



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 117 OF 2015

CHINA ROAD AND BRIDGE CORPORATION KENYA.....PLAINTIFF/DECREE HOLDER

VERSUS`

ECONITE MINING COMPANY LIMITED.....1ST DEFENDANT/JUDGMENT DEBTOR

MARY MANYIWA MERI2ND DEFENDANT

BERNARD SHUME CHAMUTU.....3RD DEFENDANT

MERI CHIGAMBA MERI4TH DEFENDANT

JUMA MKALA MWABEJA5TH DEFENDANT

MANYIWA SHUME MANYIWA6TH DEFENDANT

MERI CHAMUTU MERI..... 7TH DEFENDANT

RULING

1. There are 2 applications before me. The 1st one is by way of Notice of Motion dated 21st November, 2019. It is premised on the provisions of Order 22 rule 35(b) of the Civil Procedure Rules, 2010. It was filed by the plaintiff/decree holder. It seeks the following orders-

i. That Stephen Njoroge Gikera, a former director of the 1st defendant, Kengo Menza Mwamenza and Shee Hamisi Mwamindi, the current directors of the 1st defendant, be examined on oath, on a date to be fixed by the court, as to the Judgment debtor's means and assets and produce the Judgment debtor's books of accounts including all its other documentary evidence showing the same before the court (sic);

ii. In default of the directors complying with the above order such further order be made against them personally as this Honourable Court may deem fit; and

iii. Costs of this application be provide for.

2. The application is supported by the affidavit of Winifred Gitao, the Advocate for the plaintiff/decree holder, sworn on 21st November, 2019. On 28th January, 2020, Stephen Gikera Advocate, practising in the firm of Messrs Gikera & Vadgama Advocates, filed a replying affidavit sworn on the same date. Winifred Gitao filed a further affidavit on 12th June, 2020 sworn on 2nd June, 2020.

3. The 2nd application is by way of a Chamber Summons dated 5th August, 2020. It was filed by the law firm of Gikera & Vadgama Advocates for the intended interested party/applicant. The said application is anchored on the provisions of Order 19 rules 2, 3(1), 6 of the Civil Procedure Rules, 2010, Article 159(2) (d) of the Constitution of Kenya and all enabling provisions of the law. It seeks the following orders-

i. Spent;

ii. That this Honourable court be pleased to enjoin the applicant herein as an interested party for the limited purposes of defending

the Notice of Motion dated 21st November, 2019 as well as cross-examination of the deponent of the affidavit and further affidavit in support of the application;

iii. That this Honourable Court be pleased to strike out paragraphs 10, 14 and 16 of the supporting affidavit sworn by Winifred Gitao on 21st November, 2019 as well as paragraphs 3, 4 and 5 of the further affidavit sworn by Winifred Gitao on 2nd June, 2020 for being scandalous;

iv. That the Honourable Court be pleased to order the attendance of Winifred Gitao before this court for cross-examination of her depositions made in paragraphs 5, 6, 7, 8, 9, 10 and 14 of the supporting affidavit sworn on 21st November, 2019 as well as paragraphs 3, 4 and 5 of the further affidavit sworn on 2nd June, 2020; and

v. That the costs of this application be provided for.

4. The said application is supported by the affidavit of Stephen N. Gikera, the intended interested party, sworn on 5th August, 2020. On 24th September, 2020 the plaintiff's Advocate filed grounds of opposition and a replying affidavit sworn by Winifred Gitao on 23rd September, 2020 to oppose the application filed on 5th August, 2020.

5. In submissions filed on 13th November, 2020 the law firm of Hamilton Harrison & Mathews for the plaintiff/decreed holder submitted that the plaintiff's application dated 21st November, 2019 is aimed at discovery in aid of execution. It was pointed out that only Stephen N. Gikera had filed a response to the said application but Kengo Menza Mwamenza and Shee Hamisi Mwamindi had not.

