



Kangwana & another v Transnational Bank Limited & 7 others (Civil Case 2825 of 1997) [2025] KEHC 740 (KLR) (Civ) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 2825 OF 1997
JN MULWA, J
JANUARY 30, 2025**

BETWEEN

**JARED BENSON KANGWANA 1ST PLAINTIFF
COMMUNICATION CENTRE HOLDINGS LIMITED/APPLICANT 2ND
PLAINTIFF**

AND

**TRANSNATIONAL BANK LIMITED 1ST DEFENDANT
KANES LIMITED 2ND DEFENDANT
CHEMUSIAN LIMITED 3RD DEFENDANT
EUROPA HOLDINGS LIMITED 4TH DEFENDANT
MODERN KONDOO LIMITED 5TH DEFENDANT
LOSUPUK LIMITED 6TH DEFENDANT
SAMKOLIT LIMITED 7TH DEFENDANT
KAN LIMITED 8TH DEFENDANT**

RULING

1. For determination is the 1st & 2nd Plaintiffs/Applicants Motion dated 08/02/2023. It is brought pursuant to Order 22 Rule 35 of the Civil Procedure Rules (CPR). They seek inter alia the following orders: -

1. That the directors of Kan Limited (hereafter the 2nd Defendant) namely Kennedy Chirchir Kipchumba and the directors of Agro Frontiers Investments Limited be examined on oath as



to the judgment debtor's means and assets and to produce the judgment debtor's books of account and other documentary evidence showing the same.

2. The directors of the Chemusian Limited (hereafter the 3rd Defendant) namely Rebecca Tamining Kulei and Joshua Chehelgo Kulei be examined on oath as to the 3rd Defendant's means and assets and to produce the judgment debtor's books of account and other documentary evidence showing the same.
 3. The directors of the Modern Kondoo Limited (hereafter the 5th Defendant) namely Mary Jeruto Kiptanui and Abraham Kipsang Kiptanui be examined on oath as to the 5th Defendant's means and assets and to produce the judgment debtor's books of account and other documentary evidence showing the same.
 4. In default of the directors complying with the above order such further order be made against them personally as this Honorable Court may deem fit.
 5. That costs of the application be provided for.
2. The motion is predicated on the grounds set out on its face and the supporting and supplementary affidavits of the 1st Plaintiff, who avers to being a director of the 2nd Plaintiff thus duly authorized to depose on behalf of both Plaintiffs.
 3. The gist of the motion is that judgment in the suit was delivered on 31/08/2018 in favour of the Plaintiffs as against the 1st, 2nd, 3rd & 5th Defendants jointly and severally to the tune of Kshs. 127,089,425/- plus interest at 4% per month from 11/06/1997, which judgment and decree remains unpaid to date. The plaintiffs depone that they are not aware of any assets belonging to the said judgment debtors that could be attached in satisfaction of the decretal sum and taxed costs therefore necessitating filing of the motion before the court seeking orders from the court to examine the directors of the aforestated Defendants as to their property and means.
 4. The Motion was opposed by the 1st, 2nd, 3rd & 5th Defendants by way of grounds of opposition dated 24/01/2024 on grounds that the application is defective, bad in law and is otherwise an abuse of the Court process; the motion has failed to meet the threshold under Order 22 Rule 35 of the CPR; and that prayer (4) of the motion is untenable in light of the principles set out in the case of Salomon v Salomon (1897) AC 22 HL.
 5. The Court has considered the orders sought, the affidavits in support, the 1st, 2nd, 3rd & 5th Defendants Grounds of Opposition as well as the Plaintiffs submissions, and flags the following issues for determination.
 1. Whether this Court ought to order for the examination on oath of the Judgment debtors directors in question?
 2. Who should bear the costs of the application?
 3. Whether this Court ought to order for the examination on oath of the directors in question?
 6. At the outset, it would be germane to note that the 1st, 2nd, 3rd & 5th Defendants opposed the Plaintiffs motion by way of grounds of opposition. The Court of Appeal in Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) rightly observed that a party opting to respond to motion by way of grounds of opposition by virtue of Order 51 Rule 14 of the CPR confines themselves to issues of law and legal arguments only.



7. That said, the Plaintiff's motion saliently invokes the provisions of Order 22 Rule 35 of the Civil Procedure Act (CPR), which provides that: -

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.

8. The principles upon which such an order is premised have been the subject of abundant discussions within our jurisdiction with the parameters thereto being well settled. Kimaru, J. (as he then was) in the case of *Masifield Trading (K) Ltd vs Rushmore Company Limited & another* [2008] eKLR, while addressing himself to the above provision observed that: -

“I think the above rule grants this Court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation.”

