



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2014 OF 2014**

**[Formerly High Court Appeal No.481 of 2010]**

**ELVICX BERNARD OKUMU SIBI & 101 OTHERS ..... APPELLANTS**

**VERSUS**

**BIRKING INDUSTRIES SERVICES (BIS) LTD ..... RESPONDENTS**

An appeal from the Ruling of the Senior Deputy Registrar Hon. R. E. Ougo dated 3<sup>rd</sup> November 2010 seating at high Court Civil Division

In

Case No.942 of 2006

**Ruling of the Court**

1. This case has been through many hands. Commenced before Industrial Court [as it was then] in Causes Numbers 118 of 1999 and Cause Number 59 of 2000 which issued an award on 29<sup>th</sup> July 2004. The Claimants then filed High Court Civil Case No.942 of 2006 to enforce the award of the Industrial Court and on 3<sup>rd</sup> September 2008 a decree was issued. Subsequent and upon failure to satisfy the decree, the Claimants filed application seeking the Respondent to declare their property or means of satisfying the decree and taxed costs and in the alternative the managing director of the Respondent to show cause as to why he could not be arrested and committed to civil jail for delaying the execution of the decree and taxed costs. This application was heard and the Appeal herein is with regard to the Ruing of the Court made delivered on 3<sup>rd</sup> November 2010.
2. The Appeal was admitted for hearing on 20<sup>th</sup> May 2014, the Respondent had been served but failed to make an appearance. On 12<sup>th</sup> November 2014, the High Court gave directions for the transfer of the Appeal from the High Court to this Court under the provisions of article 162(2) of the constitution. This matter was then registered by this Court as Cause No.2014 of 2014.
3. On 19<sup>th</sup> November 2014 both parties appeared in Court for direction and it was agreed that the Appeal should be addressed by way of written submissions and take mention dates for allocation of a judgement date. The Claimants filed their submission on 13<sup>th</sup> august 2015. Despite being served and noticed being issued to the respondent, they have not filed any written submissions to this day. On 22<sup>nd</sup> September 2015, the Claimants mentioned the matter against, the Respondent was served but remained absent.

4. The Claimants have an award of kshs.22, 514,956.10 that arose from the award by the Industrial Court, this was enforced through the High Court and a decree issued. Costs were also taxed at kshs.602897.00. Efforts to execute the award and decree were not possible and hence the Claimants moved the Court with application dated 6<sup>th</sup> February 2009. The ruling subject of the Appeal related to this application by the Claimants that was seeking for orders that Respondent managing Director George Muthama Gitia be examined as to any property of the Respondent or means of satisfying the decree and taxed costs of the Claimants and for the production of any books or documents in relation to the Respondent company. Further orders were sought in the alternative that the managing director of the Respondent should show cause as to why he should not be arrested or committed to civil jail for obstructing or delaying the execution of the decree and the taxed costs. The Court in this regard held that the orders sought Court not issue and the Claimants should move the proper Court as appropriate as the Claimants had not applied to lift the corporate veil of the Respondent Company.

5. Being aggrieved by these orders, the Claimants lodged their appeal on the following grounds:-

1. *That the learned Senior Deputy Registrar erred in law in holding that the mere examination of the director of the Respondent was not enough compliance with the requirements of order XXI Rule 36 of the Civil Procedure Rules as amended*
2. *That the learned Senior Deputy Registrar erred in law in holding that the orders sought could not be granted once the corporate veil of Respondent Company had been lifted.*
3. *That the learned Senior Deputy Registrar erred in law and in fact in not considering the evidence on record to find whether or not the director of the Respondent company had satisfied the requirements of order XXI Rule 32 and 36 of the Civil Procedure Rules as amended.*

6. The Claimants as the appellants also filed their written submissions to the appeal. they made a summary of facts of the case and submitted that the Claimants were former employees of the Respondent and were awarded damages by the Industrial Court on 29<sup>th</sup> July 2004 in the sum of kshs.22,514,956.10 as terminal benefits. It was then necessary to move the High Court for enforcement under the operational law at the time, the Trade Dispute Act and HCCC No.942 of 2006 was filed. A decree was issued as prayed and costs taxed and demand to the Respondent done under the provisions of Order XII Rule 6 of the civil procedure Rules as amended.

