



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC APP. NO. 199 OF 2017**

**KIKAMBALA HOUSING ESTATE LIMITED.....APPLICANT**

**-VERSUS-**

**SAMUEL NYAMU KAMAU.....RESPONDENT**

**RULING**

1. Before the court determination is a **Notice of Motion** application dated **4<sup>th</sup> February, 2021** taken out by the Applicant/Judgment Debtor (hereinafter the Applicant) wherein it is seeking for the following orders:-

*a) Spent;*

*b) Spent;*

*c) That the orders made on the 11<sup>th</sup> December, 2020 be reviewed, set aside and vacated;*

*d) That costs of this application be in the cause.*

2. The application is supported by an affidavit of **Osman Erdinc Elsek**, the applicant's director and further on the grounds on its face. He deposited that the this court at ex-parte stage gave orders directing **Mr. Osman Edrinc** and **Deniz Elsek** to attend court in their capacity as the Applicant's directors so as to be examined on whether any or what debts are owing to the Applicant herein and whet her the applicant has any and what property or means of satisfying the decree.

3. In his view, those order are of the effect of lifting the corporate veil and seeks to hold the directors personally liable for debts of the Applicant. That such orders can only be granted when it is shown that the directors committed any fraud and that is not the case here since no fraud has been shown to have been committed on part of the Directors who are now being summoned. In any event, the Respondent has not shown that it has exhausted all the other execution mechanisms for them.

4. The deponent further lamented that the orders were also issued ex-parte contrary to the Applicant's right of fair hearing as enshrined under **Article 50** of the **Kenyan Constitution, 2010**.

5. The application is opposed by the Respondent, **Samuel Nyamu Kamau** vide his **Replying Affidavit** sworn on **7<sup>th</sup> May, 2021** and filed on **10<sup>th</sup> May, 2021**. On his part, he deponed that the Applicant is indebted to him in the total sum of Kshs.2,206,126.52 by virtue of a decree issued by this court in his favour on the **24<sup>th</sup> May, 2018**. That all his attempts to execute the decree by attachment of assets has been rendered futile as the Applicant has no attachable assets. He goes on to aver that even an application for garnishment has been unsuccessful and attempts thereof have shown that the Applicant has no attachable securities in any of the bank accounts he sought to garnish.

6. Therefore, according to the Respondent, the two directors of the Applicant Company are mischievously hiding behind the corporate veil to avoid their legal obligations and as an effort to run away from satisfying the subject decree. To buttress the assertion, the Respondent deposited that despite the Applicant's director assertions that the Applicant has assets which can be executed against, a search from the Registrar of Companies shows that none of the alleged assets are registered in the name of the Applicant Company.

7. Directions were then issued that the application be canvassed by way of written submissions and both parties dutifully filed their submissions with the Applicant filing its submissions on 18<sup>th</sup> May, 2021 whereas those for the Respondents were filed on **10<sup>th</sup> May, 2021**.

8. The Applicant's submissions reiterate the grounds adduced in support of the application that the company is distinct from its directors as was held in the case of **Salomon –vs- Salomon** and the corporate veil can only be lifted if it is shown that the company is a mere façade concealing the true facts or where fraud has been shown but this can only be done on a formal application. It is also stated that the fact that an auctioneer instructed by the Respondent has failed to identify any assets owned by the Applicant cannot be ground of lifting the corporate veil.

9. The Applicant further submitted that the orders were granted ex-parte notwithstanding that one of the Applicant's Directors resides in Turkey and owing to the travelling restrictions put in place, he might face challenges in attending court as required. Lastly, according to the Applicant, the Respondent has not been diligent enough in identifying the assets it owns and to show that the Applicant owns some assets, it has annexed a title deed to property **No.Kilifi/Mtwapa/867** registered in the name of the **Kikambala Housing Estate Limited**, the Applicant herein.

9. On part of Respondent, he reiterates the contents in his **Replying Affidavit** with an addition that the orders being sought are in the purview of the court's discretion which should be exercised rationally. He has however sought that the court takes note that the Applicant has cunningly registered its assets in the names of third parties to pre-empty any execution on those assets.

