



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2014 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 17th December, 2018)

ELVICX BERNARD OKUMU SIBI

AND 101 OTHERS.....CLAIMANTS

-VERSUS-

BIRKING INDUSTRIES SERVICES

(BIS) LIMITED.....1ST RESPONDENT/APPLICANT

LT. COL.(RTD) GEORGE

MUTHAMA GITIA.....2ND RESPONDENT/APPLICANT

RULING

1. The Application before Court is dated 17th January, 2018, brought under Section 3A of The Civil Procedure Act and all other enabling provisions seeks for Orders:-

1. THAT this Honourable Court be pleased to set aside the ex parte Orders of 30th November 2017 and all consequential Orders including the ex parte breaking Orders issued in December 2017 against L.T. Col. (RTD) George Muthama Gitia.

2. THAT this Honourable Court be pleased to order the refund/release of the cash bail of Kshs. 500,000/= to L.T. Col. (RTD) George Muthama Gitia deposited by him in court on the 12th January 2018.

3. THAT this Honourable Court be pleased to set aside the Notice to Show Cause dated 8th November 2017 issued against L.T.Col. (RTD) George Muthama Gitia as it erroneously indicates that he is the judgement-debtor herein and does not conform to this Honourable Court's Order dated 15th October 2015.

4. THAT the costs of this application be provided for.

2. The Application is premised on the grounds that:

a) That Claimants herein obtained the Orders of 30th November 2017 for the arrest of L.T. Col. George Muthama Gitia by deceit and perjury contained in the affidavit dated 27th November 2017 of one Justus Kilima who falsely claimed that he served the Notice to Show Cause to the son of L.T. Col. (RTD) George Muthama Gitia called Gitia on the 22nd November 2017 at Thome Estate.

b) That the said Justus Kilima who claims to be a process server repeats further lies by claiming that he went back to the house at Thome Estate on 23rd November 2017 and pressed a bell and a middle aged black man whose name is not given allegedly told him that L.T. Col. (RTD) George Muthama Gitia had been given the Notice to Show Cause.

c) That in fact contrary to the averment contained in the affidavit of service of Justus Kilima it is not true that the son of L.T.

Col. (RTD) George Muthama Gitia called Gitia was served with the Notice to Show Cause on the 22nd November 2017 as alleged the said son resides and works in Dubai and was in Dubai on the 22nd November 2017 making it impossible for the process server to have served him at Thome Estate.

d) That the affidavit of service is also fatally defective for failing to adhere to the law and in particular the process server did not indicate the name of the person that identified the son called Gitia to him when he allegedly served him.

e) That it was on the basis of this false and defective affidavit of service that the Learned Judge was on the 30th November 2017 duped into erroneously granting orders for warrant of arrest against L.T. Col. (RTD) George Muthama Gitia on the false allegation that he had been served with the Notice to Show Cause and failed to attend court.

f) That again contrary to the affidavit of service of Hellen Motari dated 15th December 2017 she has falsely claimed that L.T. Col. (RTD) George Muthama Gitia is stubborn and hostile on the basis of hearsay whereas she had never been in contact with L.T. Col.(RTD) George Muthama Gitia before and it appears she was already prejudiced against him even before she had met him.

g) That the affidavit of Hellen Motari is sketchy and leaves out very crucial information and lies that L.T. Col. (RTD) George Muthama Gitia was hostile and refused to open the gates to his home but she fails to disclose that she never identified herself nor purpose of her visit at the gate and only spoke to the gardener by the name Josephat Waitthaka and not to L.T. Col.(RTD) George Muthama Gitia.

h) That L.T. Col. (RTD) George Muthama Gitia was only informed by the gardener that there were police officers who wanted to speak to him and assumed that they were from the local police post who had been pestering him to give them "Christmas", since they had not stated who they were and purpose of visit and he had informed the gardener to request them to come back at 1pm when he would attend to them.

i) That when L.T. Col. (RTD) George Muthama Gitia came out at 1pm he enquired from the gardener on the whereabouts of the policemen and he was informed that they had left saying that they were too busy but had not communicated why they had gone to his home.

j) That it is therefore on the basis of concealment of the true facts by Hellen Motari the Court Bailiff of what transpired on the 13th December 2017 by Hellen Motari and her initial prejudice against L.T. Col. (RTD) George Muthama Gitia as she admits in her affidavit of service that a breaking order was obtained and all this was because of the initial perjury contained in the affidavit of Justus Kilima.

