



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 208 OF 2004

**NAKURU TEACHERS HOUSING
CO-OPERATIVE SOCIETY LTD.....PLAINTIFF**

VERSUS

WANJOYA ENTERPRISES LIMITED.....DEFENDANT

NINE SISTERS LIMITED.....OBJECTOR

RULING

1. Judgment in this suit was delivered on the 29th January 2015. A decree was thereafter drawn in the following terms:

(a) That the defendant is directed to provide the plaintiff with an equivalent suitable portion of land for residential purposes within 60 days hereof.

(b) In the event that there be default, then the defendant must refund the plaintiff the value equivalent for the said portion at current market prices which should be assessed by a valuer mutually agreed on by both parties within 30 days after lapses of the period mentioned in (a) above.

(c) Costs of this suit are awarded to the plaintiff.

2. The decree is dated the 29th February 2015. The property subject of the above Judgment and decree is **LR No. 4731/2 and 6282/2**(airstrip site) Nakuru Teachers Housing Phase II – Nakuru County.

3. The application before me is dated 8th June 2016 and is brought by the plaintiff, Nakuru Teachers Housing Co-operative Society Limited under the **Provisions of Order 22 Rules 8 and 9 of the Civil Procedure Rules and Section 3A, 1A, 1B of the Act.**

It seeks orders of injunction to restrain **NINE SISTERS LIMITED** from disposing, alienating or charging **LR NO. MITI MINGI MBARUK BLOCK 8/1604** pending hearing and determination of this application.

It further seeks injunction orders against attachment and advertisement of the said property registered in the name of **NINE SISTERS LIMITED** measuring 6.82 hectares (16.85 acres) by Tango Auctioneers or in the alternative, an order that the defendant **Kianjoya Enterprises** do pay a sum of Kshs.60,275,000/= which is the agreed sum of Kshs.58,970,000/= plus interest accrued from the 18th June 2015.

4. The application is supported and based on grounds found on the face of the application, and more specifically as may be deduced from the judgment of the court delivered on the 29th May 2015.

5. The supporting affidavit is sworn by the Secretary of the plaintiff, one Solomon Kibaki on the 8th June 2016. The terms of the Judgment of the court are clearly summarised in the decree referred to and quoted above. Following thereafter, the subject property was valued by the parties independent valuers but by consent of both parties a mutual valuation of Kshs.58,975,000/= was agreed upon and the consent filed on the 18th June 2015.

A certificate of costs upon taxation of the plaintiffs party and party Bill of costs was also issued at Kshs.2,599,847/= on the 28th September 2015. I have seen correspondence between the plaintiffs Advocates Nancy Njoroge & Company Advocates with the Defendants director Honourable Maina Wanjigi who made promises to pay the decretal sum. Such letters/emails are dated 6th November 2015, 5th November 2015, 4th November 2015 and others. The thread running through the letters is that the Defendants director Hon. Maina Wanjigi was in the process of selling 15 units at **NINE SISTERS LIMITED** to enable the company pay off the plaintiffs as per the court judgment.

In deed, in his letter dated 24th November 2015, Honourable Maina Wanjigi as chairman of the Defendant, and in other letters indicated a proposal of giving the plaintiffs alternative land of equivalent value to the judgment sum that however did not happen.

6. The only conclusion that can be drawn from the correspondence is that Honourable Maina Wanjigi was the chairman and director of the defendant company and that the defendant and Nine Sister Limited were sister companies under the directorship of Honourable Maina Wanjigi.

7. To bring this application to perceptiveness, the objector Nine sisters Limited, which is sought to be restrained from selling or disposing of **L.R. NO. MITI MINGI MBARUK BLOCK 8/1604** is a sister company to the defendant, and its director Hon. Maina Wanjigi had offered to sell 15 units out of the above property owned by the Nine Sisters Limited company to pay off the plaintiffs decretal sum.

It is for that reason that this application was filed.

8. **L.R. NO. MITI MINGI BLOCK 1604** is the property of Nine Sisters Limited whose directors are Honourable Maina Wanjigi and his wife Mary Wambui Wanjigi as confirmed by an official search dated 30th May 2016 from the Registrar of Companies.

It is deposed that the defendant sold a portion of its land to the plaintiffs and the remainder was transferred to Nine Sisters Limited and registered in its name.

This is also confirmed by an official search which confirms that the subject land portion registered to Nine Sisters Limited on the 13th August 1996.

9. There is no contestation that the property sought to be sold by the Auctioneers to recover the plaintiffs decretal sum from the Defendant is the property of both the Defendant and the said Nine Sisters Limited. The applicant has sought an order of lifting the veil of incorporation to facilitate attachment and sale of the property as aforementioned.

