



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**WINDING UP CAUSE NO. 5 OF 2006**  
**IN THE MATTER OF ZIANI HOLDINGS LIMITED**  
**AND**  
**IN THE MATTER OF THE COMPANIES ACT**  
**RULING**

1. Through an application dated 15<sup>th</sup> August, 2018 premised on the provisions of Section 94 of the Civil Procedure Act and Order 51 rule 4 of the Civil Procedure Rules, the applicant seeks the following orders:-

(i) Spent;

(ii) That the court be pleased to order that the Court Judgment of 26<sup>th</sup> February, 2009 and the consequential decree be executed forthwith by attachment and sale of the Respondent's company's asset plot No. 6308/I/MN, before the amount of the costs incurred in the suit can be ascertained by taxation; and

(iii) Costs of the application be provided for.

2. The application is supported by the affidavit of the applicant, Philomena Gertrude Bandari, sworn on 15<sup>th</sup> August, 2018. The respondent, Duncan Chengo Bandari, filed a replying affidavit on 25<sup>th</sup> September, 2018 to oppose the application.

3. The applicant's Counsel filed his written submissions on 30<sup>th</sup> October, 2018. Counsel for the respondent filed his submissions on the same day.

4. Mr. Karina, Learned Counsel for the applicant in arguing the application stated that he was relying on the provisions of Sections 63(e) and 94 of the Civil Procedure Act. He submitted that the power to order attachment before taxation is discretionary and the duty to demonstrate to the court that there is need to attach before taxation is mandatory. He stated that the land in issue is owned by the Company whereby each Director owns a single share. Counsel for the applicant further submitted that the respondent, Duncan Chengo, the *defacto* Director has been using unlawful means to deny the applicant the fruits of the Judgment.

5. He made reference to page 51 of the application where a letter from the Judiciary dated 10th October, 2017 is attached. This court was informed that the said letter confirms that the title to the suit property was deposited in court. He further submitted that at page 52 of the application there is a letter from the Ministry of Land and Physical Planning which states at paragraph 2 that the *defacto* Director is using illegal means to circumvent justice. Counsel for applicant indicated that the letter states that allegations made to them that the title is lost are lies, as the title is in Court.

6. This court's attention was drawn to the attachment at page 53 of the present application, which bears an application made to the Ministry of Land and Physical Planning by the respondent for a provisional certificate of title, in which the respondent states that he lost the original certificate of title. The court was referred to page 57 which is a police abstract he obtained after reporting about the alleged loss of the said title.

7. This court was further referred to the attachment at page 59 of the application, which is a letter from the Ministry of Land and Physical Planning addressed to the respondent informing him that it had come to their attention that he obtained a provisional certificate of title through perjury. The letter further states that they believed that he had something to do with the loss of the Land Register under the deed file in their custody.

8. Mr. Karina submitted that the *defacto* Director (respondent) was trying to defraud the applicant. Counsel made reference to this court's ruling of 7th April, 2017 which ordered the respondent to supply to Wambugu Valuer documents for valuation of the land in issue. He added that the respondent is uncooperative and is trying to take the only property for the company.

9. It was submitted for the applicant that they filed a valuation report on 16<sup>th</sup> October, 2018 which indicates that the open market value of the plot is Kshs. 75 Million. He prayed for the property to be sold and for the proceeds to be shared on a 50:50 basis. He relied on an extract from the **Encyclopedia of Forms and Precedents**, 5<sup>th</sup> edition, volume 10, at p.185 in paragraph 409 to show how the shares that were owned by the parties herein were to be divided.

10. Mr. Anami, Learned Counsel for the respondent opposed the application by the applicant by stating that Judge Serгон granted an order under Section 211 of the Companies Act and ordered the respondent to buy the applicant's shares at fair value but the company was not wound up. He further stated that the valuation of the asset of the company was to be done through a court order and that they had no issue implementing Judge Sergon's Judgment.

11. In reference to the authority cited by Counsel for the applicant from the **Encyclopedia of Forms and Precedents** (supra), Counsel for the respondent pointed out that it was applicable in instances where a company has been wound up.

12. He submitted that the land in issue was owed by the company and that Judge Sergon awarded one share to the respondent, yet the applicant claims 50:50 sharing. He indicated that he attached a CR12, to the respondent's written submissions and not to the replying affidavit.

