



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 64 OF 2014

SAMUEL OJWANG JUMA CLAIMANT/APPLICANT

VERSUS

SAPHIRE COLLECTIONS LIMITED..... RESPONDENT

RULING

1. The claimant brought the Notice of Motion dated 25.7.2019 under section 3 & 3A of the Civil Procedure Act and Rule 22 Rule 35 of the Civil Procedure Rules. The motion seeks the following orders:-

(i) That Dilip Raichand Gudka and/or Aparna Dilip Gudka, directors of the defendant/respondent/judgment debtor be orally examined as whether the judgment-debtor has any and/or what property and/or means of satisfying the decree herein;

(ii) That the court make orders for the attendance in court and examination of Dilip Raichand Gudka and/or Aparna Dilip Gudka of the defendant/respondent for production of any books of accounts or documents, for purposes of satisfying the decree herein.

(iii) That in default of the said directors complying with the above order, this Honourable Court be pleased to order that the said directors beheld personally liable to pay the plaintiff/applicant the decretal sum and costs herein in the sum of Kshs. 9,072,075.00 plus accruing interest.

2. The motion is supported by the affidavit sworn by the claimant on 25.7.2019. It is the claimants case that the Dilip Raichand Gudka and Aparna Dilip Gudka are Directors of the Respondent company; that the respondent is indebted to the claimant in the sum of Kshs. 403,906.78 plus interest as at 15.2.2019; that the respondent apparently closed operation from 1.2.2019 to fraudulently defeat the execution of the said decree; and that the said Directors are vicariously liable for the acts or omission of the respondent/judgment debtor.

3. The respondent opposed the motion by the affidavit sworn by Dilip Raichand Gudka on 17.9.2019. In brief, he contended that the respondent was performing poorly for a long time to the extent of not being able to meet her overheads; that in 2018, she fell in arrears of rent for 6 months and the landlord forced her to close down and vacate the premises; and that she had proposed to settle the judgment debt by instalments in the hope that the business would pickup but all in vain.

4. He denied that the closure of the respondents operation was fraudulent or meant to avoid payment of the judgment debt and maintained he acted in good faith in the circumstances because the company could not sustain operations due to bad economic times. Finally he prayed for the motion to be dismissed because it was unmerited, vexatious and only intended to harass the Directors.

Claimant's Submissions

5. The claimant submitted that Dilip Raichand Gudka and Aparna Dilip Gudka are the registered Directors and ordinary shareholders of the respondent in the ration of 51% and 49% respectively; that they understand all the details of the respondent and they are able to give the true position of the respondents' financial status and produce her books of accounts for examination; and that they are the right persons to be orally examined as to whether the respondent has any property and the means of satisfying the judgment debt herein.

6. The claimant relied on **Post Bank Credit Ltd (in liquidation) v Namangu Holdings Ltd [2015]eKLR** and **Justine Nyambu v Jaspa Logistics [2017]eKLR** where the court held that it has jurisdiction under order 22 rule 35 of the Civil Procedure Rules to grant the orders sought herein, and proceeded to direct the judgment debtor's director to attend court for examination on the assets of the judgment debtor and the means of settling the decrees of the court.

7. The claimant further urged that the court to lift the corporate veil of the respondent and hold the said Directors and the shareholders personally liable because they acted fraudulently with intention to frustrate execution of the decree herein by closing the shop on 1.2.2019. He relied on **Euphrasia Wariara Mukui v Naken Motors Ltd [2008]eKLR** where the court held that the directors of the judgment debtor be examined and produce books of account and other relevant materials and in default they be held personally liable for the judgment debts.

Respondent's submissions

8. The respondent submitted that the closure of her operation was not fraudulently done to frustrate execution of the decree as alleged but due to eviction by the landlord as a result of rent arrears. She therefore contended that the closure was caused by economic hardship.
9. As regards the lifting of the corporate veil, she relied on **Michael Kyambati v Principal Magistrate Milimani Commercial Courts, Nairobi & another [2016]eKLR** where the court held that lifting of the corporate veil is not to be undertaken lightly under Order 22 Rule 35 of the Civil Procedure Rules.
10. Finally, the respondent submitted that she had given all the information in the Replying affidavit herein and contended that examining her directors orally will amount to wastage of judicial time.

Issues for determination

11. There is no dispute that there is a decree of the court in the sum of Kshs. 403,966.78 plus interest in force against the respondent. There is further no dispute that the effort by the claimant to execute the decree by attachment of the respondent's assets has failed because none of her assets could be traced. There is further no dispute that the respondent has closed operations before settling the said decree. The issues for determination are:

- a. Whether the respondents' directors, Mr. Dilip Raichand Gudka and Mrs. Aparna Dilip Gudka should be orally examined on the state of affairs of the respondent.**
- b. Whether the respondent's corporate veil should be lifted and the said directors held personally liable to pay the judgment debt herein.**

Examination of the directors

12. 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.”

13. The foregoing provision deals with what is otherwise called discovery in aid of execution. It is a jurisdiction donated to the court by the rules to assist decree holders to dig out information from officers of a corporation whose assets are unknown and I should quickly add, where the decree holder's effort to execute the decree has failed due to failure to trace the judgment-debtors' assets.

14. In this case, it is common knowledge that the respondent has closed operations citing economic turbulence. She has not explained whether she owns any assets or how she intends to settle the decree herein. The claimant has invoked order 22 rule 35 above to try to dig out some information on the respondent's financial status. The respondents deems the exercise as a waste of judicial time because she has already done so in her replying affidavit.

15. I, however, do not agree with the respondent's view because the replying affidavit has given no financial statement or annexed any books of accounts for the company. It has also not stated how the respondent intends to settle the decree herein. I, therefore, find that the claimant is entitled to order 1 and 2 of the motion as prayed. Consequently, Mr. Dilip Raichand Gudka and Ms. Aparna Gudka, respondents directors are 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.

Lifting the veil

16. The claimant contended that the respondent closed operations from 1.2.2019 with intention to frustrate the execution of the decree herein. In his view the respondent acted fraudulently and for that reason the court should pierce the respondents corporate veil and hold the said directors liable personally for the judgment debt. The respondent has however disputed the alleged fraud and contended that she was forced to close operation by the landlord who evicted her due to rent arrears. No evidence was, however, tendered to support the alleged rent arrears and the eviction.

17. However, I agree with the respondent that lifting of corporate veil should not be undertaken lightly before the legal threshold is met as set out in the statute law or judicial interpretations. I will therefore not determine the issue of piercing of the corporate herein until the said

directors of the respondent are examined by the decree holder. Thereafter I will proceed to make my decision on whether or not to pierce the respondent's corporate veil.

18. In conclusion, I allow the application to the extent indicated herein above and condemn the respondent to pay the costs of the application to the claimant.

Dated, signed, and delivered in open court at Nairobi this 17th day of January, 2020.

ONESMUS MAKAU

JUDGE