k) Further the Notice to Show Cause dated 8th November 2017 does not conform to the ruling dated 15th October 2015 as the learned Judge did not declare L.T. Col. (RTD) George Muthama Gitia to be the judgement-debtor neither was it ordered that L.T. Col. (RTD) George Muthama Gitia was to personally pay the judgement which is against a company and not against him and there was no order that he be committed to civil jail in execution of the decree herein.

l) L.T. Col. (RTD) George Muthama Gitia is ready and willing to attend court for the Notice to Show Cause to show that he has not delayed the execution of the decree and taxed costs herein which was what was specifically ordered in the ruling dated 15th October 2015.

m) That it is in the interest of justice that the application herein be allowed to safeguard L.T. Col. (RTD) George Muthama Gitia's right to a fair hearing and prevent an abuse of the court process by the Claimants herein.

3. The Application is supported by the affidavit and further affidavit of, Lt. Col. (Rtd) George Muthama Gitia wherein he reiterates the grounds on the face of the application. Wherein he states that, his son was never served with a notice to show cause on 22nd November, 2017, because he does not reside at LR No. 99206 which is indicated in the affidavit of service.

4. That his residence is situate on LR No. 13330/135 and he has attached a copy of a Certificate of Title marked GMG 1 as evidence of the same. He avers that he is ready and willing to attend Court for the Notice to Show Cause to show that he has not delayed the execution of the decree and taxed costs herein.

5. The Claimant/Respondent filed grounds of opposition in response to the application wherein he states that there are no reasonable Grounds upon which to set aside the exparte Orders of 30th November 2017 and all consequential Orders including the exparte Breaking Orders issued by this Honourable Court against LT. COL (RI D) George Muthama Gitia nor the Notice To show Cause dated 8th November 2017 issued against LT.COL (RTD) George Muthama 2017 as they were justly issued in conformity with the Ruling of this Honourable Court dated 15th day of October 2015.

6. That the Applicant has not offered any security for the due performance of the decree and the application is an abuse of Court process which should be dismissed with costs.

7. The Claimant also filed an affidavit by one Hellen Ndida Motari, a Court Bailiff of the Honourable Court, wherein she stated she received a Warrant of Arrest dated 7th December 2017 from the firm of T.T.M. Aswani, Esq, Advocate, with instructions to execute the same against LT.COL (RTD) George Muthama Gitia.

8. She avers that on the 15th December 2017 with the sole aim of executing the Warrant, in the company of the Claimant herein and 3 Police Officers proceeded to the home of George Muthama Gitia in Thome Estate in Ruaraka constituency within Nairobi County with a view to executing the Warrant of Arrest. Upon arrival they asked to see the said Mr. Muthama who kept them waiting at his gate for more than 2 hours. The Court Bailiff applied for a break in order which was granted on 18th December, 2017.

9. The process server, one Justus Kilima who avers that on 22nd and 23rd November, 2017, he attended the Applicant's premises where he met a person who introduced himself as the Applicant's son, he explained the purpose of his visit and he accepted service of the Notice to Show Cause on behalf of his father. That Mr. Kilima did not suspect that the person he was dealing with was not the son of the Respondent and as such he did not ask for his identity. That the said process server went back on 23rd November to the premises of the Respondent to confirm if the documents had reached the Respondent and he was informed by a middle aged black man that the documents had reached the Respondent.

10. The Claimant also filed an affidavit wherein he reiterates the contents of process server's and Court Bailiff's affidavit and adds that after the breaking order was issued, he did accompany the bailiff and the police to the Respondent's premises wherein he identified the Respondent to facilitate for his arrest.

Applicant's submissions

11. On behalf of the Applicant it is submitted that the Honourable Lady Justice M. Mbaru did not convert the director to be a judgement-debtor, since there is no judgement entered against him as a person.

12. That the notice to show cause dated 8th November 2017, extracted by the Claimants purporting that Lt. Col. (Rtd) George Muthama Gitia was the judgement debtor and was required to show cause why he should not be arrested and committed to civil jail in execution of the decree herein, is erroneous and misleading. That the said notice to show cause is not in conformity with the ruling of Honourable Lady Justice M.Mbaru dated 15th October 2015 to the effect that:

"the Claimant shall cause the recall of the Respondent's director George Muthama Gitia to appear before the Court to show cause why he should not be arrested and committed to civil jail for delaying the execution of the decree and taxed costs herein.."

13. Neither was it ordered that Lt. Col. (Rtd) George Muthama Gitia was to personally pay the judgement which is against a company and not against him and there was no order that he be committed to civil jail in execution of the decree herein.

