



REPUBLIC OF KENYA



**KENYA LAW**  
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**China Road and Bridge Corporation Kenya v Limited & 6 others; Gikera (Applicant)  
(Civil Case 117 of 2015) [2022] KEHC 17090 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 17090 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 117 OF 2015  
MN MWANGI, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**CHINA ROAD AND BRIDGE CORPORATION KENYA ..... PLAINTIFF**

**AND**

**LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MARY MANYIWA MERI ..... 2<sup>ND</sup> DEFENDANT**

**BERNARD SHUME CHAMUTU ..... 3<sup>RD</sup> DEFENDANT**

**MERI CHIGAMBA MERI ..... 4<sup>TH</sup> DEFENDANT**

**JUMA MKALA MWABEJA ..... 5<sup>TH</sup> DEFENDANT**

**MANYIWA SHUME MANYIWA ..... 6<sup>TH</sup> DEFENDANT**

**MERI CHAMUTU MERI ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**STEPHEN NJOROGE GIKERA ..... APPLICANT**

**RULING**

1. The application before this Court is a Notice of Motion dated 13<sup>th</sup> July, 2021 brought under the provisions of Sections 3A, 22 & 63(e) of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, and Article 159(d) (sic) of the *Constitution* of Kenya, 2010. The applicant seeks the following orders-
  - i. Spent;



- ii. That this Honourable Court be pleased to issue an order directing Kengo Menza Mwamenza and Shee Hamisi Mwamindi, the directors of the Judgment debtor to produce the original and/or certified copies of the following documents-
    - a. books of accounts of the 1<sup>st</sup> defendant/judgment debtor for the period 20<sup>th</sup> June, 2012 to 29<sup>th</sup> September, 2016; and
    - b. annual reports of the 1<sup>st</sup> defendant/judgment debtor for the period 20<sup>th</sup> June, 2012 to 29<sup>th</sup> September, 2016.
  - iii. That the applicant be allowed to inspect and take copies of all the documents listed in prayer 2(a) and (b) above all inclusive and related to the matter in question which are in the 1<sup>st</sup> defendant/judgment debtor's possession for purposes of preparing for the cross-examination;
  - iv. That this Honourable Court be pleased to order that the said documents to be delivered within fourteen (14) days from the date of the order;
  - v. That in default the applicant be excused from producing and/or being cross-examined on the said documents; and
  - vi. That the applicant be awarded costs of this application.
2. The application is anchored on a supporting affidavit sworn by Lilian Atuo Opondo, the applicant's Counsel, and a supplementary affidavit sworn by Stephen Njoroge Gikera a former director of the 1<sup>st</sup> defendant company and the applicant herein, on 13<sup>th</sup> July, 2021 and 14<sup>th</sup> February, 2022 respectively. In opposition to the application, the current director and the immediate former director of the 1<sup>st</sup> defendant/judgment debtor, Kengo Menza Mwamenza and Shee Hamisi Mwamindi, respectively, filed replying affidavits sworn on 4<sup>th</sup> February, 2020.
  3. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 5<sup>th</sup> May, 2022 by the law firm of Gikera & Vadgama Advocates, the 1<sup>st</sup> defendant/judgment debtor's current and immediate former directors' submissions were filed on 10<sup>th</sup> March, 2022 by the law firm of A.O Aminga & Company Advocates, whereas the plaintiff/decree holder's submissions were filed by the law firm of Hamilton Harrison & Mathews Advocates on 9<sup>th</sup> May, 2022.
  4. Ms. Opondo, learned Counsel for the applicant submitted that sometime on 5<sup>th</sup> June, 2012, the applicant was approached by Mr. Kengo Menza Mwamenza who requested him to be his proxy and incorporate a company since he could not do so due to his political ambitions at the time. That vide a letter of engagement dated 5<sup>th</sup> June, 2012, Mr. Kengo Menza Mwamenza appointed the applicant as a nominee director of Econite Mining Company Limited which was incorporated on 20<sup>th</sup> June, 2012. It was stated that the applicant was allocated 60% shares in the said company to hold on behalf of the said Kengo Menza Mwamenza while the remaining 40% shares were allocated to Shee Hamisi Mwamindi.
  5. Ms Opondo stated that on 29<sup>th</sup> September, 2016, the applicant resigned as a nominee director and handed over all the documents pertaining the 1<sup>st</sup> director to Mr. Kengo Menza Mwamenza. She further submitted that on 22<sup>nd</sup> January, 2021, this Court ordered the applicant to produce the 1<sup>st</sup> defendant's books of accounts and documentary evidence which came into his possession when he was a director of the 1<sup>st</sup> defendant. She contended that the applicant does not have the books of accounts and annual reports of the company as they were prepared and kept by Kengo Menza Mwamenza pursuant to Clause 2(iv) of the letter of engagement dated 5<sup>th</sup> June, 2012. She stated that the said information is in the hands of the 1<sup>st</sup> defendant's current directors.