6. It was stated that the said application was necessitated by the fact that there is a pending decree of this court and a certificate of costs against the Judgment debtor, which is yet to be settled. The plaintiff's Counsel was of the view that examination of the said Judgment debtor's former and current directors is meant to ascertain whether the company has any and what property and means for satisfying the decree. The provisions of Order 22 rule 35(b) of the Civil Procedure Rules, 2010 were relied on to support the application.

7. It was submitted that the directors of the company are the appropriate officers to be cross-examined since it is their duty to keep proper books of accounts in respect to the assets and liabilities of the Judgment debtor, up to and until the dissolution of the company.

8. It was indicated that a search dated 30th September, 2019 from the Registrar of Companies showed that Kengo Menza Mwamenza and Shee Hamisi Mwamindi are the current directors of the Judgment debtor. It was asserted that it is incumbent upon them to demonstrate to the court whether the company has any property or means to satisfy the decree, and what the said property is.

9. As to whether Stephen N. Gikera, who stated that he was a former proxy director of the Judgment debtor should be cross-examined, the Counsel for the plaintiff/decreed holder relied on the English Court of Appeal decision in **Société Générale v J.M. Farin & Co.** (1904) IKB 794, in interpreting the provisions of their Civil Procedure Rules at that time, which is in *pari materia* with Order 22 rule 35 of the Kenyan Civil Procedure Rules, interpreted. "*any other officer thereof*" to include former directors. The decision of the Court of Appeal in Hong Kong in **Sano Screen Manufacturers Ltd v J & R Bossini Trading Ltd.** [2001] HKCA 407 was also relied on, which held that former officers of a Judgment debtor can be examined. The case of **Post Bank Credit Limited (In liquidation) v Nyamangu Holdings Limited** [2015] eKLR, was cited to demonstrate that former directors could be examined under the provisions of Order 22 rule 35 of the Civil Procedure Rules.

10. The Counsel for the decreed holder submitted that Mr. Stephen N. Gikera was an appropriate person to be cross-examined because –

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 24th 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.

11. It was pointed out that cross-examination will be for the period he served as a director of the Judgment debtor.

12. With regard to the chamber summons dated 5th August, 2020, the decreed holder's Counsel submitted that this court has no jurisdiction to join a person once Judgment has been entered as the cause of action has merged in the Judgment. It was argued that there is no such thing as "*interested party*", in civil proceedings governed by the Civil Procedure Rules except for Judicial Review proceedings. It was contended that there was no need to join any person to these proceedings having regard to the provisions of Order 22 rule 35(b) of the Civil Procedure Rules.

13. On the issue of cross-examination of a deponent, the authorities in **GGR v HPS** [2012] eKLR, **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited** [2006] eKLR, and **Nancy Wanja Gatabaki v Ashford Muriuki Mugwaku T/A Ashford & Co. Advocates** [2013] eKLR, were relied on to support the submission that the order for cross-examination of a deponent lies in the discretionary power of the court.

