



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 891 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**NICHOLAS KINYILI.....CLAIMANT**

**VERSUS**

**MOCCA LOUNGE AND BISTRO.....RESPONDENT**

**RULING**

Judgment in this suit was delivered in favour of the Applicant herein against the Respondent on 10<sup>th</sup> August 2018. The suit was heard ex parte following the failure of the Respondent or Counsel for the Respondent to attend court on the hearing date. The claimant thereafter taxed his costs and instructed Upstate Kenya Auctioneers to execute the decree. The Auctioneer however returned the warrants to court unexecuted by its letter dated 10<sup>th</sup> June 2019, citing inability to locate attachable assets of the judgment debtor.

By an application dated 5<sup>th</sup> February 2020 and filed on 17<sup>th</sup> February 2020, the Claimant/Decree Holder seeks the following orders –

1. That the corporate veil of the Respondent Company be lifted.
2. That Mohamed Mealen Abakare, being one of the Directors of the Respondent Company (judgement debtor) herein be summoned to attend this Court for his examination on the judgement debtor's assets and to produce all its books of account including but not limited to the judgement debtor's annual financial statement.
3. That the decree herein be executed against the said Mohamed Mealen Abakare the Managing Director of the Respondent herein personally.
4. That any other appropriate orders be made.
5. That the costs of this application be provided for.

The application is supported by the grounds on the face thereof as follows –

- a) *That a decree was passed by this Court on the 10<sup>th</sup> August 2018 and the Respondent was ordered to pay the Claimant the sum of Kshs.589,685/=.*
- b) *That the Claimant has been unable to execute the decree against the Respondent company, after judgement was passed on account that the Claimant has not been able to trace any known assets of the Respondent.*
- c) *That Mohamed Mealen Abakare the Managing Director of the Respondent has concealed and/or wasted the assets of the Respondent to avoid paying its creditors.*
- d) *That Mohamed Mealen Abakare being the Managing Director and the only known Director of the Respondent and in the absence of the Respondent's attachable assets, execution should issue against him personally.*
- e) *That this Court has jurisdiction to lift the veil of incorporation and hold a director liable to settle the decretal sum decreed against a company.*

f) That it is in the interest of justice and the Claimant should enjoy the fruits of the judgement.

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

In the supporting affidavit of Nicholas Kanyili the Applicant, he reiterates the averments in the grounds on the face of the application.

The application was served upon Counsel for the Respondent who did not file a response thereto or attend court for the hearing of the application.

The application was disposed of by way of written submissions. Only the claimant filed submissions.

#### **Determination**

I have considered the application and the submissions of the Applicant. The issues for determination are whether the Decree Holder/Applicant is entitled to the prayers sought.

#### **Lifting of Corporate Veil**

Order 22 Rule 35 of the Civil Procedure Rules under which this motion has been brought provides as follows –

**[Order 22, rule 35.] Examination of judgment-debtor as to his property.**

**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 any books or documents.**

There is no doubt that the decree herein is for money. There is however no evidence that **Mohamed Mealen Abakare** is a Director or an Officer of the judgment debtor. The application was further served upon him in person to enable him to appear before the court and confirm or deny that he is or is not a Director or Officer of the Respondent.

Further, although it is averred in the affidavit of Nicholas Kanyili, the Decree Holder/Applicant herein that he has information that the said **Mohamed Mealen Abakare** has concealed, appropriated or wasted the assets of the Respondent to avoid paying creditors, this averment is not backed by any evidence and is information from a third party which is not corroborated.

**For the foregoing reasons, it is my finding that the Applicant has not given sufficient reason for grant of orders sought with the result that the application fails and is accordingly dismissed.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF DECEMBER 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**