



**China Road & Bridge Corporations v Econite Mining Company Limited; Gikera & 3 others
(Interested Parties) (Civil Case 117 of 2015) [2023] KEHC 18646 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 117 OF 2015
DKN MAGARE, J
MAY 12, 2023**

BETWEEN

CHINA ROAD & BRIDGE CORPORATIONS PLAINTIFF

AND

ECONITE MINING COMPANY LIMITED DEFENDANT

AND

STEPHEN NJOROGE GIKERA INTERESTED PARTY

SHEE HAMIJI MWAMINDI INTERESTED PARTY

KENGO MENZA WA MENZA INTERESTED PARTY

ALI MWAKWERE INTERESTED PARTY

RULING

1. Eleven years ago, what started as a routine filing of a case has in the most profound way swallowed acres of papers. This matter was filed against the defendant. Upon hearing the plaintiff, the Hon. Mr. Justice P.J. Otieno entered Judgment through which he delivered on 29/1/2018 for Ksh. 6,300,000, costs and interest at 14% from 1/3/2016.
2. Subsequently, there were proceedings in the Court of Appeal. Those proceedings streamlined the appearance of the 1st Defendant. On 21/11/2019, the game of thrones then started. In a quick succession, Ms Gikera Vadgama & Company Advocates sought to cease acting for the 1st Defendant, at about the same time Judgment was entered. The Court of Appeal, in its wisdom, agreed with this Court that Stephen Njoroge Gikera is the brain behind the 1st Defendant. the firm could not as such lack instructions.



3. The matter has been in Court for various applications. Finally, the Plaintiff's Advocate, filed an application seeking for the following prayers:-
 - i. Stephen Njoroge Gikera, a former director of the 1st defendant, Kengo Menza Mwamenza and Shee Hamisi Mwamwindi, 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 account including all its other documentary evidence showing the same before the court.
 - ii. In default of the directors complying with the order such further order be made against them personally as this Honourable Court may deem fit.
 - iii. Costs of this application be provided for.
4. The same was responded to by a detailed Replying Affidavit by various parties. In the 1st week of the first month of my tour of duty, this matter was placed err showed out my face in a rather dramatic way. Though listed for mention, it was actually bigger than that. Directors had been summoned for cross examination. I gave directions and took some submissions. It transpired that Stephen Gikera Njoroge, had a very serious defence or so he thought. He stated that he gave cheques subject of this case to Hon. Ambassador Chirau Ali Mwakwere.
5. According to him, he was a front for Shee Hamisi Mwamindi who in turn was a front for the former Minister of mining. I was in what I can call the prisoner's dilemma. I know that generally persons act in self-preservation and as such, even where they could optimize their advantage, they will act sub optimally. I therefore, summoned Hon. Abassdour Ali Chiarau Mwakwere. My thinking was that we needed to cross examine all directors and proxies at once. He turned up and gracefully agreed to be cross examined before filing his affidavit.
6. In his deep baritone voice, he gave the Court tide bits that finally unraveled the mystery behind the payment of 11,000,000/= to a company that admittedly had not opened and has never opened a bank account. I also listened to cross examination of Shee Hamisi Mwamindu a former counselor in Kwale. He came out as a man lost in the deep blue sea. He had been requested to be a director by Ambassador Mwakwere in order to safeguard what he calls the mining licence for Kwale County Resources. He is the current sole director. There after Kengo Menza wa Menza who was said to hold 40% shares in the 1st defendant was examined. He did not have any due and has never had. Any meeting with the co- directors. Stephen Njoroge Gikera. I digress. I perused the Ruling of Justice Njoki given on 30/9//2022. It is noted that the said Stephen Njoroge Gikera, sought to shift blame to Kengo Menza Mwamwenzwa and Shee Hamisi Mwamindi. In that Ruling, Mr. Gikera was captured saying that it is Kengo Mwenza Mwamenza who approached him.
7. He even stated on oath then that he handed over documents to the said Kengo Menza wa Menza. He purported to have resigned on 29/6/2016 and handed over to Kengo Menza Mwamenza. The court dismissed that application. It was already established that Kengo Menza Mwamenza has appointed on 30/11/18 and the documents sought were never handed to them. It was also Judicially established that She Hamisi Mwamindi transferred his shares on 27/2/2019.
8. It is Stephen Njoroge Gikera who had documents. There was also a Ruling on 22/1/2021 on the same issue.
9. The orders for cross examination had hitherto been granted by the decision of Justice Njoki on 22/1/2021. This was the genesis of the cross examination. Next to be cross examined was Stephen Njoroge Gikera. I cannot say that he was not saying the truth. That will be an understatement on oath,



