



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CIVIL NO. 1554 OF 2014

ONI PROPERTIES LIMITED.....APPLICANT

-VERSUS-

SIGAL INVESTMENTS LIMITED.....RESPONDENT

RULING

1. The Decree Holder /Applicant filed a notice of motion dated 20th May 2020 in which it sought the following orders: -

i. Spent

ii. Spent

iii. Spent

iv. THAT this honorable court be pleased to order that the said KShs. 10, 000, 000.00 be released to the Applicant in settlement of the balance of the decretal sum.

v. THAT in the event that the Respondent fails to deposit the said KShs. 10, 000, 000.00, the Honorable Court be pleased to issue summons directed to Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti who are the directors of the Respondent/Judgment Debtor to attend court on an appointed day to be orally examined, as to the business and affairs of the Respondent Judgment Debtor, and/or property or properties of the Respondent/Judgment debtor, and/or the Respondent/Judgment Debtor's means of satisfying the decretal sum.

vi. THAT in the event the Respondent fails to deposit the said Kshs. 10,000,000.00, the Honorable Court be pleased issue an order directed to Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti, in their capacity as the Directors of the Respondent/ Judgment Debtor to produce before court books of accounts, audited financial statements, cheques books and other statutory documents relating to the operations and transactions of the Respondent/Judgment Debtor and its affiliates for the last three (3) years from the date hereof and the said Directors be examined on oath on the said documents.

vii. THAT in default of the said directors complying with orders V & VI above, this honorable court be pleased to lift the veil of incorporation and order that Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti be held personally liable to settle the decree of the court obtaining from this suit together with other sums expressed and or implied therein or be imprisoned and committed to civil jail for a period of not less than 6 months.

viii. THAT the Honourable Court be and is hereby pleased to make such further orders in the interest of justice upon examination of Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti.

ix. THAT the costs of this application be in the cause.

2. The Applicant had filed a suit against the Judgment Debtor/Respondent claiming ownership of LR.Nos.1160/654,655, and 656. Subsequently parties entered into an out of court settlement wherein the Applicant was awarded Kshs.48,000,000/=. The Respondent was to settle the decretal sum by releasing to the Applicant the Kshs.38,000,000/= which had been deposited in court and the balance in two instalments of Kshs.5,000,000 each on or before 31st October 2018 and 31st December 2019 respectively.

3. The Respondent was unable to settle the balance of the decretal sum despite having sold the three properties which were the subject of the suit herein. The Applicant has tried to execute the decree but cannot trace any assets of the Respondent which would satisfy the decree. The

Applicant therefore contends that it is necessary for this court to issue an order for the examination of the directors of the Respondent as provided under order 22 Rule 35 of the Civil Procedure Rules.

4. The Applicant contends that the directors of the Respondent are Mr Wilson Kipkemboi Kipkoti and Mr Samson Kiprugut Bundotich who are still running the affairs of the Respondent and should therefore be summoned for purposes of being examined as to the assets of the Respondent.

5. The Respondent has opposed the Applicant's application based on a replying affidavit sworn by Mr Wilson K Kipkoti one of the directors of the Respondent. The Respondent contends that the consent was not entered into on the understanding that the proceeds of the sale of the three properties were to be used to settle the balance of the decretal sum as the suit properties were sold before the filing of this suit.

6. The Respondent further states that the Applicant moved to court and obtained an order of injunction against it. The injunctive orders were inconveniencing potential purchasers of the suit properties. The interested party moved the court and had the injunction set aside on condition that the Respondent deposited Kshs.38,000,000/= in court. The Kshs.38,000,000/= was deposited in court despite resistance by the Applicant. The Applicant later approached the Respondent for an out of court settlement which resulted in the judgement which was entered into on 19th September 2018.

7. The Respondent contends that the issue of interest of Kshs.10,000,000/= will not have arisen were it not for the Applicant refusing to have the Kshs.38,000,000/= deposited in an interest earning account in the joint names of the Applicant and the Respondent's Advocates. The Respondent argues that the Applicant was aware that the only assets of the Respondents were the three properties which were disposed of a while ago and that the Applicant was aware that the balance of the decretal sum was to be settled once the fortunes of the Respondent improved.

8. As confirmation that the Respondent has no any other assets, the Respondent contends that it has no account, no staff, no offices and that its directors have not earned any remuneration since it disposed the only assets the company owned.

9. In a further affidavit sworn on 16th March 2021, the Applicant contends that the background preceeding the filing of the consent is immaterial to the present application. The Applicant further contends that the Respondent has conceded that it did not keep proper books of account and that the manner the company dealt with the assets of the company was fraudulent and confirms that it is a shell company which was out to fleece its creditors and that this is confirmation that the corporate veil of the Respondent should be pierced so that the directors should be held personally liable for the balance of the decretal sum.

10. The parties were directed to file written submissions. The Applicant filed submissions dated 16th March 2021. The Respondent filed submissions dated 6th May 2021. I have considered the Applicants' application as well as the opposition thereto by the Respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the Applicant has made out a case for an order to issue requiring examination of the Respondent's directors.

11. The Applicant has made an omnibus application which seeks deposit of Kshs.10,000,000/= within 14 days of the grant of an order, examination of the directors of the Respondent, jailing of the Respondent's directors for 6 months and lifting of the corporate veil. I must say at the outset that a party invoking the court's jurisdiction under Order 22 Rule 35 should not again invoke the lifting of the corporate veil in the same application. One has to choose whether to come under Order 22 Rule 35 or apply for lifting of the corporate veil or any orders of depositing money in court. It is assumed that for one to invoke the provisions of Order 22 Rule 35 of the Civil Procedure Rules, attempts to trace the assets of the company for purposes of execution have failed. That is why the Applicant is at liberty to ask the court for an order under Order 22 Rule 35 to assist in the execution process. If this does not work out, it is after this that an applicant can then ask for lifting of the corporate veil. One cannot seek the two at the same time.

12. There is no contention that the Respondent's assets cannot be readily ascertained. The Respondent's director has indicated that though the Respondent is legally existing, it does not have any assets which will satisfy the decree. The Respondent's director merely states that it will settle the decretal sum when its fortunes will improve. From the Respondent's own admission through its director, the company is operating in a manner which is not transparent. For instance, it is unbelievable that the Respondent does not have a bank account, does not have an office and staff. It is important to have the Respondent's directors examined as to the Respondent's books of accounts, audited statements and other documents such as returns. The court cannot simply decline to give an order for examination of the directors on the directors own admission that they have been filing nil returns with Kenya Revenue Authority, have no staff or offices and that its directors have not earned any remuneration since 2014.

13. From the replying affidavit filed by the Respondent, it is clear that the Respondent has no intention to settle the decretal sum in the near future. The Respondent's director is stating that they will settle the balance of the decretal sum when the fortunes of the Respondent will improve. I find that this is a good case where an order under Order 22 Rule 35 of the Civil Procedure Rules should be made. I therefore make an order that the directors of the Respondent namely Wilson Kipkemboi Kipkoti and Samson Kiprugut Bundotich do appear before the court on a date to be agreed immediately after this ruling so that they may be examined as per Order 22 Rule 35 of the Civil Procedure Rules. Costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JUNE 2021

E. O. OBAGA

JUDGE

In the Virtual presence of:-

M/s Kendi for Applicant

M/s Mureithi for Mr Mugambi Imanyara for Defendant

Court Assistant: John

E. O. OBAGA

JUDGE