



**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**  
**TO THE HIGH COURT OF KENYA**  
**RULING**

1. The petitioner/applicant Philemona Gertrude Bandari has through a Notice of Motion dated 19th December, 2016 moved this court under the provisions of sections 780, 782, 1003, 1004 and 1024 of the Companies Act for the following orders:-

(i) Spent;

(ii) spent;

(iii) In the alternative to prayer 2, one Sanjeev Khagram of A.B. Patel & Patel Advocates, Oriental Building, Nkrumah Road, P O Box 80274 – 80100, Mombasa or the Official Receiver be appointed as a Receiver to preserve the assets of the Company;

(iv) The Respondent Company and the said Duncan Chengo Bandari being the *de facto* sole member and director of the Respondent Company be directed to within seven (7) days of the Order to release all records and disclose all information relating to the affairs of the Company to one Wambugu Cyprian Mambo of Wambugu & Associates, Certified Public Accountants, Motormart Building, Moi Avenue, P O Box 86895 – 80100, Mombasa for purposes of valuing the company as decreed in the judgment dated 26/2/09;

(v) The Respondent Company pays the petitioner 50% of the value of the company within seven (7) days of the date which valuer files the report in court;

(vi) In event the company and or Duncan Chengo Bandari refuses, neglects or otherwise fails to give the valuer such records, information, and access as the valuer may require, or to pay the petitioner the 50% share of the value declared by the valuer, the assets of the company be attached and sold and 50% of the proceeds be paid to the petitioner as decreed in the said judgment of 26/2/2009; and

(vii) Cost of this application to be in the cause.

2. The application is premised on the grounds on the face of it and the affidavit of the applicant filed on 19<sup>th</sup> December, 2016. The respondent filed grounds of opposition on 12<sup>th</sup> January, 2017 and a replying affidavit on 19<sup>th</sup> January, 2017. Counsel on record filed their written submissions which they highlighted.

### **APPLICANT'S SUBMISSIONS.**

3. Mr. Sitonik, Learned Counsel for the applicant informed the court that Judgment was delivered on 26<sup>th</sup> February, 2009 where Serگون J ordered the applicant's co-director at Ziani Holdings Ltd, Duncan Chengo Bandari, (*hereinafter referred to as Chengo*) to buy the applicant's share of the company at a fair market value. The court was to appoint a Valuer within 30 days from 26<sup>th</sup> February, 2009 who was to determine the value of the share. Counsel explained that this did not happen as the Ziani Holdings Limited (*hereinafter referred to as the respondent*) filed an application by way of chamber summons dated 25<sup>th</sup> March, 2009 seeking stay of execution. The said application was struck out on 6<sup>th</sup> May, 2009.

4. Counsel further stated that Chengo thereafter filed an application dated 20<sup>th</sup> April, 2011 seeking to comply with the Judgment out of time. On 28<sup>th</sup> August, 2015, he sought to apply for review of the Judgment but withdrew the application on 16<sup>th</sup> November, 2015.

5. Mr. Sitonik argued that the applicant has filed the present application to actualize the Judgment given and there was urgency in having the property preserved as Chengo has made attempts to dispose of the same fraudulently with a view of defeating the Judgment.

6. Counsel referred to a copy of the Judgment in Mombasa HCCC No. 485 of 1995 where the court declared that there was an attempt to deny the applicant her share of the property. It was submitted that in the year 2015, Chengo, the *de facto* Director of the company filed a claim for adverse possession against the company, with the company being the respondent where he purported not to know the physical address of the company. The company was served through substituted service. Counsel referred the court to paragraph 5(f) of the applicant's affidavit.

7. Mr. Sitonik further contended that Chengo has refused to give the applicant the records of the company and has denied the Valuer access to the property thus the apprehension on the part of the applicant that the property will be disposed of.

8. It was submitted that in the year 2011, Chengo had stated that he had been unable to comply with the Judgment due to divorce proceedings. Counsel informed the court that the said proceedings had been finalized but there was still no compliance.

9. The court was informed that it has powers to deal with parties who are hell bent to defeat justice and the court is not *functus officio*, because it has powers to deliver justice and ensure that court orders are complied with and that no party steals a match against the other.

10. Mr. Sitonik concluded his submissions by urging the court to allow the applicant to enjoy the fruits of the Judgment by allowing the application. He referred the court to his list of authorities and relied on the decisions in **Telkom Kenya Ltd. vs John Ochanda (Suing on his own behalf and on behalf of 996 Former employees of Telkom Kenya Ltd)**, [2014] eKLR, **Bellevue Development Company Ltd. Vs Vinayak Builders Ltd. & Another** [2014] eKLR, **Ntulele Group Ranch & Another vs Sankale Ole Kisotu & 9 others** [2014] eKLR and **Njuguna vs Njau** [1980] eKLR.