Stephen Njoroge Gikera, advocate, lied to the Court that he gave Hon. Mwakwere the cheques. As an advocate, he knew or ought to have known that there will always be paper trial. The evidence that we unearthed. Subsequently, brought the ignoring of the blatant lies to the said witness gave. He did not disclose that the exchange the original cheques for cheques in his firm made and banked all of them on 29/11/2023. I shall revert on this shortly.

10. I note that Stephen Njoroge Gikera had filed a further affidavit on 11/3/2023 where he stated that the Hon. Chirau Ali Mwakwere was not candid as he was involved in the affairs of the 1st Defendant.
11. Stephen Gikera testified that Hon. Mwakwere could not incorporate a company supply stones since he was a Minister of Mining. He states and I quote:-

“I insist I handed all the cheques for a total of Kshs. 8,000,000/= to Hon. Chirau Ali Mwakwere.
12. Handing over means, one give, the physical cheques as issued by the Issuer. As it turns out later, all the cheques were replaced from Ecolite Mining Co. Ltd to the firm of Ms Gikera Vadgama & Company Advocates with hindsight, it should have been clear to all but Justice is blind.
13. Mr. Gikera admitted that he had taken a sum of Kshs. 2,250,000/= . All the cheques were for either 800,000/= or 900,000/= . There was no cheque for 50,000/= or a figure ending with 50,000/= . It should have been clear then that the cheques were actually banked.
14. I decided in my wisdom or otherwise to follow the money. This was because parties had sworn and it was clear that Ecolite Mining Co. Ltd did not have a disclosed account.
15. The question then is mind, how did the cheques clear, without a bank account. Three issues were in my mind.
 - i. The cheques may never have been banked.
 - ii. The cheques, were negotiated to a third party
 - iii. The cheques were replaced by a third party.
16. In order to clear the above questions I ordered that Branch Manager, KCB Ltd, Voi Branch to attend Court, and shed light on the cheques. He did not turn up. I issued a warrant of arrest and fixed the matter for mention. The warrant turned into magic. The Manager turned up with a lawyer alleging that the specific cheques never cleared.
17. A 6 months’ statement from the date of the first cheque to the expiry of the last cheque. This was informed by the banking custom that cheques is become stale after 6 months Bank unless so indicated on the negotiable instruct itself.
18. I was supplied with a 38-page statement. To my horror, dismay and consternation, my eyes landed in page of that statement in the statement the following was recorded. Date duration, details amount 29/10/14 (cheques) No. 00164 to the firm of Gikera & Vadgma all totaling to 11,000,000/=/
19. When I confronted each of the directors, and G. Hon. Ali Mwakwere they did not recognize the payment, except Stephen Njoroge Gikera. He now changed his story that he received the money on behalf of his client, the 1st defendant. It was real water under the Nyali bridge. Our mission was to find who received the proceeds of the transaction herein given that the 1st Defendant did not have an account.



