of the Respondent Company.

5. Khan states that on 12th November 2013, he addressed a letter to the Board of Directors, Boa Maweni Limited, tendering his resignation as a Director, with effect from the date of the letter.

6. Khan further states that he transferred all his eight hundred (800) shares and interest in the Respondent Company to Muhammad Faisal, one of the current Directors of the Respondent Company.

7. Khan therefore maintains that he has no control over the Respondent's assets and as such, he cannot be held liable to the Claimants.

8. Khan points out that the Claimants obtained a decree against the Company on 14th June 2017, after he had ceased being a Director of the

Respondent Company.

9. On 29th January 2021, the Claimants filed a further affidavit sworn by the 1st Claimant, McDonald Charo.

10. Charo depones that whereas Khan states that he is not a Director of the Respondent because he resigned on 12th November 2013, the records from the Registrar of Companies show that as at 9th January 2017, Khan was still a Director of the Respondent.

11. Charo states that for a person to resign as a Director, they must lodge with the Registrar of Companies, minutes of the Board appointing new Directors, an affidavit sworn by the resigning Director and a deed of transfer of shares.

12. Charo further states that Khan failed to file with the Registrar of Companies, notification of change of Directors, bearing his signature and that of the Company Secretary.

13. Charo adds that the purported new Directors, Malik Ali and Muhammad Faisal are non-Kenyans, who were former employees of Khan, and had left the country.

14. Khan responded to Charo's further affidavit by his own further affidavit sworn on 17th February 2021.

15. In his further affidavit, Khan challenges the authenticity of the *CR 12* dated 9th January 2017, filed by the Claimants, on the following grounds:

a) The *CR 12* indicates that he is a Kenyan Citizen, while he is Pakistani Citizen holding Passport Number xxxxxxxxx;

b) That the aforesaid *CR 12* is not accompanied by an official receipt, confirming that it was indeed issued by the Registrar of Companies.

16. Khan depones that he had complied with all the registration formalities as required under the law, in that he had tendered his resignation on 12th November 2013. He adds that prior to that, a Board meeting had been held on 12th November 2012.

17. Khan further depones that the Respondent's Company Secretary had complied with all the requirements and had also applied for a *CR 12* on 18th December 2015 and had paid Kshs. 5,700 as evidenced by receipt number B 0608243 issued by the Registrar General's Office.

18. Khan goes on to state that the Department of Registrar General had issued a *CR 12* dated 28th January 2016, which confirmed that Khan was no longer a Director of the Company.

19. Khan states that prior to his resignation on 12th November 2013, he was not aware of the claim herein and adds that it cannot be said that his resignation was intended to defeat the ends of justice. Khan maintains that he only became aware of the claim in the month of May 2019.

20. The Motion was urged by way of written submissions. Both parties submitted on the mixed issues of examination of Directors and lifting of the corporate veil. On the face of the Claimants' Motion, however, there is no prayer for lifting of the corporate veil. I will therefore not deal with this issue at this stage.

21. The question properly before the Court is whether a case has been made for summoning of the named Directors for examination under Order 22 Rule 35 of the Civil Procedure Rules. This provision provides as follows:

35. 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 account and books or documents.

22. In his two affidavits sworn in opposition to the Claimants' Motion, Shahbaz Khan depones that he is not a Director of the Respondent and cannot therefore be called for examination as regards the Respondent's ability to settle the decretal sum.

23. Khan claims to have resigned as a Director of the Respondent on 12th November 2013, an averment that the Claimants contest.

24. In his further affidavit sworn on 29th January 2021, the 1st Claimant, McDonald Charo depones that records from the Registrar of Companies obtained on 9th January 2017, show that as at that date, Khan was still a Director of the Respondent.

25. Charo goes further to challenge the legality of Khan's resignation as a Director of the Respondent Company and adds that the named Directors, Malik Ali and Muhammad Faisal, who Charo describes as former employees of Khan, had left the country.

26. In his own further affidavit sworn on 17th February 2021, Khan challenges the authenticity of the company records filed by the Claimants, and presents his own CR 12 dated 28th January 2016, showing that as at that date, he was no longer a Director of the Respondent.

27. Looking at the rival affidavits filed by the parties, it is evident that the position of Khan as a Director of the Respondent is a highly contested matter. There even appears to be two conflicting sets of company records.

28. This however does not bar the Court from summoning Khan for examination on the Respondent's ability to settle the decretal sum herein, which has remained outstanding for a long time.

29. I say so because under Order 22 Rule 35 of the Civil Procedure Rules, the Court is empowered to summon a person other than a Director, for examination.

30. 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.....”

32. Assuming therefore that Khan actually ceased to be a Director when he says he did, that is to say, 12th November 2013, he remains a person of interest as far as the Respondent's ability to settle the outstanding decretal sum is concerned.

33. I therefore direct that **Shahbaz Khan** shall appear before this Court on **24th May 2021 at 11.00 am**, for the purpose of examination under Order 22 Rule 35 of the Civil Procedure Rules.

34. The costs of this Motion will be in the cause.

35. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF APRIL 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyange for the Claimant

Mr. Gakuo for the Director