10. On the 20th June 2016, the court by an interim order of injunction restrained the said **Nine Sisters Limited** from selling and or dealing in any manner or charging the property **LR NO. MITI MINGI MBARUK BLOCK 8/1604** pending hearing and disposal of the present application.

11. In its grounds of opposition dated 1st July 2016 and filed on the 4th July 2016, the objector Nine Sisters Limited objected to the attachment of the property on grounds that being a legal entity, and not a party to the suit and that liabilities under the decree should not be transferred to it. Honourable Maina

Wanjigi, a director of the objector in his replying affidavit sworn on the 21st July 2016 deposes that the objector has proprietary rights over the property and is a different legal entity and therefore its property ought not be attached in execution of the decree. He however admits that the two companies, the defendant and the objector share directorship.

12. From the above prognosis, the question that arises for determination is only one.

Whether the property of a limited liability company, whose directors are similar with those of a Sister Limited Liability Company may be attached to recover a liability of the other Sister Company.

13. It is trite that a limited liability company has its own legal existence and personality separate from its directors and shareholders. It does not hold properties on behalf of its directors nor do the directors have powers to dispose of its property for their own benefit. See **Kenya National Capital Corporation Limited -vs- Hans Jurgen Langer (2016) e KLR** where Justice Fred Ochieng captured vividly the legal position of limited liability companies as separate and distinct legal entities from their directors and shareholders.

14. The issue of lifting the veil of incorporation, referred to as “**piercing the corporate veil**” in **Halsbury's Laws of England 4th Edition Vol. 7** has been visited on many occasions in our Kenyan courts. The business of the company is carried out through its directors and agents but for the benefit of the company. In reality, a limited liability company is an association of persons who are the beneficiaries of the corporate assets and liabilities.

The directors are the controlling vehicles of the company.

See **Litein Tea Factory Ltd and Another -vs- Davis Kiplagat Mutai & 5 Others (2015) e KLR**.

15. It is now trite that the veil of incorporation may be disregarded and lifted when it is being used to mask for fraud or improper conduct, and when the court, in its function to do justice by treating a particular company for purposes of litigation before it, as identical with the persons who control that company.

16. The defendant company in this case and the objector company have similar directors, the persons who move and make decisions for the two companies.

See **Joel Ndemo Ongali & Another -vs- Loyce Mukunya (2015) e KLR**

Based on the above, the Honourable Maina Wanjigi offered and promised, as a director and chairman of both the defendant and the objector to sell some properties of the objector to liquidate the liabilities of the defendant.

17. In that aspect, the veil of incorporation was lifted by no other than the common director, Honourable Maina Wanjigi himself. Having done so voluntarily, in my view, he cannot come around and plead protection by the law to deny the defendant attachment of the same property that he had offered for sale to pay its debts. That in my considered view would be condoning mischief, fraud and improper misconduct by the directors and especially the director, Honourable Maina Wanjigi. As stated in **Halsbury's Laws of England 4th Edition**(Supra) and quoted by **J. Gikonyo in Joel Ndemo Ougau & Another (Supra)**.

18. I agree with the objectors submission that the objectors are not parties to the present case and therefore not judgment debtors.

This is however a proper case to lift the corporate veil and move for attachment of the objectors property for reasons I have stated above. Directorships of both the defendant company and the objector being the same, and they having been frustrating recovery of the decretal sums by hiding behind the corporate veil, for the ends of justice to meet, I shall pierce that veil of incorporation and ultimately allow the objectors property **LR NO. MITI MINGI MBARUK BLOCK 8/1604** to be attached in execution of the decree by

Tango Auctioneers.

19. I have considered the consent judgment recorded by the parties and the two options they put forth on 29th January 2015. The defendant failed to comply with either of the two.

The defendant has failed to provide or give the plaintiffs an equivalent suitable land for residential purposes (options No.1)

It has also failed to refund to the plaintiffs the agreed value of land as assessed and agreed upon by all the parties in the sum of Kshs.60,275,000/= all inclusive as at 18th June 2015.

20. For the above reasons, the plaintiff's application dated 8th June 2016 is allowed and specifically prayer No(d).

The court proceeds to grant an order of attachment and advertisement for sale of property known as **LR NO. MITI MINGI/MBARUK BLOCK 8/1604** registered in the name of **NINE SISTERS LIMITED** measuring 6.82 Hectares by Tango Auctioneers. The objectors' opposition is found to be devoid of merit for reasons stated above and is dismissed.

21. The interim orders of injunction given by the court on the 19th September 2016 and issued on the same day are vacated.

The applicant/plaintiff shall have costs of the application payable by the defendant.

Dated, Signed and Delivered this 6th Day of April 2017

J.N. MULWA

JUDGE