9. The duty of this Court in respect of the above provision was further discussed in the decision of Ringera J. (as he then was) in *Ultimate Laboratories v Tasha Bioservice Ltd: Nairobi HCCC No. 1287 of 2000* (unreported) as follows:

“The court's duty under the Order and Rule in question is limited to ensuring that the person being examined answers all 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.....While I agree with the defendant's/judgment debtor's advocate that the objective of an examination of a company's director or officer under Order XX1 Rule 36 is to obtain discovery, for the purpose of execution of a decree against the company, 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 don't agree that the court does not have the power in an application in execution which is grounded under the above provisions as well as the inherent power of the court and all other provisions of the law to lift the corporate veil of the company and order the director to personally discharge the debts of the company”.

10. Additionally, the court proceeded to state;

“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.... What needs to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule”.

11. With the above in mind it is undisputed that judgment in the matter was delivered on 31/07/2018 and thereafter the Plaintiffs Party and Party Bill of Cost was taxed vide a ruling delivered on 10/12/2020. It would appear that on 24/12/2019 the Plaintiffs and 1st Defendant entered into a deed of settlement wherein it was agreed that the 1st Defendant- Transnational Bank- would pay Kshs. 267,000,000/- in full and final settlement of any and all claims the Plaintiffs had or may have against it in connection with the judgment of this Court delivered on 31/07/2018. To date, the Plaintiffs contend that the 1st, 2nd, 3rd & 5th Defendants have failed and not made good on the decree of the Court.
12. The Decree holders/Plaintiffs depone that they are not aware of any assets belonging to the aforementioned defendants that could be attached in execution of the Court’s decree which facts have not been challenged by the judgment debtors.
13. The 1st, 2nd, 3rd & 5th Defendants in their grounds of opposition state that the plaintiffs have not met the test under Order 22 Rule 35 and that the prayer seeking that orders be made against the directors personally to comply with the reliefs sought in the motion is an affront to the age-old decision in *Salomon v Salomon* (1897) AC 22 HL.
14. The above classical case settled that a company and its directors are considered separate entities, to wit, a company is legally distinct from its directors’ and can be held liable for its own actions, and not the personal actions of its directors, often referred to as “corporate veil”. It seems that the 1st, 2nd, 3rd & 5th defendants reservation is that the motion seeks to pierce the corporate veil. In *Salomon* (supra), it was equally settled that piercing of the corporate veil, such as in the instant matter, would entail an examination of the directors of the company to have them personally liable for the decretal sum in favour of the Plaintiffs that presently remains unsatisfied.
15. To the above end, this Court concurs with the rendition of Gikonyo, J. in the case of *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & another* [2014] eKLR, wherein he addressed himself as follows -;

“... [the] separate legal personality of a company can never be departed from except in instances where the statute of the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.”
16. At this juncture, upon a detailed review of the reliefs sought by the Plaintiffs, it would seem that the 1st, 2nd, 3rd & 5th defendants reservation on piercing the corporate veil, is premature. What the former seek is an examination on oath of the 2nd, 3rd & 5th Defendant directors, as to the means and assets of the said Defendants, and in default there be personal compliance by the said directors in respect of being examined on oath as to the means and assets of the companies in question and not personal satisfaction of the decretal sum. 17. In this case, the motion is limited to Order 22 Rule 35 of the CPR and not piercing of the corporate veil whereas the affidavit in support of the motion is not predicated on the judgment-debtors having committed fraud, improper conduct and criminal activities to thus warrant piercing of the corporate veil. In any event, the latter can only be arrived upon an examination



of the books of account and the directors. Therefore, the 1st, 2nd, 3rd & 5th defendants opposition to the motion is not well taken in the circumstance.

17. In the end, it is this Court's finding that the Plaintiffs have made out a case at having the directors of defendants namely; - Kennedy Chirchir Kipchumba, Rebecca Tamining Kulei, Joshua Chelelgo Kulei, Mary Jeruto Kiptanui and Abraham Kipsang Kiptanui respectively, summoned for purposes of cross-examination as to their means and assets, and to produce the 2nd, 3rd and 5th defendant's books of accounts and any other documentary evidence, on a date that may be taken with concurrence of the parties Advocates.

Who should bear the costs of the application?

19. Costs of the motion are awarded to the Plaintiffs in any event.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

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JANET MULWA.

JUDGE

