



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL SUIT NO. 39 OF 2011**

**CHARLES ASIKOWA OKOLO .....PLAINTIFF**

**VERSUS**

**BENJAMIN NYAMUMBO OONGE**

**AGRICULTURAL FINANCE**

**CORPORATION.....DEFENDANTS**

**EMKOS COMPANY LIMITED**

**R U L I N G**

1. The applicant Charles Asikowa Okolo filed a notice of motion dated 17/3/2014 against Benjamin Nyamumbo Oonge and Emkos Company Limited the first and third respondents respectively. The applicant sought five reliefs two of which have since been overtaken by events. Those which remain for determination are the following;-
  - (a) *That the Honourable court do lift the veil of incorporation of the third defendant and compel the directors therein to effect the transfer in favour of the plaintiff/applicant.*
  - (b) *The Honourable court do review the judgement and decree herein.*
  - (c) *That costs of the application be provided for.*
2. The applicant contends that there has been discovery of new and important evidence which was not available at the time he testified in this case. The applicant contends that he has obtained a statement of one of the directors of Emkos Company Limited indicating that the company had been handed over to the first respondent who is now the beneficial owner of the suit land and that he has been selling part of the suit land to third parties.
3. The applicant contends that the first and third respondents have been colluding in their attempt to defeat the interests of the applicant. Mr Ochanda for the applicant argued that at the time judgement was given, the property was charged to Agricultural Finance Corporation and that the position has now changed in that the property has been discharged by the A.F.C. Mr Ochanda also referred to page 5 of the judgement of this court where I held that there was no consent of the Land Control Board obtained when this was not the case as letter of consent was in the court file during the hearing. The applicant annexed two consents one for subdivision and the other for transfer both dated the same day.

4. Mr Ochanda argued that it was not known to his client that the company had been given to the first respondent who had thus become beneficial owner.
5. The application was opposed by Mr Kiarie for the 1st respondent through grounds of opposition dated and filed in court on 7/4/2014. The first respondent contends that the applicant has not demonstrated any mistake or error apparent on the face of the record. That there has been no demonstration of new discovery of evidence to warrant review of the judgement.
6. I have carefully considered the applicant's application as well as the submissions of his counsel. I have also considered the grounds of opposition and submissions by counsel for the 1st respondent. The grounds for review of judgement are clearly set out in order 45 of the Civil Procedure Rules. To begin with there is no error apparent on the face of the record which has been demonstrated. The applicant's advocate pointed to page 5 the judgement and submitted that the court's finding that the transaction was null and void for want of consent of the land control board was wrong in that the applicant had filed copies of two consents one for sub division and the other for transfer. He argued that this was a wrong finding. With respect to the learned counsel, this cannot be a ground for review. Failure to consider certain evidence which was on record on the part of a Judge cannot form a ground for review. It is only a good ground for appeal.
7. The applicant is contending that he has since discovered that Emkos Company had been transferred to the first respondent and as such the first respondent was a beneficial owner of the property owned by the company. The position as it was then and now is that the property was not in the name of the first respondent. The position has not changed. The directorship of the company is still the same as it were at the time of judgement. Nothing would have been easier than the applicant making an application to the Registrar of Companies to provide the current directors of the company. A mere statement from one of the directors that the company has changed hands is not enough. The only time when proper change can be made is when directorship changes at the companies Registry and not at the instance of a statement from a "former" director.
8. Some information which is now being said to be new evidence could have been readily available were the applicant to be diligent. The proviso to order 45 rule 3(2) enjoins the court to ensure that where there is an allegation that there is discovery of new evidence there must be strict proof of such allegation. If it is true that the company was given to the first respondent in 1994 as alleged, then this is evidence which could have been in the knowledge of the applicant if the were diligent at the time of trial.
9. The applicant sought and was granted a relief which was in his pleadings. There is a judgement in his favour and there has been partial settlement of the decree. The applicant cannot again come back to court to get a different remedy which he did not get at the time under the guise of review.
10. The applicant has no judgement against the third respondent. He cannot therefore seek lifting of the corporate veil. The grounds upon which a corporate veil can be lifted are clear. None has been demonstrated by the applicant. The upshot of this is that the applicant's application lacks merit. The same is hereby dismissed with costs to the first and 3rd respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 18th day of September, 2014.

**E. OBAGA**

**JUDGE**

In the presence of Mr Ingosi for Mr Ochanda for Plaintiff/Applicant and Mr Ndarwa for 1st and 3rd defendant/Respondents. Court clerk Kassachoon.

**E. OBAGA**

**JUDGE**

**18/9/2014**