14. It was submitted that the Judgment debtor had not shown that the affidavits of Winifred Gitao offended the provisions of Order 19 Rules 3(1) and Rule 6 of the Civil Procedure Rules, or that they contained any false depositions and innuendos. The Counsel for the plaintiff/decreed holder justified the reason why several paragraphs in the 2 affidavits of Winifred Gitao should not be struck out.
15. In concluding the said submissions, it was stated that Stephen N. Gikera had failed to lay a proper basis on why it was necessary to cross-examine Winifred Gitao on her affidavits or to demonstrate that special circumstances exist which call for the cross-examination of the said deponent, thus the prayer for striking out some paragraphs of her affidavit had not been proved. This court was urged to allow the application dated 21st November, 2019 and dismiss the one dated 5th August, 2020.
16. In written submissions filed on 29th October, 2020 the law firm of Gikera & Vadgama Advocates on behalf of Stephen N. Gikera stated that the latter swore a replying affidavit stating that in the directorship of the Judgment debtor, he was a proxy of Kengo Menza. It was further stated that Stephen N. Gikera resigned from directorship and had no knowledge of the facts and access to the documents of the Judgment debtor and that it would be a waste of judicial time to call him to testify.
17. It was contended that the decreed holder had not attempted to locate any of the directors of the company, namely, Kengo Menza Mwamenza or Shee Hamisi Mwamindi. As such, no basis had been laid to show why Stephen N. Gikera should be examined on the affairs of a company that he no longer held a directorship.
18. On the issue of whether Stephen N. Gikera should be enjoined in this suit as an interested party, his Counsel relied on Black's Law Dictionary which defines an "*interested party*" as a party who has a recognizable stake in a matter and a "*necessary party*" as a party who being closely connected to a lawsuit should be included in the case if feasible, but whose absence will not require dismissal of proceedings.
19. Counsel for Stephen N. Gikera also relied on Rule 2 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 (Legal Notice No. 117), which defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.
20. It was thus submitted that the court can either enjoin a party on an application made by an interested party or on its own motion. The Counsel for Stephen N. Gikera relied on the decisions in **Marigat Group Ranch & 3 Others v Wesley Chepkoiyet & 19 Others** [2014] eKLR and **AMM and JMN** [2019] eKLR, on who an interested party and necessary party are, respectively.
21. It was stated that orders should not be made against Stephen N. Gikera without him being given a chance to be heard. His Counsel relied on the case of **Kiai Mbaki and 2 others v Gichuhi Macharia & another** [2005] eKLR, on the rights of a party to be heard.
22. On the request for some paragraphs on the decreed holder's deponent's affidavit being struck out, it was submitted that several paragraphs were scandalous and irrelevant statements whose basis had not been disclosed. It was contended that the depositions were not within the personal knowledge of the said deponent. It was also stated that she had not adduced documentation or sources on which they are premised thus contravening the provisions of Order 19 rule 3 of the Civil Procedure Rules, 2010.
23. Stephen N. Gikera prayed for paragraphs 5, 6, 8, 9, 10 and 14 of the decreed holder's supporting affidavit and paragraphs 3, 4 and 5 of her further affidavit to be struck out for being scandalous, irrelevant and oppressive. His Counsel cited the case of **Kiplagat Kotut v Rose Jebor Kipngok** [2020] eKLR, where the court struck out paragraphs of an affidavit as the deponent was not a party to the suit and he failed to disclose the source of his information.
24. The decision in **Kenya Electricity Generation Limited T/A Kengen & Another v Kingsway Motors (K) Ltd & Another** [2005] eKLR, were cited where different courts struck out some paragraphs from affidavits which had been sworn by Advocates representing litigants.
25. With regard to the application made for Stephen N. Gikera to be cross-examined as per the prayer sought in the application dated 21st November, 2019, it was submitted that before his resignation, he was a proxy director of the 1st defendant and had no knowledge of the affairs or the property of the 1st defendant. It was stated that Winifred Gitao in her further affidavit however deposed that Stephen N. Gikera had an active and critical role in the management and affairs of the 1st defendant. It was contended that the inconsistent statements by the decreed holder's deponent required interrogation.
26. The case of **Hiten Kumar A. Raja v Green Span Limited & 4 Others** [2013] eKLR, was cited to illustrate that the right to cross-examine a deponent on an affidavit is discretionary, and that discretion should be exercised judicially (sic).

ANALYSIS AND DETERMINATION

27. The issues of determination are-

- i. If Stephen Njoroge Gikera (Stephen N. Gikera) should be enjoined as an interested party to this suit;**
- ii. If Stephen N. Gikera, a former director of the Judgment debtor together with Kengo Menza Mwamenza and Shee Hamsi Mwamindi, the current directors of the Judgment debtor, should be examined on oath, on a date to be fixed by the court, as to the Judgment debtor's means and assets and produce the Judgment – debtor's books of account including all its other documentary evidence;**
- iii. If Winifred Gitao should be cross-examined on the depositions on her affidavits; and**

iv. Whether some paragraphs of her affidavits should be struck out.

If Stephen N. Gikera should be enjoined as an interested party to this suit.

