



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

Civil Case 301 of 2002

MAKORI ZACHARIA PLAINTIFF

VERSUS

KISII BROADWAYS DEFENDANT

RULING

Nelson Yabesh Bichanga, Julius Resco Nyabuti and Rachel Monyangi Yabesh filed an application by way of a notice of motion brought under **Order XXI rules 22(1) and 23** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. They sought the setting aside of warrants of arrest issued against them on 22nd October, 2007. The aforesaid three applicants were directors of Kisii Broadways limited, the defendant herein. The defendant was the registered owner of a motor vehicle registration number KAH 891C, which was insured by M/S United Insurance Co. Ltd (under statutory management).

The plaintiff obtained judgment against the defendant sometimes in July 2005. The judgment sum was Kshs.2,663,830/=. The defendant's insurance company was said to have been put under statutory management before the decretal sum was settled.

On 17th October, 2005 the plaintiff's advocate filed an application pursuant to the provisions of **order XX1 rule 36** and **91** of the **Civil Procedure Rules** seeking four substantive orders as follows:

- (a) that the three aforesaid directors be ordered to attend and be orally examined on oath so as to disclose the assets and liabilities of the defendant.
- (b) Leave to attach and execute the decree herein against the said directors be granted,
- (c) the directors to furnish to court books of accounts, statements of annual returns and any other information relating to the present and past status of the said defendant company.
- (d) the corporate veil of the defendant directors be lifted and execution to proceed against them personally.

The said application was listed for hearing on 28th May, 2007. On that date, Mr. Otiso advocate held brief for Mr. Ongwenyi Advocate for the defendant and applied for adjournment as the defendant's advocate intended to withdraw from acting for the defendants. The plaintiff's advocate objected to the application for adjournment. The court (Gacheche J) realised that the plaintiff had not paid additional court filing fees and ordered that the same be paid within 14 days from 28th May, 2007.

The court stood over the application to 19th September, 2007 but without any prayer by the plaintiff, the court proceeded to order the issue of warrants of arrest against the three aforesaid directors.

The said orders caused the three directors to file the present application. In an affidavit sworn by Nelson Yabesh Bichanga, he deposed that the warrants of arrest were pre-mature since the plaintiff's application dated 12th October, 2005 and filed on 17th October, 2005 had not yet been heard. The deponent added that in **Misc. Civil Suit No.1345 of 2005 (O.S), KENSILVER EXPRESS LTD & OTHERS VS THE COMMISSIONER OF INSURANCE & OTHERS**, all judgments and execution proceedings in suits arising out of accidents involving motor vehicles that had been insured by M/s United Insurance Co. Ltd were stayed until the said Originating Summons was heard and determined. A copy of the order issued in the above matter was annexed to the said affidavit.

On 18th December, 2007 Gacheche J granted an order of a temporary stay or execution of the warrants of arrest earlier ordered against the three directors aforesaid.

Mr. James Okao, the plaintiff's advocate, filed a replying affidavit. He stated that the corporate veil of the defendant's directors was lifted and execution allowed to proceed against them pursuant to the application of 12th October, 2005. With regards to the orders issued in **HCCC Misc. Civil Suit No.1345 of 2005 (O.S)**, Mr. Okao contended that the orders could not stay execution in this matter as they had been appealed against and the plaintiff was not a party to the suit in which the orders were issued.

During the hearing of the applicant's application, the plaintiff's Counsel submitted, **inter alia**, that the application ought to have been brought by way of a Chamber Summons and not a notice of motion. He further submitted that the court ordered that the directors be examined. They were duly served but failed to attend court for examination. In his view, the warrants of arrest were rightfully issued.

I have considered the application and the submissions by both counsels. Determination of this application presents no difficulties at all. This is simply because the warrants of arrest could not issue before the plaintiff's application dated 12th October 2005 had been argued and disposed of. The court had on 6th March, 2006 directed that a date be set for oral examination of the directors but that was never to be. When the application dated 12th October, 2005 came up for hearing, the same was adjourned. The provisions of **Order XX1 rule 36** of the **Civil Procedure Rules** are clear regarding examination of a judgment-debtor or officers of a company that is a judgment debtor.

The record does not show that at any one time the corporate veil of the judgment debtor herein was ever lifted. I do not wish to say much regarding that issue because one of the prayers in the application that is yet to be determined seeks lifting of the corporate veil. Suffice to say that I do not think that there was any basis for issuing the warrants of arrest as aforesaid. The warrants of arrest are hereby vacated. The plaintiff's advocates should set down the application dated 12th October, 2005 for hearing and on that date the three directors should attend court for their examination as earlier directed. The costs of this application shall be in the cause.

DATED, SIGNED and DELIVERED at KISII this 30th day of July, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of

N/A for the Plaintiff.

Mr. Ogari H/B for Mr. Tiego for the Defendant.

D. MUSINGA.

JUDGE.