



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISCELLANEOUS APPLICATION NO.32'A' OF 2017

KENNETH KARANJA KIBATHI T/A

M/S KIBATHI & COMPANY ADVOCATES.....APPLICANT

-VERSUS-

EQUITY MASTERS LIMITED.....RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **24th February 2016**, brought under **Order 22 Rule 35** of the *Civil Procedure Rules, Sections 1A, 1B, 3A, 63(a)* of the *Civil Procedure Act, Section 48(2)* of the *Advocates' Act, Cap 16 Laws of Kenya* and *Rule 13A* of the *Advocates Remuneration Rule*.

The Applicant has sought for the following orders

- 1) That his Honourable Court be pleased to order the Thika Land Registrar to issue an official search in respect to land parcels No.Ruiru Kiu Block 4/1689 and Ruiru Kiu Block 4/1754 registered to the Respondent herein.**
- 2) That this Honourable Court does issue a Prohibiting Order against the Respondent's land parcels no. No.Ruiru Kiu Block 4/1689 and Ruiru Kiu Block 4/1754, registered to the Respondent in respect to Order 2 above.**
- 3) That his Honourable Court be pleased to compel Albert Maina Githinji, Alex Kungu Maina and Francis Maina Ndegwa being Directors of the Respondent/Judgement Debtor, to be orally examined on oath as to the particulars and as to the company's means, assets and liabilities and produce its books of accounts and other documents or evidence showing the same and consequently be ordered to settle the Applicant's claim as Directors and shareholders of the Respondent.**
- 4) That the Applicant be given leave to attach and execute the Decree herein against the personal property and assets of Albert Maina Githinji, Alex Kungu Maina and Francis Maina Ndegwa.**
- 5) That costs of this application be provided for.**

This application is supported by the grounds set out on the face of the application and on the *affidavit* of **Kenneth Karanja Kibathi Advocate**. These grounds are:-

- 1) That the Advocate/Applicant has obtained Judgement against the Respondent.**
- 2) That Applicant is unable to execute the Decree against the Respondent as the Respondent has closed shop to avoid execution.**
- 3) That the Applicant has personal knowledge and also having visited the land parcels in the company of one of the Directors of the Respondent who owns the land parcels being No.Ruiru Kiu Block 4/1689 and Ruiru Kiu Block 4/1754 registered to the Respondent herein but cannot obtain an official search as the Respondent has really frustrated the Applicant by misleading him to believe that they are ready to settle this matter.**
- 4) That it is just and fair that the orders sought herein be granted.**

In his *Supporting Affidavit*, **Kenneth Karanja Kibathi Advocate**, averred that he obtained *Judgement* for **Kshs.424,687/60**, against the Respondent as per *annexture KKK-1*. Further that the Applicant has tried to negotiate with the Respondent in trying to settle this matter in vain. Further that the Respondent through one of its Directors approached the Applicant with a view to settle this matter by suggesting that

the Applicant takes one plot that he was shown by the Directors and he chose one of them as per *annexture KKK-2, photographs of the plot*.

The Applicant further averred that he has since established that the said plots are owned by the Respondent being *LR.No.Ruiru/Kiu Block 4/1689* and *Ruiru/Kiu Block 4/1754*, and are registered under the Respondent's name. He also alleged that he has tried to carry an official search at the Thika Lands Office with no success due to the fact that the Respondent holds the title documents. It was his contention that it is very imperative that the court orders the land Registrar Thika, do issue the Applicant with an official search in order to help the Applicant satisfy the *Decree* as against the Respondents who have tried to hide their assets away from the Applicant. Further that it is in the interest of justice and fairness that the application for prohibition and examination of the Respondent's Directors be granted. He urged the Court to allow the application.

The application is opposed and the *Law Firm of C.G. Waithima & Co. Advocates*, for the Respondent filed *Grounds of Opposition* on *11th October 2016* and averred that:

- 1) *That the Defendant/Respondent herein are not the proprietors of the said suit properties.*
- 2) *That the said suit properties were sold to third parties to offset the Respondent's Company debts last year.*
- 3) *That the orders sought are incapable of being granted due to the above reasons.*
- 4) *That this Honourable Court cannot issue its orders in vain.*

On *13th October 2016*, the parties allowed *Prayer No.2 by Consent* and that is to the effect that;

“The Court be pleased to order Thika Land Registrar to issue an official search in respect of land parcel No.Ruiru/Kiu Block 4/1689 and Ruiru/Kiu Block 4/1753, registered in favour of the Respondents herein”.