20. I recall that Hon. Ali Chirau Mwaakwere had testified that the 1st defendant was incorporated together with his company. They were meant to help Hon. Mwakwere's Advocates Stephen Njoroge Gikera to venture into mining. The local director was incorporated to give semblance of local participation.
21. I now need to find whether the 1st Defendant has complied with the orders to produce Accounts and books to show that they are not a shell.
22. In *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22, the house of lords recognized the doctrine of separate legal and corporate personality of a company. This has over time been refined by the issue of lifting the corporate veil.
23. In order to left the corporate, the loft is not whether the company can pay its debts. This is because companies can also run into financial headwinds. The test is whether the company is a shell, front, a façade created to appear as if it is a real thing when in reality it is a front for defrauding members of the public and creditors.
24. A classical shell, is where the board constitutes of the main actor, and stooges, who are the beck and call of the main actor and do not hold Amount General meetings. The second aspect is that it has no known account or sporadic accounts, opening shortly and then changing. In this case, it was all agreed that the 1st Defendant did not keep books of accounts. In all years of existence, it has not opened a bank accounts. Instead its funds are taken to the individual director.
25. In this case the 11,000,000/= was paid to Gikera and Vadgama advocates. Though a firm of Advocates, there was no evidence of involvement of other partners, if any.
26. Instead it is only Stephen Njoroge Gikera who was dealing. What surprised me was not that he took the money but that he had the naivety to imagine that the Court could not pierce through the labyrinth he created. Unlike the spider's web, the facade created by Stephen Njoroge Gikera was amateurish. It did not pass the masters a comprehensive scheme.
27. This probably explains why the 1st Defendant was not interested in setting aside judgment which had been entered exparte.
28. While I was laying the noose slowly around necks that deserved, I requested if anyone had an application to make, now that the bank had confirmed that cheque Nos. 31,32,33,34,35, 36,28,29,30 were not cleared. I expected at point parties to be aware that the end was high and as such Rush for some kind of settlement while Plaintiff was in desperation. What I saw was a different Application. An application to set aside. I was not surprised. This is because they had deceived everyone that only one person had been dealing.
29. It is important to point out that, it was not my duty to find whether or not he debt herein was due. That had been settled by the Court, P.J.O. Otieno when delivery by Judgment on 28/1/2018.
30. The Ruling on 21/11/2016 where the Court declined to release the firm of Ms Gikera & Vadgama advocates to cease acting for the first defendant should have been a pointer for things to come. There was given a seal of Approval by the Court of Appeal sitting in Mombasa.
31. I have also seen application counter applications seeking to shift blame to Kengo Menza Mwamenza and Shee Hamisi Mwamindi. Hon Lady justice Njoki Mwangi made three Ruling on the said aspect, that is on 30/9/2022, 13/7/2021, 22/1/2021.
32. After reviewing the evidence, I find that the 1st Defendant was a shell a facade. It is not a proper company but a front. The question is, whose front? Currently Kengo Menza wa Menza is the director.



He was drifted in when this matter was ongoing. He looks and appears to be totaling lost. He has no idea or the mental capacity to fathom the fraud of this magnitude. He did not participate in anything that led to the issues at hand. His drafting to be the sole director was done simply to protect the brains behind the facade. I therefore that changes in the company register that resulted in Kengo Menza wa Menza being made a sole director be reversed. The company should revert to the directors who were directors when the atrocity enumerated herein, were committed.

33. Going behind the facade I found two faces. One of Stephen Njoroge Gikera seated on the driver's seat and one of Shee Hamisi Mwamindi. From the testimony I find that Shee Hamisi Mwamindi is a stooge and a façade for Stephen Njoroge Gikera. He does not know and cannot know the extent of the fraud that was created.
34. He was a mirror held by Stephen Njoroge Gikera to access the Kwale county. He has never participated in any action. He stared when signing of his record and when directed to hand over to Kengo Menza. He has no idea what it means to be a director and is of limited education and exposure.
35. He was taken advantage of by Stephen Njoroge Gikera who was riding on the shoulder of the Minister for Mining Hon. Ambassador Chirau Ali Mwakwere though listed as a director I don't find him to be a brain behind the company.
36. The sole and only brain company was Stephen Njoroge Gikera. He received a sum of 11,000,000/= which the co-director learnt in Court yesterday. The payment was made through cheque No. 000171 for Ksh. 800,000/= and cheque Nos. 000164, 000163, 000166, 000165, 000168, 000167, 000170, 000169 for Ksh. 900,000/= each. Given the admission that the company does not have a bank Account it is safe to find that all the proceeds were utilized by the said Stephen Njoroge Gikera. I therefore find that given that the 1st Defendant Econite Mining Company Ltd. had done only one transaction and that transaction resulted in the all proceeds being paid to Stephen Njoroge Gikera, it is only fair that he be found fully liable for the debts of the 1st Defendant.
37. I therefore lift the corporate veil of the 1st Defendant and behind it I find Stephen Njoroge Gikera as the only brain behind the company. I find him 100% liable for setting the decretal sum and costs for the parties.
38. I disregard the percentage of shareholding as they are not Germaine to sharing of liability. My duty is to find the engine behind the shell. It does not matter under what head party has hidden his hands. Once the head is found, it is the one to be cut. This also applies to cases, where directors hide behind houseboy's and house girls and they are not known as directors. When lifting the veil of incorporation the work of the court is not to settle the sharing structure but to find the person liable for settling debts of shell. It is an equitable remedy and takes cognizance of human frailties and incentive to commit fraud.
39. This will make the end of the matter save that there are two other applications that needs to be dispensed with. The first one is dated 12/4/2023. The same has been spent. It is marked as such.
40. The second one is for setting aside. The same has been overtaken by events and as such stands dismissed, with costs.
41. All in all I allow the Application dated 21st November, 2019 and make the following orders: -
 - a. The veil of incorporation of the 1st defendant is hereby lifted.
 - b. The sole brain behind the 1st defendant was Stephen Njoroge Gikera, who received the entire sum of Kshs. 11,00,000 from the plaintiff.



