



**Family Bank Limited v Ceven Limited (Arbitration Cause E084 of 2023
& Commercial Miscellaneous Application E075 of 2023 (Consolidated))
[2024] KEHC 3059 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E084 OF 2023 & COMMERCIAL
MISCELLANEOUS APPLICATION E075 OF 2023 (CONSOLIDATED)**

**AA VISRAM, J
MARCH 18, 2024**

BETWEEN

FAMILY BANK LIMITED APPLICANT

AND

CEVEN LIMITED RESPONDENT

RULING

1. I have considered the Application dated 10th August, 2023, and the affidavit in support of the same sworn on even date, the Grounds of Opposition dated 8th and 15th September, 2023; the replying affidavit sworn on 25th September, 2023, in respect of Mr. Andrew Gitonga; the replying affidavit of Mr. Desmond Patrick, sworn on 12th September, 2023; the submissions of counsel and the applicable law.
2. The Applicant is praying for the cross-examination of the Directors of the Company as set out in prayers No. 2 and No. 3 in respect of an award arising out of an arbitration.
3. The Applicant stated that it obtained a decree from the court, in the sum of Kshs. 423,976,203/= and has been unable to satisfy the same. Accordingly, the Applicant seeks to summon and cross examine the Directors/ Shareholders in relation to satisfaction of the said debt.
4. As regards the Corporate Directors against whom the orders are sought, the Applicant submitted that there is no bar to examining a Corporate Director or corporation, and the same ought to be allowed.
5. In opposition to the Application, counsel for Eunivy Resources Limited stated that it is not the Judgment Debtor, and the Applicant is attempting to lift its corporate veil. It admitted, that while



the Respondent is a shareholder of the said company, it is not involved in the daily operations of the Judgment Debtor. Nor is it a custodian of any of the documents sought by the Applicant.

6. In further opposition to the Application, counsel for Mr. Andrew Gitonga stated that no fraud has been demonstrated by the said individual, and in any case, any allegations ought to have been raised during the arbitration proceedings. Counsel submitted that the decree also contains an amount of approximately Kshs. 200,000,000/= that is over and above the correct decretal sum and is erroneous.
7. In opposition to the Application, and on behalf of Mr. Desmond Patrick, counsel relied entirely on his replying affidavit sworn on 12th September, 2023.
8. Having considered the above, I note that a copy of the decree and relevant warrants issued by the court have been annexed at Exhibit EKM1 and EKM2 of the Applicant's affidavit sworn on 10th August, 2023, and at Exhibit marked E1 at pages 11 to 115 of the annexed list and bundle of documents.
9. The Applicant produced a CR12 for the Respondent showing the Directors and Shareholders of the Respondent at page 117 of the said list and bundle of documents. The persons in the said CR 12 are the same individuals that the Applicant seeks to summon, with the exception of Mr. Henry Waweru. Mr. Waweru had been included on the basis that he had sworn affidavits during the course of the arbitration stating that he was a director for the Judgment Debtor, and because he was involved in the day to day operations of the Respondent.
10. Order 22 Rule 35 of the [Civil Procedure Rules](#) provides that:-

“where a decree is for the payment of money, the decree-holder may apply to the court for an order that- the judgmentdebtor; in case of a corporation, any officer thereof; or 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. Moreover, the rule is wide enough to allow the court to summon any person so long as he or she has relevant information that may aid in discovery for the purpose of execution. See [Tropical Wood Limited v Samilis International Investments](#) [2017] eKLR.
12. The applicable principles upon which this court ought to exercise its jurisdiction in relation to Order 22 Rule 35 is found in [Masefield Trading \(K\) Ltd v Rushmore Company Limited & Another](#) Civil Suit No. 1794 of 2000; [2008] eKLR, where the court sated as follows:-

“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.”

13. Applying my mind to the law as stated above, and based on the reasons stated by counsel, I am satisfied that prayer 2 and 3 ought to be granted for the purpose of discovery in aid of execution in relation to the named individuals only, but not for the various corporate entities at this stage.
14. I say so, because summoning the various corporate entities (although listed in the CR 12 as shareholders) in the absence of an explanation as to which particular individuals in these entities may



have relevant information to aid discovery of execution, would at this stage, lead to a fishing expedition. To my mind, this is not the purpose of order 22 rule 35.

15. Further, I take note of the submission that the decree relates to an erroneous sum which is in excess of the arbitral award. I find that this is a separate issue and the Respondent ought to have moved the court formally if it wished to challenge the decree. At present no evidence has been placed before this court to the effect that the decree has either been set aside or is invalid.
16. Based on the reasons above and the reasons put forward by counsel, I find that the following individuals, namely, Michael Muhire; Desmond Maina; Andrew Gitonga; and Mr. Henry Waweru ought to be, and are hereby summoned to appear for a hearing in terms of prayer No. 2 and No. 3 on 9th July, 2024.
17. The upshot is that the Application is with merit and same is allowed with costs payable by the Respondent to the Applicant.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 18TH DAY OF MARCH 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....For the Applicant

.....For the Respondent