In response to the above *Consent Order*, *Mr. Benard Leitich, the District Land Registrar, Thika Lands Registry* filed a *Replying Affidavit* on *11th May 2018*, and confirmed that the land parcels *No.Ruiru/Kiu Block 4/1689* and *Ruiru/Kiu Block 4/1753*, are currently registered in the name of *Equity Masters Ltd* on a *leasehold* tenure of *99 years* from *1st September 1995*, as per *annexture BKK-1 & 2*. He further confirmed that the lease over the two properties were lodged for registration on *27th November 2015*, but by that time, the *DCIO Kasarani* had placed an embargo against all dealings in properties within *Ruiru Kiu Block 4*, pending investigations from that office. He attached *green cards* for the said two parcels of land which show the *Certificate of Lease* in favour of *Equity Masters Ltd* were issued on *2nd May 2018*. It is therefore evident that by *11th May 2018*, the two parcels of land *Ruiru/Kiu Block 4/1689* and *Ruiru/Kiu Block 1753* were registered in favour of *Equity Masters Ltd*, and not third parties as alleged by the Respondent in their *Grounds of Opposition* dated *10th October 2016*. Therefore from the *Consent Order* issued on *14th October 2016*, *Prayer No.2* has been overtaken by events as the *Thika Land Registrar* has now produced an *official search* and confirmed that the two suit properties *Ruiru/Kiu Block 4/1689* and *Ruiru/Kiu Block 1753* are registered in the name of *Equity Masters Ltd*, the Respondent herein.

The Applicant had alleged that the Respondent herein owes him *Kshs.424,687/60* and a Judgement was entered against the Respondent which the Respondent has failed to satisfy.

The Court has perused the annextures to the instant application and indeed, it is evident that a *Judgement* was entered against the Respondent for *Kshs.424,687/60* on *18th May 2015*. The Applicant has alleged that the Respondent had promised to settle the said Decretal amount by giving the Applicant one of its piece of land that it owns within *Ruiru/Kiu Block 4* and that one of the Respondent's Director had even taken the Applicant to the site and he chose one of the Plots.

Though the Respondent filed its *Grounds of Opposition*, it did not dispute that allegation. The Respondent alleged that the suit properties have now been transferred to third parties which allegations are not true as the official search produced by the Thika Land Registrar shows the suit properties are still registered in favour of the Respondent herein.

The Respondent still owes the Applicant the Decretal amount as per the *Decree* of the Court issued on *18th May 2015*. These properties being the only known assets of the Respondent, then the Court finds it prudent to prohibit their sale until the Decretal sum is satisfied. *The Court therefore finds prayer No.3 merited.*

The Applicant has further urged the court to compel *Albert Maina Githinji, Alex Kungu Maina* and *Francis Maina Ndegwa*, the *Directors* of the Respondent to appear in court and be orally examined under oath as to the particulars of the Company's assets and liabilities.

I have perused the entire application and the annextures thereto and I have not seen any evidence that the three named persons are Directors of the Respondent. The Applicant did not attach any search from the Company's Registry to confirm who are indeed the *Directors* of *Equity Masters Ltd* and whether the three named persons are indeed the current *Directors* of the said Company. Without that confirmation of whether the three named persons are *Directors* of *Equity Masters Ltd*, this Court finds that there is no basis laid to compel *Albert Maina Githinji, Alex Kungu Maina* and *Francis Maina Ndegwa* to appear in court for oral examination under the oath.

Having found that there is no evidence that the three named persons are current *Directors* of the Respondent herein, the Court finds no reasons of dealing with the issue of lifting the Corporate Veil and thus *prayer No.5 is not merited.*

This Court having now carefully considered the instant *Notice of Motion*, the *Court finds it merited only in terms of prayer No.3 since prayer No.2 was fully satisfied*. However, the *Court finds that prayers No.4 and 5 are not merited and the same are dismissed entirely*.

However, the *Applicant is entitled to costs of this application*.

It is so ordered.

Dated, Signed and Delivered at Thika this 28th day of September 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Kibathi for Applicant

No appearance for Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court – I apply for the copy of the Ruling.

L. GACHERU

JUDGE

28/9/2018