7. Upon this background the Claimants submitted that the Deputy Registrar in the ruling erred as order XXI Rule 36 now amended to be Order 22 Rule 35 of the Civil procedure Rules, 2010, the demand to a corporate body, an officer can be examined orally as to whether any or what debts are owing to the judgment-debtor and whether the judgement-debtor has any property or means of satisfying the decree. Such examination should also establish as to whether the director is aware of the debts owing to the judgement debtor and what property exists or the means available to satisfy the decree and debts. That when the director was called, he remained vague and evasive when dealing with the issues put to him. The Deputy Registrar should not have allowed the mere examination of the Respondent director and should have done more. This Court has the power to evaluate the evidence and come to a different finding as held in **Mwanasokoni versus Kenya Bus Service Ltd [1985] KLR 931**. The Deputy Registrar erred by misapprehending the claimants' case on the question of lifting the corporate veil as held in **Corporate Insurance Co. Ltd versus Savemax Insurance Brokers Ltd [2002] 1EA 41**. The Claimants had application did not relate to the lifting of corporate veil but rather Order Xxi required the examination of the company director with a view to finding out what property or means existed to satisfy the decree and taxed costs

### **Determination**

8. As a Superior Court of Record and this being a first appeal and as the first appellate Court in employment and labour disputes I am required to re-reconsider the evidence on record and come to my own conclusions. See the case of **Selle Vs. Associated Boat Company Ltd [1968] EA 123**.

9. There exists a valid judgement herein. A decree has been issued and certificate of costs issued by the court. Such are legal processes that have been sanctioned by the Court against the Respondent who I

snow a judgement-debtor. As submitted by the Claimants as the appellants herein, the Respondent has not made any effort since the delivery of judgement on 29<sup>th</sup> July 2004 to satisfy the same. Equally, since the decree and Certificate of Costs were issued, the Respondent has not made an indication as to how it intends to satisfy the same.

10. The application submitted by the Claimants before the Learned Deputy Registrar and dated 6<sup>th</sup> February 2009 was based on the provisions of Order XXI Rules 32, 35, and 36 of the Civil Procedure Rules as amended. The amended Rule is at Order 22 Rule 35 of the Civil Procedure Rules, 2010 which provides;

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

11. An application thus brought under the provisions of the above cited rule is very specific. The Court must establish there is a decree for the payment of specific monies which then entitles such a decree holder to apply to the Court for the call of the judgement-debtor for examination as to what property or means of satisfying the decree. This is not the process to re-open the case in defence, rather judgment has already been entered and a decree issued and at this point, there is a lawful judgment that is to be executed.

12. The procedures outlined under Order 22 Rule 35 are conditions precedent to a form of enquiry as to what property or means of satisfying the decree the judgment debtor may have as correctly held in **National Bank Limited v Linus Kuria Ndung'u Milimani HCCC No. 81 of 1998** where the Court held;

*The rule is very clear concerning the issues that the Court should consider and be satisfied before making the order for committal to civil jail.*

*First to be adhered to is the requirement that the reason for which informed the Deputy Registrar to decide the way he did must be recorded in writing ..... the Deputy Registrar must be satisfied;*

- i. That the judgment debtor has, since the date of the decree, the means to pay the amount of the decree and some substantial part thereof;*
- ii. And refuses or neglects or neglected to pay the same ...*

13. The Deputy Registrar seized with such an application under Order 22 Rule 35 [previously XXI Rule 36] must be satisfied that the judgement-debtor has since the decree was passed against them have the means to pay the judgement amounts or the satisfaction of the judgment sum in any other form. The evaluation of the judgement-debtor is paramount. That is why the decree-holder has caused their appearance in Court after due notice enforced through due process. Such requirements for the Deputy Registrar were set out by the Court in the case of **Beatrice Wanjiku & another v Attorney General & another [2012] eKLR** thus;