11. He brought to the court's attention that in the chamber summons dated 25<sup>th</sup> March, 2009, the law firm of Steve Kithi & Co Advocates sought to come on record in place of Okumu Advocates since Judgment had been entered in the case but the application was struck out and the said law firm of Steve Kithi & Company was subsequently not allowed to come on record.

### **RESPONDENT'S SUBMISSIONS**

12. Mr. Oduor, Learned Counsel for the respondent informed the court that the law firm of Steve Kithi has been on record for as long as the law firm of Ndegwa & Associates (as it then was) has been on record. No objection has ever been raised on Steve Kithi & Co. Advocates representing the respondent.

13. He cited the provisions of Section 3A of the Civil Procedure Act and Articles 159(1) and 159(2) of the Constitution of Kenya to cure any defect on the issue of representation. He stated that in the case of **Rai vs Rai**, the court observed that the rules of procedure should not be used as mistresses but handmaidens of justice. He added that courts ought to exercise equity and give parties an opportunity to be heard.

14. Counsel submitted that the applicant's rights as a Director of Ziani holdings were extinguished on 26<sup>th</sup> February, 2009 after the elapse of six months since delivery of the said Judgment. Mr. Oduor indicated that the applicant had not proved that Chengo frustrated her from management of the company.

15. Counsel contended that the Judgment of 26<sup>th</sup> February, 2009 did not provide that the applicant was to be paid 50% of the value of the company. He further submitted that the court became *functus officio* after delivery of the said Judgment. He cited the case of **Telkom Kenya Ltd. vs John Ochanda** (supra) where the court addressed the issue of *functus officio*. He also referred to the case of **Dhanji Jadra Ramji vs Commissioner of Prisons & another** [2014] eKLR where the holding is that the court becomes *functus officio* once it has discharged its responsibility of delivering a Judgment and that the court can thereafter not review or alter its decision. He urged the court to drop its tools upon finding that it has no jurisdiction in so far as execution of the Judgment in issue is concerned. He contended that the applicant should not hide behind the veil of executing the Judgment of 26<sup>th</sup> February, 2009. He prayed for dismissal of the application.

#### **APPLICANT'S REJOINDER**

16. Mr. Sitonik submitted that he was seeking enforcement of the Judgment of 26<sup>th</sup> February, 2009 and not a review of the same. Chengo was to purchase the applicant's share in the land owned by the company. Counsel referred this court to line 8 from the bottom of page 14 of the said Judgment where the Judge observed that it was obvious from the evidence presented that Chengo had conducted the affairs of the company in a manner oppressive to the applicant. On the same page of the said Judgment at line 10 from the bottom, the Judge stated that Chengo had no intention of allowing the applicant to run the affairs of the company.

17. Counsel added that the doctrine of *functus officio* bars the court from engaging in exercise of the case but not on issues of execution. He referred to the case of **Bellevue Development Company Ltd. Vs Vinayak Builders Ltd. & Another** (supra) which held that the court can deal with supplemental matters to give effect to the Judgment. Mr. Sitonik indicated there is fear that the property may be sold to a third party.

#### **ANALYSIS AND DETERMINATION**

The issues for determination are if this court is *functus officio* and if it has jurisdiction to grant the orders sought.

18. Having heard the submissions of the Counsel on record, there is no doubt in my mind that Chengo has put hurdles in the way of the applicant's full realization of the Judgment delivered on 26<sup>th</sup> February, 2009 by Sergon J. In paragraph 6 of her supporting affidavit, the applicant deposes that the respondent has refused to give her records of any information relating to the affairs of the company, has denied the Valuer access to the only asset of the company i.e. LR. MN/I/6308 and has continued his attempt to sell the land secretly. The applicant attached copies of a ruling in Msa. HCC No. 485 of 1995 whereby she proved that the respondent had previous to the Judgment in issue, sold and transferred the property LR.MN/I/6308 to a third party without her knowledge or consent.

19. The applicant in paragraph 5 of the said affidavit outlines a further attempt by Chengo to deny her the fruits of the Judgment of 26<sup>th</sup> February, 2009. She deposes that he has instituted a claim for adverse possession in ELCC No. 331 (O.S) of 2015 (Mombasa) **Duncan Chengo Bandari vs Ziani Holdings Company** claiming that he has become the owner of the land owned by the company. In the said pleadings, he has cited the company where he is the sole *de facto* director as the respondent. The applicant further deposes that in the said suit, the respondent has applied for orders to serve the company by substituted service as he does not know the physical location of the company, thereby telling the court an outright lie of being unable to trace the company. A copy of the Chengo's supporting affidavit to the said suit is attached to the applicant's affidavit to the present application as annexure P8. The applicant further deposes that the respondent requested for Judgment on 21<sup>st</sup> December, 2015 by purporting that the company in which he is the sole Director had failed to enter appearance. A copy of the request for Judgment is attached to the applicant's affidavit as annexure P6.