28. On 29th January, 2018, Judge P.J. Otieno entered Judgment in favour of the plaintiff/decree holder as against the 1st defendant/Judgment debtor in the sum of Kshs. 6,300,000/= plus interest thereon at 14% from 1st March, 2016 until payment in full. He also awarded costs and interest on costs at 14% from the date the costs shall have been agreed or taxed, until payment in full. A decree was issued on 29th January, 2018. A certificate of costs was issued on 15th August, 2019 where an award of Kshs. 301,588.00 was made in favour of decree holder as against the Judgment debtor.

29. Although Counsel for the decree holder submitted that the Civil Procedure Rules do not provide for joinder of interested parties, Order 1 rule 10(2) provides for joinder of the plaintiff, the defendant as well as any person whose presence in court may be necessary. This court's understanding of the said provisions is that they extend to even persons who may wish to be enjoined in suits as interested parties. Order 1 rule 10(2) of the Civil Procedure Rules provides as follows-

“(2)The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions in the suit, be added.” (emphasis added).

30. The above provisions are therefore applicable to the present proceedings as Stephen N. Gikera is seeking to be enjoined in the suit herein as an interested party. The odds are however against him as he has applied to be enjoined in the suit herein too late in the day after delivery of the Judgment.

31. In the case of **Lilian Wairimu Ngatho & Another v Moki Savings Cooperative Society Limited & Another** [2014] eKLR, the court stated as follows about joinder of parties after Judgment-

“The provisions of order 1 rule 10 (2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as the regular and orderly progression of a law suit, including all acts and events between the time of commencement and entry of the Judgment.” A party can therefore only be enjoined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.” (emphasis added).

32. The real issue in controversy in this case was whether the 1st defendant was indebted to the plaintiff in the sum claimed in the plaint. Judgment was delivered on 29th January, 2018. The applications which are before this court are residual and/or incidental/supplemental proceedings as the decree holder attempts to enforce the Judgment of the court and recover the costs attendant thereto.

33. When considering an application of joinder of a party after Judgment had been delivered, the court in the case of **Rubina Ahmed & 3 Others v Guardian Bank Ltd. (sued in its capacity as a Successor in Title to First National Finance Bank Ltd)** [2019] eKLR, the Court of Appeal cited its decision in **JMK v MWM & Another** [2015] eKLR, where it stated as follows on the application of the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules –

“Commenting on this provision, the learned authors of Sarkar’s Code for Civil Procedure (11th Edition, Reprint, 2011, Vol. 1 p. 887) stated that:

“The Section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar’s Code, (supra) quoting as authority, decision of Indian Courts on the provisions, express the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal in Tanzania, while considering the equivalent of Order 1 Rule 10(2) of the Civil Procedure Rules, in Tang Gas Distributors Ltd. v Said & Others [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.” (emphasis added).

34. Having considered decided cases cited in this ruling, I am not persuaded that Stephen N. Gikera should be joined as an interested party to this case during supplemental proceedings, after the Judgment was pronounced in the year 2018. This court is bound by the holding of the Court of Appeal in the decision of **JMK V MWM & Another** (supra). I therefore decline to enjoin Stephen N. Gikera as an interested party to this suit.

If Stephen N. Gikera, a former director of the 1st defendant, Kengo Mwenza Mwamenza and Shee Hamisi Mwamindi, the current

directors of the 1st defendant, should be examined on oath.

35. From the depositions contained in the affidavits of Winifred Gitao and Stephen N. Gikera, there is no doubt that the latter was at one time a director of the Judgment debtor. The decree holder's deponent attached to her affidavit a CR 12 for the Judgment debtor which indicated that as at 11th May, 2017 Stephen Njoroge Gikera was a shareholder of the 1st defendant and was the majority shareholder with 60% shareholding. Shee Hamisi Mwamwindi held 40% of the shareholding.

36. In addition to the above, a lease entered into on 24th August, 2014 between the Judgment debtor and the decree holder, one Steve Gikera signed the lease agreement as a director of the 1st defendant. The said documents establish that Stephen N. Gikera had a role to play in the operations of the Judgment debtor. 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

37. Order 22 rule 35(b) of the Civil Procedure Rules provides for examination of Judgment debtors, officers or any other persons. It provides as follows-

“ Where a decree is for the payment of money, the decree-holder may apply to the court for an order that in the case of a corporation, any officer thereof 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.”