6. She also stated that pursuant to Clause 6 of the said letter of engagement, the applicant requested for financial documents, management accounts and updated list of directors and shareholders of the company through letters dated 26<sup>th</sup> January, 2021 and 26<sup>th</sup> February, 2021 but the said letters had elicited no response from the 1<sup>st</sup> defendant and the appointer. Ms Opondo relied on the provisions of Sections 628 and 478 of the *Companies Act* No. 17 of 2015 and submitted that inasmuch as the said Act does not confer a right of inspection of the books of accounts to a former director, the Court has the discretion to order for production and inspection of the 1<sup>st</sup> defendant's records.
7. The applicant's Counsel urged this Court to excuse the applicant from producing the books of accounts and annual reports which are in the possession of Kengo Menza Mwamenza and Shee Hamisi Mwamindi who are the 1<sup>st</sup> defendant/judgment debtor's current directors.
8. Mr. Otieno, learned Counsel for the current and immediate former directors of the 1<sup>st</sup> defendant relied on the provisions of Order 22 Rule 35 of the *Civil Procedure Rules* and the case of *Ultimate Laboratories v Tasha Bioservice Limited NBI HCCC No. 1287 of 2000* and submitted that owing to the judgment debtor's indebtedness to the plaintiff/decreed holder, the plaintiff was well within its rights to seek orders of this Court to summon the judgment debtor's director(s) and/or former director(s) to be cross-examined on oath over the state of affairs of the company. In submitting that the purpose of Order 22 Rule 35 of the *Civil Procedure Rules* is to enable the Court to establish the company's true financial position and not to penalize any party. He relied on the case of *Postbank Credit Limited (in Liquidation) v Nyamangu Holdings Limited [2015]* eKLR and submitted that Mr. Stephen N. Gikera is the appropriate person to produce the documents sought herein and thereafter be cross-examined for the following reasons-
  - i. He was a majority shareholder with 60% shareholding at the time the plaintiff's cause of action arose;
  - ii. He signed the lease agreement dated 24<sup>th</sup> August, 2014 between the plaintiff/decreed holder and the judgment debtor;
  - iii. The plaintiff/decreed holder addressed all cheques for rent due to the judgment debtor through Gikera & Vadgama Advocates where Stephen Gikera is a partner;
  - iv. The judgment debtor shared the same office postal address with that of Gikera Vadgama Advocate; and
  - v. That throughout the proceedings and his engagements with the decreed holder, he never asserted that he was a proxy director.
9. Mr. Otieno cited the English Court of Appeal decision in *Société Générale v J.M. Farin & Co. (1904) IKB 794*, where the Court in interpreting the provisions of their *Civil Procedure Rules* at that time, which are in pari materia with Order 22 Rule 35 of the Kenyan *Civil Procedure Rules*, interpreted. "any other officer thereof" to include former directors. He submitted that as at 11<sup>th</sup> May, 2017, Stephen Njoroge Gikera was a shareholder of the 1<sup>st</sup> defendant and was the majority shareholder with 60% shareholding. Mr. Otieno stated that the applicant's contention that he was a proxy for a shareholder by the name Kengo Menza Mwamenza is an issue that is subject to being proved through cross-examination.
10. In addition, Mr. Otieno stated that it is Mr. Kengo Menza's position that he had no dealings whatsoever with the judgment debtor until 30<sup>th</sup> November, 2018 when he was appointed by the applicant as a director for the 1<sup>st</sup> defendant/judgment debtor. He submitted that this Court had already pronounced



itself in its ruling dated 22<sup>nd</sup> January, 2021, by directing that the applicant herein be examined, which ruling had not been appealed from.