20. In paragraph 7 of her affidavit, the applicant states that unless the assets of the company are preserved by way of an injunction restraining the respondent company and Chengo from disposing of the assets of the company, or by appointing a receiver, he will dispose of the assets thereby defeating or delaying execution/enforcement of the said Judgment and decree.

21. The replying affidavit of the respondent sworn on 19<sup>th</sup> January, 2017 largely addresses the issues of this court being *functus officio*. Counsel for the respondent extensively submitted on the said issue and his submissions have been duly replicated in this ruling.

22. In paragraphs 19 and 20 of the replying affidavit, Chengo deposes that no notice of appeal has been lodged for the last eight years and that the applicant has not made any effort to communicate with a view to satisfying the Judgment. He further states that the orders being sought transcend the confines of the Judgment or the provisions of section 33 of the repealed Companies Act that was applied to the Judgment. In paragraph 11 of the replying affidavit, he deposes that the application herein is incompetent as it presumes that the affairs of the company are in exactly the same position as they were eight years ago.

23. In paragraph 12 of the said affidavit, Chengo states that the applicant is confusing the value of the company's shares with the value of the property and assets held in the name of the company on the other hand.

24. In paragraph 21 of the replying affidavit, Chengo states that the application herein is an attempt to defend Mombasa ELCC No. 331 (O.S) of 2015, through the back door.

25. The Court of Appeal in the case of **Kenya Shell Ltd. vs John Ochanda** (supra) which was relied upon by both counsel on record, cited with approval the case of **Jersey Evening Post Ltd. vs Al Thani** [2002] J LR 542 at 550 in illustrating the exceptions to the *functus officio* doctrine. It stated as follows:-

***“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting arithmetical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected.”*** (emphasis mine)

26. Similarly, in the case of **Bellevue Development Company Limited vs Vinayak Builders Limited & Another** [2014] eKLR, the court stated thus:-

***“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 being sought in the case despite that judgment has***

**already been rendered by the court.**” (emphasis added)

27. According to Counsel for the respondent, the court became *functus officio* on delivery of its Judgment on 26<sup>th</sup> February, 2009. In his view, the applicant is seeking a review of the orders of the court instead of appealing the decision of the said court. Mr. Sitonik is of the view that the orders being sought are aimed at execution of the Judgment so delivered. His client has no issue with the Judgment but enforcement of the same.

28. In the Judgment delivered on 26<sup>th</sup> February, 2009, Serگون J. held as follows:-

**“What is apparent from the evidence is that the company owns plot No. 6308/I/MN and that the respondent has put up a house. What should be valued is the plot and not the structure standing thereon .... For clarity purposes, the valuer who shall be appointed to carry out the valuation of the shares should not take into account the house standing on the land. In the end, I allow the petition in terms of prayer (a) as prayed. Let the parties appear before this court for mention within 30 days for purposes of appointing a valuer. The respondent has 6 months from the date hereof to comply with the provisions of section 4 of the Companies Act. In default, the provisions of section 33 of the Companies Act shall take effect. Cost of the petition is given to the petitioner and shall be met by the Company.”**

29. In determining the issue of the reason why the share of the applicant has not been valued and bought off by Chengo, I perused the court file. It reveals that soon after delivery of the Judgment of 26<sup>th</sup> February, 2009, Counsel for the respondent filed a Chamber Summons dated 25<sup>th</sup> March, 2009, seeking to come on record and for stay of execution pending appeal. The application was struck out by Serگون J. as it was admitted by Mr. Kithi that he had not filed a Notice of Appeal within the required timeliness.

30. Mr. Kithi thereafter filed another application dated 13<sup>th</sup> July, 2009 seeking leave to come on record, a consent order was eventually recorded on the said application on 10<sup>th</sup> September, 2009 before Ojwang J (as he then was). The foregoing shows that the law firm of Steve Kithi & Co Advocates are properly on record.

31. On 28<sup>th</sup> April, 2011, Mr. Kithi appeared before the said Judge when he informed the court that he was seeking a prayer for the application dated 20<sup>th</sup> April, 2011 to be certified as urgent. He also informed the court that the shareholders were a married couple who did not comply with the terms of the Judgment of 18<sup>th</sup> February, 2008 (sic). They were in the process of divorce and the divorce was complete. The Judge certified the Notice of Motion of 20<sup>th</sup> April, 2011 as urgent and ordered for listing of the case on priority basis. The said application was listed for hearing on 29<sup>th</sup> April, 2011, 13<sup>th</sup> May, 2011 and 25<sup>th</sup> August, 2011. On 12<sup>th</sup> October, 2011, Mr. Kithi appeared before Kasango J. and he was ordered to serve the applicant herein with the said application.