14. It is submitted that the purpose of Order 21, rule 36 (which is now Order 22, rule 35 after amendment) of the Civil Procedure Rules is simply to enable the judgement-debtor; "to be orally examined as to whether the judgement-debtor company 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 officer or director.

15. That there is no power under this provision to order the arrest of a director who complies with the order to be examined and shows that the judgement-debtor company has no means of satisfying the decretal sum. They rely on the decision in decision in **Trans-national Bank Ltd-Vs-New Sports View Ltd(2006)eKLR** where it was held at page 2 that:-

"The application before the court is made under rule 36 of Order 21. It is instructive that the object of this rule is to obtain discovery for purposes of execution in order to avoid unnecessary trouble and delay in satisfaction of money decrees. The applicant seeks to elicit information from Mr. Kabogo as to whether the defendant company has any property, assets or means of satisfying the decretal sum. The company ceased operating nearly twelve years ago when it became insolvent. In other words, Mr. Kabogo is saying that the company has neither property, assets, or means of satisfying the decretal sum I don't think that examining him under rule 36 would elicit any more information than is already contained in his replying affidavit. To grant the orders sought would, therefore, not add any value to the information he has already give, and may even prove to be an exercise in futility."

16. Further that the provisions of Order 21, Rules 32 & 35 of the Civil Procedure Rules (now being Order 22, Rules 31 & 34), are not applicable to the Respondent's director for the simple reason that he is not the judgement-debtor herein. That those provisions specifically refer to the judgement-debtor. The judgement-debtor as the decree shows is Birking Industries Services Ltd and not Lt. Col. (Rtd) George Muthama Gitia who is a separate legal entity from the Company and in this case where judgement was entered against the Respondent company and not the director, he cannot therefore be liable for the decree against the company.

17. That the Appellants Application was clearly made under Order XXI Rule 36, which does not apply to lifting the Corporate veil of the Respondent Company but clearly sought to examine its Director with a view to finding out if the Company had any and what property or means to satisfy the Appellant Decree against it and the taxed costs.

18. The Appellants did not seek at that stage the lifting of the veil of the incorporation of the Respondent as it was not a feasible step to take at that stage. The Appellant were therefore right to concentrate for the time being on the examination of the Managing Director of the Respondent Company and this was not meant to hold him personally liable for the debts of the Respondents Company. The Applicant urges the Court to allow the Application.

19. On behalf of the Respondent it is submitted that the Order extracted from the judgment on the 26th day of November, 2016, was upon the Director of the Respondent Company and thus the Respondent was aware of what was expected of him and yet he did nothing to comply. That he was brought to Court on 12th January, 2018, under a warrant of arrest.

20. That on 26th July, 2018, he led evidence on the last accounts of the Respondent and it was evident that the Respondent Company was

aware of the pending Court case and therefore ought to have budgeted for the same. That the Claimants had made an application to attach the Respondent Company's assets which assets were not traced by the auctioneer.

21. That the notice to show cause was regular and the Director failed to show cause why he should not be arrested and committed to Civil Jail for delaying the execution of the Decree and the taxed costs. That the Application should be allowed with costs.

22. The application before me is to have the Applicant released from the obligation requiring him to show cause as ordered by Court on 8/11/2017. Indeed the Applicant appeared in Court after being arrested and was examined on oath. He stated that he is the Respondent's Managing Director and he is aware of the judgement entered against the Respondent in 2007/2008.

23. He stated that at that time, the company was dormant and had no business. He stated that the company was no longer operational and he wrote a letter to the Commissioner of Income Tax on 15/12/2000 indicating as such.

24. They did the last audit on 31/12/2000 and the company had made a loss of 1.5 million. He stated that the company had a bank account and the last transaction was done on 10/1/2002 and 12/11/2003 respectively.

25. He contends that the company has no assets to satisfy the judgement when the judgement was rendered in 2004. In cross examination he indicated that all company liabilities were covered by the audit report. He however indicated that the company has not wound up.

26. From the explanation above, it is apparent that the company is no longer in operation but it has never been wound up. In my view, the Applicant has discharged his liability to show he has not as a person delayed execution of the decree as was sought.

27. The company is still in existence having not wound up and so execution should proceed against the company. Since the application before me does not extend to lifting of the veil on directors, I will make a finding that the Applicant has discharged the requirement made in the order made by this Court on 8/11/2017. I will therefore discharge him of any further requirement of the said order and further orders a refund of the cash bail deposited in Court of 500,000/=.

28. There will be no order as to costs.

Dated and delivered in open Court this 17th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: