



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1225 OF 2013

KIFARU INVESTMENT LIMITED.....1ST DECREE HOLDER

WANJIRU SHINGA.....2ND DECREE HOLDER

KISHORKUMAR DHANJI VARSANI.....3RD DECREE HOLDER

HARJI DHANJI VARSANI.....4TH DECREE HOLDER

SAMUEL WAMBU MWANGI.....5TH DECREE HOLDER

MOHAN SINGH PANESAR.....6TH DECREE HOLDER

WILLIAM PIKE.....7TH DECREE HOLDER

=VERSUS=

KIHINGO VILLAGE (WARIDI GARDENS)

LIMITED.....1ST JUDGEMENT DEBTOR

KIHINGO VILLAGE (WARID GARDENS)

MANAGEMENT LIMITED.....2ND JUDGMENT DEBTOR

RULING

1. This is the notice of motion dated 23rd May 2019 brought under Article 40, 48 and 159 (2) of the Constitution, 2010, Section 14 and 29 of the ELCA, section 863 of the Companies Act, Section 1A, 1B, 3A, 63 and 98 of the Civil Procedure Act, order 9 rule 9 and order 51 rule 1 of the Civil Procedure Rules 2010 and other enabling provisions of the law.

2. It seeks orders

1. *Spent.*

2. *Spent*

3. *Spent*

4. *Spent*

5. *FAPCL Group Limited be and are hereby appointed to manage Kihingo Village (Waridi Gardens) estate in place of the 2nd Judgement Debtor, in compliance with the decree dated 5th February 2019.*

6. *Pending the hearing and determination of this application herein, an interlocutory injunction do issue barring the judgement*

debtors whether by themselves, or through their agents or servants or howsoever from in any manner dealing with, transferring, disposing of, charging or otherwise interfering with the reversionary interest of and club house erected on Land Reference Number 27754 (IR NO. 108885), other than in compliance with the decree dated 15th February 2019.

7. An injunction compelling the 1st judgment debtor to execute all necessary documents for transfer of the reversionary interest of and club house erected on Land Reference Number 27754 (IR NO. 108885) to the 2nd judgment debtor within 7 days of this court's order failing which the Deputy Registrar of the Environment and Land Court at Milimani be ordered to forthwith execute these documents.

8. The registrar of companies be ordered to rectify the company register and records of the 2nd judgment debtor in accordance with the award dated 28th July 2016 and decree dated 15th February 2019 to:-

a. Remove all references to Class B shares; and

b. Remove all purported Class B shareholders.

9. This court issue summons to the following persons to attend court and show cause as to why they should not be punished for contempt of court in accordance with Section 29 of the Environment and Land Court Act for failing to obey the terms of the decree dated 15th February 2019.

a. James Ndungu Gethenji – 1st and 2nd judgement debtors

b. Chacha Mabanga – Director, 2nd defendant.

10. The court bailiff with the assistance of the police be ordered to arrest James Ndungu Gethenji and Chacha Mabanga who should be produced to court forthwith.

11. In the event that contempt is not purged, the court do convict James Ndungu Gethenji and Chacha Mabanga to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, each.

12. All further and necessary directions as may be necessary for the efficient and expedient disposal of this application.

13. The costs of this application on a full indemnity basis.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (gg).

4. The application is supported by the affidavit of Mohan Singh Penesar, the 6th Decree Holder/Applicant sworn on the 23rd May 2019 and a supplementary affidavit sworn on 27th June 2019.

5. The application is opposed. There is a replying affidavit sworn by James Ndungu Gethenji, a director of the 2nd Judgment Debtor sworn on the 25th June 2019. There is also a replying affidavit sworn by Mr. Chacha Mabanga, the alleged contemnor sworn on the 25th June 2019 and a further affidavit sworn on 1st July 2019.

6. It is the 2nd Judgment Debtors submissions that the court is *fuctus officio* as the Decree Holders are attempting to re-litigate issues that are already determined. The decree was extracted unprocedurally. The 2nd judgment debtor cannot comply with the appointment of the management of FAPLC to manage the affairs of the 2nd judgement debtor as this would be in contravention of the orders granted in Petition E105 of 2018 which is pending in the High Court, Commercial Admiralty and Tax Division. Further that the decree holders ought to lift the 2nd judgment debtor's corporate veil before citing the directors for contempt.

7. It is Chacha Mabanga's submissions that the meeting of 13th April 2019 was improperly convened contrary to court orders therefore the resolutions cannot be binding. Further, that this court is *fuctus officio* as far as the prayers sought in the application are concerned. Also that some of the prayers sought are *subjudice* Petition E105 of 2018. He cannot be cited for contempt in light of the orders granted on that petition.

8. I have considered the notice of motion and the affidavits in support, I have also considered the replying affidavits, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether this court is *fuctus officio*.

(ii) Whether the decree holders/applicants are entitled to the prayers sought.

(iii) What effect if any do the orders in Petition E105 of 2018 have on the instant application.

(iv) Whether the director of the 2nd judgment debtor ought to be cited for contempt.

9. There is no doubt that the dispute was referred to arbitration. The arbitration was concluded and an award delivered on 28th July 2016. By the ruling dated 6th February 2018 the court entered judgement in favour of the plaintiffs as against the defendants in terms of the sole Arbitrator's Final Award published on 28th July 2016. The Plaintiff/Decree holders went ahead and extracted decree. The same has not been set aside. The Judgment Debtors contend that the said decree was unprocedurally extracted.

10. Section 14 of the ELCA, provides that:-

“A judgment, award, order, or decree of the court shall be enforceable in accordance with the Civil Procedure Rules”.

I have gone through order 21 rule 8 of the Civil Procedure Rules. The judgment debtors admit that they received a draft decree from the decree holders advocates to which they objected to it. This confirms that the draft decree was forwarded to them. It cannot therefore be claimed that the decree was extracted unprocedurally.

11. Section 34(1) of the Civil Procedure Act provides that:-

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit”.

This court therefore cannot be said to be *factus officio* as it has to ensure that it's orders are executed.

12. There is also no doubt that there exists another matter being Petition NO. E105 of 2018 before the High Court Commercial, Admiralty and Tax Division. On 4th December 2018, the following order was issued:-

“That pending the hearing and determination of the petition herein the status quo prevailing in terms of directorship of the nominal respondent and provision of utilities and services to the members of the nominal respondent shall prevail, be and is hereby granted”.

The said orders are still in force and have not been discharged.

13. As long as these orders are still in force, this court would be granting the prayers sought in this application in futility.

14. In view of the orders subsisting in PET No. 105 of 2018, it would not be in the interest of justice for this court to issue orders sought in prayers 5 to 11 of the application. The Decree Holders/Applicants ought to decide in which case they wish to proceed with.

15. I also note that prayer (6) of the Decree Holders' application refers to a club house. The said club house was not mentioned in the Final Award. Similarly prayer (8) of the said application refers to Class B shares which the Final Award does not specifically mention.

16. As stated earlier, this court adopted the Award of the sole Arbitrator. A decree has been extracted. The same has not been set aside. It is upon the decree holders to take it through the normal execution procedure. They should however do so as per the terms of the Award.

17. The upshot of the matter is that this court cannot grant the orders as they are sought. For avoidance of doubt, the judgment debtors should not interfere with the provision of services and utilities to Kihingo Village (Waridi Gardens) Estate. Each party do bear own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 26th day of September 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kabugu for Allen for the Decree holders

Mr. Gikinyo for Katiku for the Judgment Debtors

Ms L. Ezekiel for Otieno for Chacha Mabanga

Kajuju - Court Assistant