### **Analysis and Determination**

10. I have carefully considered the application, the affidavit sworn in support and in rebuttal thereof as well as the written submissions filed by both parties together with the cited authorities. I find that the only issue that has clearly crystalized for determination is *whether the Applicant has made a case for review and/or set aside the exparte orders granted on 11<sup>th</sup> December, 2020.*

11. It is trite law that a court can set aside an ex-parte order upon a sufficient cause being shown by the applicant. Essentially, setting aside an exparte order is a matter of the discretion of the court and some of the grounds to be considered in exercise of that jurisdiction were illuminated in the case of **Esther Wamaita Njihia & two others –vs- Safaricom Ltd.**, where the court inter-alia stated that;

*"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd. the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali). It also goes without saying that the reason for failure to attend should be considered."*

12. A similar finding was made by the Court of Appeal in the case of **CMC Holdings Ltd –vs- James Mumo Nzioka [2004]eKLR**, where it was held thus:-

*"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"*

13. On the same breath **Order 45** of the **Civil Procedure Rules, 2010** lays down the jurisdiction and scope of review limiting it to the following grounds:-

*a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*

*b) On account of some mistake or error apparent on the face of the record, or*

*c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.*

14. In this particular case, the orders sought to be set aside and/or reviewed were made ex-parte on the **2<sup>nd</sup> December, 2020** based on the Respondent's application dated **2<sup>nd</sup> December, 2020**. As earlier indicated in this ruling, those orders were to the effect of directing the Applicant's directors to attend court at inter-parties hearing of the application dated **2<sup>nd</sup> December, 2020** for them to be cross-examined on the what assets the Applicant company owns. Those orders were granted based on averments that the Respondent had failed to locate any assets registered in the name of the Applicant company and there was need to ascertain whether the Applicant owned any worthy assets enough to satisfy the decree of Kshs.2,206,126.52 issued in favour of the Respondent.

15. The grounds advanced by the Applicants are that the Respondent has not been diligent enough to identify the assets owned by the Applicant and further that the orders to summon its directors were made ex-parte without according them an opportunity to be heard. The Applicant further averred that one of its directors will face hardships in attending court since he is based in Turkey.

16. I have perused the annexures to the application at hand and one of them is a title deed to property **No.Kilifi/Mtwapa/867** which is approximately 6.5Ha. and registered in the name of **Kikambala Housing Estate**, the Applicant/Judgment Debtor herein. In taking note that the ex-parte orders were issued so that the Applicant's directors could account for the properties owned by the Applicant, I am of the view that the Respondent did not exercise thorough diligence in undertaking a search of the properties owned by the Applicant which include the above named property. I therefore do not see any further need of the directors attending the inter-partes hearing of the application dated **2<sup>nd</sup>**

**December, 2020** given that they have shown one of the properties owned by the applicant.

17. Under **Section 3A** of the **Civil Procedure Act** this court can exercise its *inherent power to make such orders as may be necessary for the ends of justice*. It is also a fundamental duty of this court to do justice between the parties and pertinent to that duty, each party should be allowed a proper opportunity to ventilate their respective cases upon the merits of the matter. It is in line with the principle of natural justice which is applicable to all courts, whether superior or inferior, that a person or entity against whom a claim or charge is made, be given a reasonable opportunity of appearing and presenting his/her/its case. If this principle is not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which adversely affects him/her/it, set aside.

18. In this case, since **Mr. Osman Erdinc** has shown in his affidavit that the Applicant owns some land as stated above and while observing the principle in the case of **Salomon –vs- Salomon**, that a Company is distinct from its directors, I am persuaded that the Applicant's directors should be accorded a chance to be heard before they are summoned for cross-examination.

19. In conclusion, having considered the facts of this case, the affidavits filed by both parties, the submissions by both counsels and the relevant law and authorities, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, the *ex parte* orders made on **2<sup>nd</sup> December, 2020** summoning the Applicant's director to court for examination are hereby set aside.

20. Each party shall bear its own costs for this application.

21. The Respondent is at liberty to fix its application dated **2<sup>nd</sup> December, 2020** for inter-parties hearing at a convenient from the court registry.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF .....JULY....., 2021.**

**D. O. CHEPKWONY**

**JUDGE**