



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

(COMMERCIAL & ADMIRALTY DIVISION)

CIVIL CASE NO. 721 OF 2012

FRAME CONSULTANTS LIMITED.....PLAINTIFF

VERSUS

KIHINGO VILLAGE (WARIDI GARDENS) LTD.....1ST DEFENDANT

WAGEMA LIMITED.....2ND DEFENDANT

R U L I N G

1. Before Court is the plaintiff's application dated 17/10/2019 brought under **Sections 1A, 1B and 3A of the Civil Procedure Act 2010, Order 22 Rule 35 and Order 51 Rule 1 of the Civil Procedure Rules.**
2. The plaintiff had sought orders that the directors of the 1st defendant be summoned to attend court and be orally examined on whether the 1st defendant has any means or property of satisfying the decrees herein. It also sought orders that the said directors do produce books of accounts of the 1st defendant and in the alternative, the 1st defendant's veil be lifted and its directors be held personally liable for settlement of the decree.
3. The application was supported by the affidavit of **ENG. Francis M. Kimani** sworn on 17/10/2021. It gave the background of the dispute as follows. That vide Mediation Cause No. 33 of 2018, a Mediation Settlement Agreement was entered into on 14/12/2018 which resulted in a judgment against the 1st defendant for Kshs. 7,000,000/=.
4. A sum of Kshs. 2,500,000/= was paid on 5/2/2019 but the balance remained unpaid. The plaintiff took out Warrants of Attachment of Movable Property but was unable to locate the 1st defendant's assets. That necessitated the present application for recovery of the decretal sum of Kshs. 4,502,450/=. It was contended that for that reason, the orders sought ought to be granted.
5. The application was opposed vide the affidavits of **Hon. James Ndungu Githinji and Robert Marekia Gathenji** sworn on 17/6/2020 and 22/7/2020, respectively. They were the Managing Director and director respectively of the defendants. Mr. Ndungu averred that he had caused the company to pay the applicants Kshs. 10,000,000/= from proceeds of a sale of property known as **Number 1 Kihigo Village.**
6. That the purchaser of the last unit owed the Company Kshs. 40,000,000/= which was sufficient to clear the applicant's claim. He prayed that the firm of Hamilton Harrison & Mathews, Advocates be directed to release the mother title of the property in order to facilitate the registration of the sold unit.
7. He attached an Agreement for Lease dated 25/9/2015 between the 1st defendant and one **Anne Mumbi Waiguru** for lease of **House Number 1D on LR.NO. 27754, NAIROBI.**
8. It was submitted for the applicant that the 1st defendant had admitted owning an asset known as **House No. 1D (Dafina) Kihingo Village on L.R.NO. 27554** and that it was expecting Kshs. 40,000,000/- from sale proceeds of that asset. That the title to that house was unencumbered. That the 1st defendant expected to settle the claim from the proceeds of the sale of that house.
9. It was submitted that the prayer for lifting of the 1st defendant's corporate veil would safeguard the plaintiff in the event the 1st defendant failed to settle the decretal sum.

10. The 1st defendant submissions were dated 21/9/2020. It was submitted that the plaintiff had not demonstrated that it was unable to trace the 1st defendant's assets. That there was admission that the 1st defendant had a property known as **House NO. ID (Dafina) Kihigo Village on L.R. No. 27554** and that the plaintiff ought to have been more diligent.

11. In the premises, it was submitted that there was no cause to lift the corporate veil of the 1st defendant as the plaintiff had failed to prove the core ingredients for the said prayer. That for the corporate veil to be lifted, the plaintiff should have proved that there was fraud or improper conduct on the part of the company and Directors/Shareholders, tax evasion, that the company was being used to conduct criminal activities and that there was fraudulent and improper design by the Directors/Shareholders of the company. The case of **Electrowatts Limited Vs Countryside Suppliers Limited and Another (2014 Eklr)**, was relied on in support of those submissions.

12. I have carefully considered the depositions and submissions on record. This application was heard concurrently with the Motions dated 17/10/2019 filed in **HC COMM. 5 OF 2018 and HC COMM 6 of 2018**, respectively. Those Motions were supported by affidavits sworn by **Francis M. Kimani and Faith W. Kanjumba**, respectively.

13. It is not in dispute that pursuant to a mediation settlement agreement dated 14/12/2018, judgment was entered for the applicant for Kshs. 7,000,000/=. Out of this, a sum of Kshs. 2,500,000/= was paid by the 1st defendant. It is also not dispute that the balance was not settled. There was an attempt to execute for the balance but the same was unsuccessful.

14. **Order 22 Rule 35 of the Civil Procedure Rules** provides as follows: -

“Where a decree is for the payment of money, the decree- holder may apply to the court for an order that—

(a) the judgment-debtor;

(b) in the case of a corporation, any officer thereof; or

(c) any other person, 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.”

15. The plaintiff submitted that it was unable to trace any of the 1st defendant's assets to attach. The plaintiff moved this court under the above provision to summon and examine the directors of the 1st defendant to establish whether the 1st defendant had means or any property to settle its decree.

16. The affidavits dated 17/6/2020, 29/6/2020 and 22/7/2020 revealed that the 1st defendant had property known as **House No. ID (Dafina) Kihingo Village on Land Reference No. 27554**. That property was in the process of being leased to a third party and the proceeds therefrom would be applied towards settlement of the decree.

17. The Court saw the Lease Agreement dated 20/9/2015. It was between the 1st defendant and one Anne Mumbi Waiguru for a consideration of Kshs. 80,000,000/=. The subject property to be leased is **House No. ID (Dafina) Kihingo Village on Land Reference No. 27554**. The agreement was duly executed by the 1st defendant.

18. In view of the foregoing, it is clear that the 1st defendant was able to establish that it owned an asset capable of settling the decree. Although the agreement was supposed to be completed within 90 days, it had not been fully performed as at the time the motion was being heard.

19. Since the issue before Court was ***whether the 1st defendant had any means or property of satisfying the decree herein***, the Court finds that that question was answered in the affirmative.

20. In this regard, all that the plaintiff has to do is either to attach the said property or garnishee the proceeds therefrom.

21. The second issue is whether the 1st defendant's corporate veil ought to be lifted so as to hold its directors personally liable to settle the decretal sum. Since the Court has already found that an asset belonging to the 1st defendant has been disclosed, I do not consider it necessary to determine this issue.

22. In view of the foregoing, I will decline the application but give liberty to the plaintiff to return to Court in the event execution on the asset fails or circumstances warrant the granting of the orders sought in the subject application. Each party to bear own costs.

23. These orders apply to Milimani HCC. Nos. 5 and 6 of 2018 respectively.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021.

A. MABEYA, FCI Arb.

JUDGE