



REPUBLIC OF KENYA



KENYA LAW
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Samaki Industries (K) Ltd v Gilfilian Technical Services Limited (Civil Suit 52 of 1992) [2025] KEHC 8520 (KLR) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 8520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 52 OF 1992
JK NG'ARNG'AR, J
JANUARY 27, 2025**

BETWEEN

SAMAKI INDUSTRIES (K) LTD PLAINTIFF

AND

GILFILIAN TECHNICAL SERVICES LIMITED DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion application dated 30th November 2023 pursuant to Section 3A of *Civil Procedure Act*, Order 22 Rule 35 of the *Civil Procedure Rules*, Section 31, 107 and 125 of the *Companies Act*, Article 159 of the *Constitution*, and all other enabling provisions of the law.
2. The Plaintiff seeks for orders that pursuant to the judgment delivered on 30th April 2020 and subsequent decree issued on 4th June 2020, the Defendant/Respondent is compelled to pay the outstanding debt of Kshs. 37,343,002 together with costs and interest at court rates from the date of the suit till payment in full. That in default to comply, the court makes an order of lifting the Defendant/Respondent's corporate veil and pursue the individual director/shareholder in their personal capacity to pay the decretal amount due to the Plaintiff/Applicant or to be imprisoned and committed to civil jail for a period of not less than 6 months. That alternatively, a Notice to Show Cause do issue to the J. Schwartzman who currently is the only known director who acted in that capacity before/after filing of the suit and also at the time when the Plaintiff procured services of the Defendant. The Plaintiff also prayed for costs.
3. The application is premised on grounds on its face and the Supporting Affidavit sworn on 30th November 2023 by Salim Verjee that on or about the year 1990, the Plaintiff procured services of the Defendant for installation of ice plant production, blast freezer and cooling tower. That the Defendant blackmailed the Plaintiff to withdraw from litigation in order for them to continue with the work. That when the Plaintiff instituted the primary suit, judgment was delivered on 30th April 2020 where the Plaintiff was awarded Kshs. 37,343,002 together with costs and interest at court rates from the date



- of the suit till payment in full. That the Plaintiff has made demands for payment but the Defendant has been evasive. That once the corporate veil is pierced, directors of the Defendant will be examined as a step towards satisfying the decree herein. That no prejudice will be suffered by either party if the application is allowed with costs.
4. In response, a Replying Affidavit was sworn on 9th April 2024 by Joseph Schwartzman that the period alluded to between 1990 and 1995 is not material in the present suit for reason that the suit herein was only instituted against the Defendant company in 2010. That he is not a director of the Defendant company and was not one at all material times to the application under consideration. That whereas he was a director of the Defendant company at incorporation, he ceased being one upon resignation with effect from 8th January 1996 and the registrar of companies was duly notified of the resignation. That there was no claim whatsoever from the Plaintiff against the Defendant company in the manner sought or howsoever as at January 1996 being the time of resignation as director of the company. It was deposed that the judgment and decree issued by court ought to be executed only against the company or its last known directors from the date of the suit being 20th April 2017 as stipulated in the judgment of Hon. Justice PJO Otieno dated 30th April 2020. That justice will not be served if the deponent is subjected to court proceedings in respect to a company which he had nothing to do with for more than a decade and a half.
 5. The Plaintiff filed a Further Affidavit sworn on 19th April 2024 by Salim Verjee, the director of the Plaintiff, that Mr. Joseph Schwartzman did not comply with direction of the court issued on 8th February 2024. That Mr. Schwartzman was a director of the Defendant company at the time the Plaintiff procured services as shown by the letters dated 4th June 1990, 25th June 1990, 18th July 1995. That the current defendant was enjoined in the suit because the Plaintiff's advocate at the time of filing the suit in 1992 made a typing error naming the wrong defendant.
 6. The Plaintiff filed submissions dated 7th June 2024 to his Notice of Motion application dated 30th November 2023.
 7. Mr. J. Schwartzman also filed a Notice of Motion application which was dated 4th April 2024 under Certificate of Urgency pursuant to Article 50, 159 (2) (d) & (e) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, and all enabling provisions.
 8. Mr. J. Schwartzman seeks for orders that this court be pleased to vacate/set aside its directions issued on 8th February 2024 pursuant to the Plaintiff's Notice of Motion application dated 30th November 2023 to the extent that it seeks the attendance in person of Mr. J. Schwarzman in Mombasa Law Courts as the last known director of the Defendant company. That this court be pleased to issue any other or further orders as the court may deem fit to grant, and that costs of this application be provided for.
 9. The application is based on grounds on its face and the supporting Affidavit sworn by Mr. J. Schwartzman on 4th April 2024 where he has reiterated averments in the Replying Affidavit herein above sworn on 9th April 2024.
 10. The Plaintiff filed a Replying Affidavit sworn on 23rd May 2024 by Salim Verjee where he reiterated contents of his Further Affidavit sworn on 19th April 2024.
 11. The application dated 4th April 2024 was canvassed by way of written submissions. Mr. Schwartzman/Applicant filed submission dated 31st May 2023 while the Plaintiff/Respondent filed submissions dated 31st May 2024.
 12. I have considered Notice of Motion application dated 30th November 2023, the responses and submissions thereto, and the Notice of Motion application dated 4th April 2024 together with the



responses and submissions. The issue for determination is whether the applications are merited for grant of the orders sought.

13. The Plaintiff in their application prayed for orders that a Notice to Show Cause do issue against Mr. J. Schwartzman who is the only known director who acted in that capacity at the time the Plaintiff procured services of the Defendant to the Plaintiff. This according to the Plaintiff is aimed at lifting the corporate veil to pursue directors/shareholders in their personal capacity to pay the outstanding amount of Kshs. 37,343,002 together with costs and interest at court rates from the date of filing suit till payment in full pursuant to the judgment of 30th April 2020 and subsequent decree issued on 4th June 2020.
14. Orders were issued by this court on 8th February 2024 requiring personal attendance of Mr. J. Schwartzman who through their advocates filed an application seeking that this court vacates/sets aside the directions. This was on the basis that Mr. Schwartzman ceased being a director of the Defendant with effect 8th January 1996.
15. This court has perused the documents on record and confirmed that indeed the Plaintiff procured services from the Defendant as shown in the letters dated 4th June 1990, 25th June 1990 and 18th July 1995, when Mr. Schwartzman was a director of the Defendant. This court has also confirmed that Mr. Schwartzman officially resigned as director of the Defendant.
16. Order 22 Rule 35 of the [Civil Procedure Rules](#) provides: -
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.
17. This court is also guided by the case of [Post Bank Credit Limited \(In Liquidation\) v Nyamangu Holdings Limited](#) (2015) eKLR where it was held that: -

“Order 22 Rule 35(c) of the *Civil Procedure Rules* allows the court to order any other person to attend court and be orally examined as to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein. A former director could also be called upon to attend court and be examined under Order 22 Rule as long as it is shown he is appropriate in an inquiry to establish to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein.”
18. On the basis provision and authority above, this court finds that Mr. Schwarzman is required to attend court for cross examination on the basis that he is the only known director who acted in that capacity when the Plaintiff procured services of the Defendant.
19. I therefore direct that Mr. Joseph Schwartzman shall attend court for examination under Order 22 Rule 35 of the [Civil Procedure Rules](#). The Plaintiff shall have cost.



DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF JANUARY, 2025.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Plaintiff

..... Advocate for the Defendant

Court Assistant – Shitemi