11. Mr. Mugambi, learned Counsel for the plaintiff/decreed holder submitted that the orders sought are superfluous since on 22<sup>nd</sup> January, 2021 this Court ordered Mr. Mwamenza and Mr. Mwamindi to avail the judgment debtor's books of accounts, notices, minutes and resolutions from the date of the lease agreement being 24<sup>th</sup> August, 2014 between the decreed holder and the judgment debtor to the date of the Court's ruling. He stated that in addition, this Court ordered Mr. Mwamenza, the judgment debtor's current director to supply the aforementioned documents as per its ruling within fourteen days. Mr. Mugambi pointed out that there are two Court orders directing Messrs Mwamenza and Mwamindi to produce the documents sought herein, which orders have not been complied with.
12. He also submitted that the applicant's contention that he was just a nominee director acting on the instructions of Mr. Mwamenza was made when the Court was considering the decreed holder's application for production of the judgment debtor's books of accounts, documentary evidence and examination of its directors and the Court held that was an issue subject to being proved through cross-examination. Mr. Mugambi was of the view that the application herein is the applicant's attempt to review and/or appeal against the Court's ruling.
13. He referred to the case of *Stephen N. Gikera & another v Econite Mining Company Limited & 7 others [2018]* eKLR, where the applicant's Counsel argued before the Court of Appeal that the applicant herein was the judgment debtor's majority shareholder and director, and the said Court held that the applicant herein represented the directing mind, soul and hands of the 1<sup>st</sup> defendant/judgment debtor thus the Court upheld this Court's decision to lift the judgment debtor's corporate veil.

#### **ANALYSIS AND DETERMINATION**

14. This Court has considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof and the replying affidavit. It has also considered the written submissions filed by Counsel for the parties. The issue that arises for determination is whether the application herein is merited.
15. In the applicant's supporting affidavit, he deposed that he urgently needs the documents sought herein so as to prepare for his cross-examination which is scheduled for 14<sup>th</sup> July, 2021.
16. In his replying affidavit, Mr. Kengo Menza Mwamenza, the current director of the 1<sup>st</sup> defendant/judgment debtor deposed that he was appointed as the director of the 1<sup>st</sup> defendant/judgment debtor on 30<sup>th</sup> November, 2018 and was handed documents for safe keeping by one Stephen Njoroge Gikera who was the 1<sup>st</sup> defendant/judgment debtor's former director. He averred that the documents now sought by the applicant herein were never submitted nor handed over to him during his appointment hence the application herein is the applicant's attempt to deflect blame on him without any justifiable cause.
17. On the other hand, Mr. Shee Hamisi Mwamindi, the immediate former director of the 1<sup>st</sup> defendant/judgment debtor in his replying affidavit deposed that he resigned as the 1<sup>st</sup> defendant/judgment debtor's director on 27<sup>th</sup> February, 2019 pursuant to the resolution of 15<sup>th</sup> February, 2019 and transferred his shares to the current director, Mr. Kengo Menza Mwamenza. He averred that the applicant herein was the sole custodian of the documents sought hence the proper person to produce the documents sought is the applicant. Mr. Shee Hamisi Mwamindi stated that upon appointment of one Kengo Menza Mwamenza, the company's documents were handed over to him for safe keeping by the applicant herein, the 1<sup>st</sup> defendant/judgment debtor's former director.