38. The decision cited by Counsel of the decree holder in **Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings' Limited** (supra) aptly fits in the circumstances of this case.

39. This court is of the finding that under the provisions of Order 22 rule 35(b) of the Civil Procedure Rules, Stephen N. Gikera fits in the description of **“other person”** by virtue of him being a former director of the Judgment debtor. This court holds that he shall be examined on oath as to the Judgment debtor's means and assets and produce the Judgment debtor's books of account 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 decree holder, up to the time when he resigned from the Judgment debtor.

40. Kengo Menza Mwamenza and Shee Hamisi Mwamwindi, who are the current directors of the 1st defendant did not oppose the application dated 21st November, 2019. The said current directors shall also avail the books of accounts of the Judgment debtor.

41. In addition to the above, Stephen N. Gikera, Kengo Menza Mwamenza and Shee Hamisi Mwamwindi shall produce all the notices, minutes and resolutions of the Judgment debtor from the date of the lease agreement to the date of this ruling. The above order is in furtherance to the prayer made by the decree holder for production of other documentary evidence.

If Winifred Gitao should be cross-examined on her affidavits.

42. Order 19 rule 3(1) of the Civil Procedure Rules provides as follows-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

43. I do agree with the Counsel for Stephen N. Gikera that there are instances where Advocates cannot swear affidavits on behalf of their clients. The circumstances in this case are however different. The documentary evidence attached and facts deposed to, in the affidavit of Winifred Gitao came into her knowledge in her capacity as the Counsel for the decree holder in her attempt to trace the assets of the Judgment debtor but she hit a brick wall, necessitating the filing of the application dated 21st November, 2019. It is clear to this court that by seeking the prayer to cross-examine Winifred Gitao, Stephen N. Gikera is trying to circumvent the glaring facts which have been brought out by the exhibits attached to the affidavit of Winifred Gitao.

44. Having gone through the supporting affidavit and further affidavit of the decree holder's deponent, I am satisfied that she supported her depositions with exhibits where applicable. In other instances, she disclosed the sources of her information.

45. The authorities cited by the law firm of Gikera & Vadgama Advocates that an Advocate should not swear an affidavit on behalf of his/her clients do not apply in this case. For the reasons stated herebefore, I decline to grant an order for the cross-examination of Winifred Gitao by Stephen N. Gikera.

Whether some paragraphs of Winifred Gitao's affidavit should be struck out.

46. I have gone through paragraphs 5, 6, 7, 8, 9, 10 and 14 of the affidavit sworn on 21st November, 2019 and the paragraphs 3, 4 and 5 of the further affidavit sworn on 2nd June, 2020 by Winifred Gitao. I have considered the said depositions against those contained in the replying affidavit of Stephen N. Gikera sworn on 28th January, 2020. I have also considered the annexures attached to the affidavits of Winifred Gitao and the ones attached to the affidavit of Stephen N. Gikera, I find nothing scandalous, oppressive or irrelevant which would warrant this court to invoke the provisions of Order 19 rule 6 of the Civil Procedure Rules to strike out the paragraphs aforementioned in the

supporting and further affidavits sworn by Winifred Gitao.

47. The Counsel for Stephen N. Gikera delved into the issue of its client being held personally liable for the debts of the Judgment debtor. I see no such prayer before me. The said Counsel seems to have misapprehended the purport of prayer 2 of the application dated 21st November, 2019.

48. In conclusion, I find that the application dated 21st November, 2019 is well merited. The application dated 5th August, 2020 is dismissed in its entirety for being unmeritorious. Costs of the 2 applications are awarded to the plaintiff/decree holder. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF JANUARY, 2021. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Mugambi for the plaintiff/decree holder

Ms Opondo for Mr. Stephen Gikera (Intended Interested Party)

N/A for the defendant/Judgment debtor

Mr. Oliver Musundi - Court Assistant.