*... Under Rule 35 aforesaid, where a judgment-debtor appears before the Court in obedience to a notice issued under Rule 32, or is brought before the Court after being arrested in execution of a decree for the payment of money, he may be examined on his means or otherwise to satisfy the amount of the decree and the Court may on terms as it may think fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be. The application is disallowed if the judgment-debtor is unable to pay the judgment debt as a result of poverty or other sufficient cause.*

14. To therefore require the claimants to first file a new and separate application seeking the lifting of the Respondent company corporate veil before being heard on their application that was based under Order 22 Rule 35 was a misapplication of the law. I agree with the submissions by the Claimants that the principles set out in the case of **Corporate Insurance versus Savemax Insurance Brokers** are clear in that;

*An application under the provisions of Order XXI Rule 36 [now Order 22 Rule 35] is misconceived if it seeks the examination of a corporation because a corporation is not amenable to an order for examination.*

*An application for examination under Order XXI rule 36 is premature and incompetent if brought before a decree is extracted. The veil of incorporations may be lifted where it is shown that the company was incorporated with or was carrying business as no more than a cloak, mask or sham, a device or stratagem for enabling the directors to hide themselves from the eye of enquiry. The corporate veil can be lifted at any stage, including execution, in appropriate cases.*

15. In the Record of Appeal and the proceedings before the Deputy Registrar on 10<sup>th</sup> September 2009, the Respondent counsel confirmed that the Respondent company director was willing to attend for his examination. Such director was put on the stand under oath and stated;

*My full names are Lt. Col George Muthama Gitia. I am the person named in the application. Birking industries (BIS) Ltd used to be my company. It was formed in 1989 September. There are 3 shareholders...I cannot remember the number of shares held.*

16. Upon such a submission, the Court was well seized of the person envisaged under Order 22 Rule 35. To therefore rule that the Claimants were then required to lift the corporate veil to warrant the orders sought for the call and examination of the company/Respondent director to show what property or means they had so as to satisfy the judgement-debt and in the alternative show cause as to why such a director should not be committed to civil jail was to misapply the law and fail to note that such a requirement was overtaken by events. The director or the Respondent Company had already presented himself in court. It was not nectary to then require the lifting of the corporate veil. Such a requirement was not to serve any useful purpose known in law or applicable under the provisions within which the application before the Court was presented.

17. I find the basis of the claimants' application as presented was seeking the examination of such a director as to the company property that would be used to satisfy the decree or any other means of paying such judgement debt. The appearance of the respondent director in court was not for him to offer a defence, rather he was in court to set out how the judgement debt was to be satisfied. In the absence of such satisfaction or explanation, the claimant had made an alternative prayer that the court should have given a consideration. That of the director show cause as to why he should not be committed to civil jail for not delaying the execution of the decree and taxed costs. To thus entertain any other matter outside the one that was before the court without any reason of just cause was a misapplication of the law.

18. I also find the nature of the appeal herein is in recognition that the claimants as Appellants have had a valid judgement since 2004, they have a legitimate expectation that is reasonable that upon their submission of the application such as the one that was before the Deputy Registrar and subject of this appeal, the court was not to be an impediment, rather facilitate the course of justice to ensure lawful execution of its judgment and orders. The court will therefore direct herein as appropriate.

**In conclusion therefore, the appeal is hereby allowed and;**

- a. **The ruling of the Deputy Registrar delivered on 3<sup>rd</sup> November 2010 hereby set aside.**
- b. **In the interests of justice and noting the appeal as allowed, the Claimants shall cause the recall of the Respondent director George Muthama Gitia to appear before Court to show cause why he should not be arrested and committed to civil jail for delaying the execution of the decree and the taxed costs herein; and**
- c. **Costs of the appeal awarded to the claimant/Appellants.**

Delivered in open court and dated this 15<sup>th</sup> day of October 2015.

**M.Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

.....

.....