13. Mr. Anami cited the case of **Federation of Women Lawyers Kenya (FIDA) vs Attorney General and Another** [2018] eKLR, where the court said that when it comes to division of the property of persons who were married, the jurisprudence of 50:50 had been overtaken by the law.

14. To reinforce his argument that this court is *functus officio* and should as such not entertain the present application, he made reference to the matter of **Les Belles Savages Limited Les Belles Savages Limited and in the matter of the Companies Act, Chapter 486, Laws of Kenya** [2014] eKLR.

15. In concluding his submissions, Mr. Anami contended that the formula for division of the shares the subject of the dispute is 1/1000<sup>th</sup>, with the applicant having the value of only one share.

16. Mr. Karina in response to the respondent's submissions emphasized that the application before this court is anchored on Section 94 of the Civil Procedure Act, which allows for execution before taxation.

17. He further posited that the applicant wishes to enforce the consequential decree issued by this court from the ruling of 7th April, 2017 on how the parties would share the property of the company. He stated that the respondent did not appeal against the said ruling.

18. He distinguished the case of **FIDA vs Attorney General and Another** (supra) from the present case by stating that the property herein is owned by a juristic person and was not matrimonial property. He further stated that the applicant and respondent were equal shareholders. He took issue with the manner in which the CR12 was introduced to the documents filed in court, which in his view, would cause prejudice to the applicant if it was to be considered.

## **ANALYSIS AND DETERMINATION**

The issues for determination are:-

- (i) If this court is *functus officio*;
- (ii) If the parties herein held equal shares in Ziani Holdings Limited; and
- (iii) If an order for execution before taxation should be granted.

## **FUNCTUS OFFICIO**

19. This court extensively addressed the doctrine of *functus officio* in its ruling of 7th April, 2017 and relied on several authorities to support its position that this court is not barred to address any applications which are supplemental to the Judgment delivered on 26<sup>th</sup> February, 2009 by Judge Sergon.

20. The order that is being sought in the present application is for attachment and execution before taxation under the provisions of Section 94 of the Civil Procedure Act. The said provisions state as follows:-

***“Where the High Court considers it necessary that a decree passed in the exercise of its original Civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”***

21. In the matter of **Les Belles Savages Limited and in the matter of the Companies Act, Chapter 486, Laws of Kenya** (supra), Judge Gikonyo when addressing the issue of *functus officio* cited the Court of Appeal decision in Nyeri Court of Appeal Civil Application No. 21 of 2013, **Dickson Muricho Muriuki vs Timothy Kagandu Muriuki and 6 Others**, where the court held that:-

**".....properly understood, whereas the court becomes functus officio when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court."** (emphasis added).

22. In this case, the order being sought by the applicant for attachment and execution before taxation, is supplemental or incidental to the Judgment of Judge Serгон and has been made in the process of actualization of the said Judgment. This court is therefore not *functus officio*.

#### **If the parties herein held equal shares in Ziani Holdings Limited**

23. Mr. Anami's submission was that the applicant and the respondent did not hold equal shares in Ziani Holdings Limited. In his view, the applicant held 1/1000<sup>th</sup> of a share in the said company. He therefore urged the court not to make an order for the asset of the company, that is plot No 6308/I/MN to be sold and the proceeds divided equally between the parties herein.

24. On the other hand, Mr. Karina was categorical that the applicant and the respondent held a share each in Ziani Holdings Limited and argued that the applicant is entitled to 50% of the proceeds, after the sale of the asset owned by the said company.

25. After hearing the evidence of the applicants, on page 2 of the Judgment dated 26th February, 2009, Judge Sergon stated as follows:-

**"The evidence indicates that the petitioner and the respondent hold equal shares in the company. The duo are the only directors and shareholders of the company."** (emphasis added).

26. There is no lack of clarity as to what Judge Sergon found after hearing the evidence tendered by the parties. In his finding, the parties held shares on a 50:50 basis. Contrary to the respondent's submissions, there is no new element that this court introduced in its ruling of 7th April, 2017.

27. It is apparent that since the delivery of Judge Sergon's Judgment, the respondent has taken the applicant in circles and has not shown interest in purchasing her share in Ziani Holdings Limited. The argument put forth by the respondent that the property was acquired during the subsistence of a marriage between the parties herein holds no water. This court is not dealing with division of a matrimonial property but with an asset owed by Ziani Holdings Limited, where the applicant and the respondent were Directors and shareholders in equal shares. The case of **FIDA vs Attorney General and Another** (supra) is not applicable in the present circumstances.