- c. Though Shee Hamisi Mwamindi was a director he was a stooge for Stephen Njoroge Gikera and as such he is not liable to settle the decretal sum. However, he shall bear costs for KCB of Kshs. 50,000/= . I therefore award KCB costs of Ksh. 50,000/= payable by Shee Hamisi Mwamindi.
- d. Kengo Menza wa Menza is not liable to settle. However, I strike out charges in the company register for the 1st defendant that brought him in as a director. The company shall revert to its former status till payment of the decretal sum herein.
- e. The Registrar of companies/Business registration service is accordingly directed to expunge from the register the changes that bought in Kengo Menza wa Menza and restore Stephen Njoroge Gikera and Shee Hamisi Mwamindi as directors. Only Shee Hamisi Mwamindi has a luxury of resigning as a director before conclusion of payment decretal amount. Stephen Njoroge Gikera shall remain a director and shareholder till the matter is marked as settled.
- f. For avoidance of doubt, Stephen Njoroge Gikera shall settle the entire decretal amount as adjudged against the 1st defendant in the Decree.
- g. Being under order in rem, there the same applies to payment of costs of all the person awarded costs herein, except Shee Hamisi Mwamindi who was not awarded but he is to pay KCB within 30 days in default execution shall proceed, by dint of Section 34 of the Civil Procedure Act against Stephen Njoroge Gikera notwithstanding that the parties awarded costs were not substantive parties.
- h. Kengo Menza wa Menza is discharged from the suit and removed as a director of the 1st defendant, with costs of 120,000/= for the anxillary proceedings payable by Stephen Njoroge Gikera.
- i. Hon. Ambassador Ali Chirau Mwakwere is discharged from the summons given with costs of Kshs. 100,000/= payable by Stephen Njoroge Gikera.
- j. Shee Hamisi Mwamindi to pay KCB though their advocates, a lawful sum of Kshs. 50,000/= within 30 days; upon payment he be discharged from the suit and be and liability to surrender the nominal shares he is holding to the true owner, Stephen Njoroge Gikera the same, being deemed as having been paid for.
- k. For all the proceedings after taxation of costs, the plaintiff has incurred huge expenses to avoid returning to court for taxation, I direct that their costs payable as Kshs. 150,000 payable by Stephen Njoroge Gikera within 30 days to the Plaintiff.
- l. The plaintiff to have the decree updated and certificate of costs, for taking into consideration a s um of Ksh. 2,250,000/= paid, Stephen Njoroge Gikera for settlement within 30 days.
- m. Though payment was made to the firm of Gikera and Vadgama, no other partner in that firm is liable other than Stephen Njoroge Gikera.
- n. In default of payment execution do proceed, as aforesaid.
- o. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 12TH DAY OF MAY, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE



JUDGE

In the presence of:

Miss Opondo for the 1st Defendant and Mr. Gikera

Mr. Munyoki for Ali Mwakwere

Mugambi Titus for the plaintiff

Court Assistant - Firdaus