18. The applicant in his supplementary affidavit deposed that while acting as a nominee director, he received instructions from his appointee Kengo Menza Mwamenza with respect to the duties he would undertake on his behalf in the 1<sup>st</sup> defendant/judgment debtor. He averred that during the period he was a proxy director and upon his resignation on 29<sup>th</sup> September, 2016, he handed over all the documents pertaining the 1<sup>st</sup> defendant to Kengo Menza Mwamenza. The applicant stated that he received no further instructions from Mr. Kengo Menza Mwamenza after resigning from the directorship of the 1<sup>st</sup> defendant and handing over the documents.
19. It is noteworthy that the application herein is based on the allegation that the applicant was a nominee/proxy director of Mr. Kengo Menza Mwamenza in the 1<sup>st</sup> defendant/judgment debtor company and that he resigned as a director on 29<sup>th</sup> September, 2016. It is the applicant's contention that during his time as a proxy director, the books of accounts and annual reports were prepared and kept by Kengo Menza Mwamenza. In addition, he stated that upon his resignation, he handed over all the documents pertaining to the 1<sup>st</sup> defendant/judgment debtor to the said Kengo Menza Mwamenza therefore, in the event Kengo Menza Mwamenza and Shee Hamisi Mwamindi fail to produce the 1<sup>st</sup> defendant's/judgment debtor's books of accounts and annual reports for the period 20<sup>th</sup> June, 2012 to 29<sup>th</sup> September, 2016, the applicant should be excused from producing and/or being cross-examined on the said documents.
20. This Court has gone through the proceedings in relation to the plaintiff/decreed holder's application dated 21<sup>st</sup> November, 2019 and found that the submissions made therein in opposition to the said application are similar to the ones made by the applicant herein. This Court thoroughly considered the decreed holder's application therein, the submissions by the Counsel for the parties and delivered a ruling on 22<sup>nd</sup> January, 2021. In the said ruling, the Court held that there was no doubt that the applicant herein was at one time a director of the judgment debtor and that he had a role to play in the operations of the judgment debtor thus his contention that he was a proxy for a shareholder by the name Kengo Menza Mwamenza is an issue that is subject to being proved through cross-examination.
21. In addition, this Court directed that by virtue of the applicant being a former director of the judgment debtor, he shall be examined on oath as to the judgment debtor's means and assets and produce the judgment debtor's books of accounts and other documentary evidence which came into his possession when he was a director of the judgment debtor, from the date of the lease agreement between it and the decreed holder, up to the time when he resigned from the judgment debtor. This Court also made orders affecting the current and immediate former directors of the 1<sup>st</sup> defendant/judgment debtor to the effect that they avail all the books of accounts of the judgment debtor. It is also noteworthy that on 25<sup>th</sup> January, 2022, this Court directed the current director of the 1<sup>st</sup> defendant/judgment debtor to produce the books of accounts and comply with this Court's ruling delivered on 22<sup>nd</sup> January, 2021 within fourteen days from 25<sup>th</sup> January, 2022 when the matter was listed for cross-examination of the current director(s) and former director(s).
22. In light of the above, it is evident that the orders sought by the applicant in prayers No. 2, 3 and 4 of the application herein have already been granted on two separate occasions by this Court. As such, all pertinent issues of fact and points of law having been fully canvassed and considered, it is my finding that this Court is *functus officio* and lacks jurisdiction to grant the orders sought. See Election Petitions Nos. 3, 4 & 5 [Raila Odinga & others vs IEBC & others \[2013\]](#) eKLR.
23. This Court notes with great concern that the application herein is an attempt by the applicant to review this Court's ruling delivered on 22<sup>nd</sup> January, 2021 without filing a proper application for review. The applicant is in other words inviting this Court to sit as an appellate Court in its own decision. The



applicant seems to be keen in taking this Court around in circles, a practice which he should stop, more so as he is an officer of the Court by virtue of being an Advocate.

24. This Court finds that the application herein is bereft of merit and is an abuse of the Court process. Consequently, the application dated 13<sup>th</sup> July, 2021 is dismissed with costs to Messrs Shee Hamisi Mwamindi, Kengo Menza Mwamenza and the decree holder, China Road and Bridge Corporation Kenya.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Ms Opondo for the 1<sup>st</sup> defendant and the applicant

Mr. D. Otieno Odundo for Messrs Shee Mwamindi, Kengo Menza Mwamenza

Mr. Mugambi for the decree holder

Mr. Oliver Musundi – Court Assistant.