28. Attachment of a CR12 to submissions as was done by Counsel for the respondent is frowned upon by this court as it is tantamount to an attempt to introduce evidence through the back door. This court will therefore pay no regard at all to the said CR12.

29. The Court of Appeal in **Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi and Another [2014] KLR** addressed a similar issue whereby an attempt was made to introduce evidence by way of submissions. The Court had the following to say:-

**"Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."** (emphasis added).

30. Furthermore, evidence of shareholding was tendered before Judge Sergon. I therefore hold that there was no ambiguity in the said Judge's Judgment or in this court's ruling of 7th April, 2017 that the only asset of Ziani Holdings Limited was owned by the applicant and the respondent on a 50:50 basis.

#### **Whether execution should issue before taxation.**

31. When dealing with a case wherein an order for execution before taxation had been sought under the provisions 94 of the Civil Procedure Act, the court in **Mercedes Sanchez Rau Tussel vs Samken Limited & 2 Others [2002] eKLR** held thus:-

**"The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs.....aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for review.....no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone the pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment....."**

32. A perusal of the Judgment of Judge Sergon shows that the respondent had at one time sold plot No. 6308/I/MN but the sale was reversed through a court order. It has now transpired that after this court's ruling of 7th April, 2017, the respondent proceeded to the Ministry of Land and Physical Planning and obtained a provisional certificate of title on the ground that he had lost original title. The respondent in his

replying affidavit at paragraph 6 explains the circumstances which made him apply for the said certificate. If the contents of his depositions were to be regarded as true, this court would have expected to see a letter from the Deputy Registrar, Mombasa High Court addressed to the Chief Land Registrar, Mombasa, informing him of the loss of the original certificate of title.

33. With regard to the depositions contained in paragraph 3 of the respondent's affidavit, it was clear to this court when writing the ruling of the 7th April, 2017 that the respondent had frustrated efforts by the applicant to realize the decree. The said facts are well captured in the said ruling. It is apparent that the respondent herein did not file an appeal to challenge the said ruling. The orders made therein are also not the subject of review by this court. Had the respondent been aggrieved by the said ruling he should have appealed. He did not and the applicant is therefore entitled to the decree resulting therefrom, to perfect the Judgment delivered on 26th February, 2009. Nothing therefore turns on the depositions contained in paragraph 3 of the respondent's replying affidavit. The contentions contained in paragraphs 4 and 5 of the said affidavit have been addressed in preceding paragraphs of this ruling.

34. Having perused the annexures marked P-12, P-13, P-14, P-16 and P-17 that are attached to the applicant's affidavit, it is clear that the respondent applied for a provisional certificate of title in respect to LR. MN/I/6308 (CR 20862) on the basis that the original title was lost. It was however within his knowledge that it was in the custody of the High Court, Mombasa. The reasons advanced by the respondent do not denote that he acted in good faith and this court cannot fall into the trap of believing such facts, that misrepresent the true state of affairs.

35. It is further evident that knowing that the allegation about the loss and/or misplacement of the certificate of title was not true, the respondent went ahead to obtain a police abstract, a copy thereof is attached to the affidavit sworn by the applicant. The letter written by the Deputy Registrar on 10<sup>th</sup> October, 2017 addressed to the applicant confirmed that the certificate of title for the subject property was in the custody of the court, yet the application by the respondent for a provisional certificate of title was lodged at the Mombasa District Land Registry on 19th March, 2018. A provisional certificate of title was issued on 3<sup>rd</sup> July, 2018, as per the annexure marked P-15, attached to the applicant's affidavit.

36. In light of all the above, the application is hereby allowed. I hereby grant orders for:-

(i) Attachment and sale of the asset for Ziani Holdings Limited, namely, plot No. 6308/I/MN before the amount of the costs incurred in the suit can be ascertained by taxation;

(ii) The said proceeds shall be deposited in court. Either party will be at liberty to apply for release of the said proceeds, subject to an amount thereof being set aside for costs of the winding up cause; and

(iii) Costs of the application dated 15<sup>th</sup> August, 2018 are awarded to the applicant.

**DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of January, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the applicant

Mr. Anangwe holding brief for Mr. Anami for the respondent

Mr. Oliver Musundi - Court Assistant