32. On 24<sup>th</sup> August, 2015 an application was filed by Chengo seeking to review the Judgment delivered on 26<sup>th</sup> February, 2009. A hearing date was thereafter taken for the said application but come the 16<sup>th</sup> November, 2015, Counsel for the applicant herein had not been served with the said application. Mr. Mwainzi for the respondent withdrew the said application. The said withdrawal paved way for the applicant to file the present application wherein Judge P.J. Otieno granted prayer No. 2 pending *inter partes* hearing.

33. It is clear from the foregoing excerpts from the court proceedings that the respondent and its *de facto* director, Chengo, filed application after application thereby stalling the execution of the Judgment of 26<sup>th</sup> February, 2009. The applicant therefore has a valid reason to seek audience from this court for enforcement of the said Judgment. It contains orders for mention of the case within 30 days from the date of the Judgment for purposes of appointing a Valuer. There has been nil progress in actualization of the aforesaid order. It is thus my finding that the High Court is not *functus officio* and is still seized of this matter.

34. The provisions of section 63 of the Civil Procedure Act are applicable in the circumstances of this case. The said section makes supplemental provisions in the following terms:-

***“In order to prevent the ends of justice being defeated, the court may, if it is so prescribed-***

***(a) Issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;***

***(b) Direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;***

***(c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;***

***(d) Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;***

***(e) Make such other interlocutory orders as may appear to the court to be just and convenient.”***  
(emphasis added).

35. The Judgment of the court has not been perfected as the applicant is yet to realize the fruits of the Judgment. Having found that this court is not *functus officio*, it therefore automatically follows that this court has jurisdiction to determine the application dated 19<sup>th</sup> December, 2016. Chengo's argument that the applicant has been indolent for the last eight years, is far-fetched and misplaced. The proceedings that have taken place since delivery of the Judgment on 26<sup>th</sup> February, 2009 to date show no indolence on the part of the applicant in enforcing the Judgment. It is a doctrine of equity that equity shall not suffer a wrong to be without remedy.

36. Section 3A of the Civil Procedure Act provides that:-

***“Nothing in this Act shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

37. In the case of **Equity Bank Limited vs West Link MBO Limited**, Civil application No. 78 of 2011, Musinga J.A held:-

***“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the Constitution or statute.”***(emphasis added).

This court under the said provisions has inherent jurisdiction to ensure that ends of justice are met.

38. Mr. Sitonik relied on the provisions of Sections 780(1) and 782(1) and (2), 1003(3)(b) and (e), 1004(9)(2) and (3) and 1024 of the Companies Act in seeking orders in the present application. Section 782 provides as follows:-

***(1) If, on the hearing of an application made in relation to a company under section 780 or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.*** (emphasis added).

***(2) In making such an order, the Court may do all or any of the following:***

**(a) regulate the conduct of the affairs of the company in the future;**

**(b) require the company-**

**(i) to refrain from doing or continuing an act complained of; or**

**(ii) To do an act that the applicant has complained it has omitted to do.**

39. Counsel for the respondent did not address the foregoing provisions that were relied upon by Counsel for the applicant. The provisions of Section 782 of the Companies Act empowers this court to grant the orders sought. The Judgment of 26<sup>th</sup> February, 2009 and subsequent divorce of the applicant and Chengo did not sound the death knell of the company. The company exists to date, all that is outstanding is for payment to the applicant, of a fair value of her share in the company. As for the matter that is pending before the ELC, all that this court can do is note of its existence.

40. Arising from the pleadings on record, the submissions made and authorities cited, I am satisfied that the applicant has made out a case meriting the grant of the following orders:-

(i) That the Official Receiver be and is hereby appointed as a Receiver to preserve the assets of the respondent company;

(ii) The respondent company and Duncan Chengo Bandari being the *de facto* sole member and director of the respondent company are hereby directed to within seven (7) days of this order to release all records and disclose all information relating to the affairs of the Company to one Wambugu Cyprian Mambo of Wambugu & Associates Certified Public Accountants, Motormart Building, Moi Avenue, P O Box 86895 – 80100, Mombasa for purposes of valuing the company as decreed in the Judgment dated 26th February, 2009;

(iii) The respondent company pays the applicant 50% of the value of the company within seven (7) days of the date which the Valuer files the report in court;

(iii) In event the company and/or Duncan Chengo Bandari refuse, neglect or otherwise fail to give the Valuer such records, information, and access as the Valuer may require, or to pay the petitioner the 50% share of the value declared by the Valuer, the assets of the company be attached and sold and 50% of the proceeds be paid to the petitioner as decreed in the said judgment of 26th February, 2009; and

(iv) Costs are awarded to the applicant.

**DELIVERED, DATED and SIGNED at MOMBASA on this 7<sup>th</sup> day of April, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Sitonik for the appellant

Mr. Kithi for the respondent

Temu - Court Assistant