



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.479 OF 2016

ANDREW KHAEMBA.....CLAIMANT

VERSUS

AFRISCAN KENYA LIMITED.....RESPONDENT

RULING

The claimant by application and Notice of Motion dated 22nd August, 2019 brought under the provisions of Article 48 of the Constitution, 2010 and section 3 of the Employment and Labour Relations Court Act, 2011 and Order 22 rule 35, Order 39 rule 5 and 6 of the Civil Procedure Rules and seeking for orders that;

1. Spent.

2. A temporary injunction do issue directing the District Registrar, Nyahururu Land Registry not to allow any further registration of dealings and making of any entries in the register relating to Land Title Nyandarua/Olarangwai/3432 pending the hearing and determination of this application.

3. A temporary injunction be issued directing the District Registrar, Ngong Lad Registry, not to allow any further registration of dealings and making of any entries in the register relating to Land Title Kajiado/Olchoro – Onyore/9095 pending the hearing and determination of this application.

4. This court be pleased to make an order for the attendance of one Benjamin Kariamburi Mwangi being the majority shareholder of the respondent for purposes of being examined as to whether the respondent/judgement debtor has any property or means of satisfying the decree herein and to produce the respondents books of accounts.

1.

5. In default of prayer 2 above, the court be pleased to lift the respondent's corporate veil and order the said Benjamin Kariamburi Mwangi to personally satisfy the judgement debt.

6. The said Benjamin Kariamburi Mwangi do show cause why the said properties that is to say Land Title Nyandarua/Olarangwai/3432 and or Kajiado/Olchoro – Onyore/9095 should not be sold in execution of the judgement debt herein.

The application is supported by the affidavit of the claimant and on the grounds that there is an unsatisfied decree against the respondent herein dated 17th September, 2018 and a Certificate of Costs dated 14th February, 2019.

The respondent has frustrated all effort at execution that has transferred all movable assets to an unknown place and there are no attachable assets. One Benjamin Kariamburi Mwangi is the majority shareholder and the principal officer of the respondent and the registered proprietor of Land titles Nyandarua/Olarangwai/3432 and Kajiado/Olchoro – Onyore/9095.

The respondent has a leasehold interest in Nyandarua/Olarangwai/3432 for a period ending 31st May, 2026.

There is real and present danger that unless the court intervenes the said Benjamin Kariamburi Mwangi may alienate, dispose and or deal with the properties Nyandarua/Olarangwai/3432 and or Kajiado/Olchoro – Onyore/9095 in a manner calculated to frustrate the claimant from executing against him and the court should order him to take personal responsibility for the decretal sum owing.

The respondent is no longer in operation and has a skeleton staff at the office and is in the process of closing business,

In his affidavit, the claimant also avers that upon the decree of the court herein and Certificate of Costs attempts to execute have been frustrated by the respondent who has moved all attachable properties from its premises. Efforts by Cleverline Auctioneers to execute did not bear fruits.

In the circumstances the claimant is not able to tell whether the respondent has any other attachable properties causing frustrations to execute and realise the judgement proceeds.

The claimant also avers that the Benjamin Kariamburi Mwangi was his supervisor while in the employment of the respondent, he is the majority shareholder and principal officer of the respondent per the records from the Companies Registry CR 12 as of 2nd August, 2019. As a former employee of the respondent the claimant is aware that Benjamin Kariamburi Mwangi is the principal officer for the respondent and should be made to satisfy the decree as he has registered interests in land tilts **Nyandarua/Olarangwai/3432** together with one Margaret Wambui Mwangi who is since deceased and **Kajiado/Olchoro – Onyore/9095** where the respondent business is situate.

The claimant also avers that he has learnt that Kajiado/Olchoro – Onyore/9095 is subject to Charge in favour of Siraji Sacco Society. There is therefore real danger that unless the court intervenes, Benjamin Kariamburi Mwangi may alienate, dispose or deal with both properties in Nyandarua/Olarangwai/3432 and or Kajiado/Olchoro – Onyore/9095 to frustrate the judgement of the court. The court should intervene to prevent further hardship upon the claimant by issuing the orders sought.

In reply, the respondent filed the Replying Affidavit of Benjamin Kariamburi Mwangi and who avers that he is a shareholder in the respondent company and the application by the claimant is filed with the motive of creating an impression that he is involved in financial impropriety to warrant him taking sole responsibility of the decretal sum.

The respondent has 4 directors as evidenced by the claimant's annexure "AK-4" and 2 shareholders and despite being the majority shareholder in the respondent company he is not in charge of the daily operations though once in a while he is able to interact with the managing director for updates.

Mr Kariamburi also avers that he was never served with the decree and Certificate of Costs against the respondent to enable him know how much was due to the claimant and he is not aware of any frustrations arising to the claimant as alleged. The proclamation notice attached to the claimant's application suggests that amongst the moveable properties subject to attachment are fertigation unit and fertigation spray unit which the auctioneer indicates the condition is unknown. There is also suggestion that the respondent transferred these assets to defeat execution which is not true.

Where the two items were existing at the time of proclamation the auctioneer ought to have stated the value.

The respondent has been undergoing financial challenges occasioned by the encroachment of its flower farm by KETRACO Limited which entry constructed high voltage power line making the farm hazardous to work. Farming activities dwindled because of the enrolment. The employees got involved in theft of the respondent's properties which compelled the managing director to transfer Central spray unit and Compressor Pump to avert theft and a report was made to Murungaru police post.

The respondent filed suit against KETRACO Limited in ELC Cause No.24 of 2018.

Mr Kariamburi also avers that land title Nyandarua/Olarangwai/3432 is jointly owned with Margaret Wambui Mwangi and himself. The title is currently leased until 31st May, 2026 and not available for disposal. The original title is deposited with Investment Fund for Developing Countries in Denmark which lent the respondent 62,500 Euros.

Title Kajiado/Olchoro – Onyore/9095 is in his name and charged to Siraji Sacco Limited which has the first proprietary mortgage in the whole title over a loan of Ksh.3.5 million.

The invitation by the claimant for the court to stop any dealings with these properties is unacceptable and violates constitutional rights over property ownership. These properties in Nyandarua/Olarangwai/3432 and Kajiado/Olchoro – Onyore/9095 do not belong to the respondent.

The respondent business despite being hampered by KETRACO limited is still active and has not shown signs of winding up that might warrant an application for the lifting of the veil by the court.

Both parties made their oral submissions in court and the claimant filed written arguments.

The claimant submitted that upon the decree of the court and Certificate of Costs the respondent has failed to satisfy the same necessitating this application to have the respondent's director(s) be held personally liable to offset the decretal sum.

Mr Kariamburi Mwangi is the majority shareholder and is director of the respondent and during the claimant's employment he was in charge of operations and thus the employer as defined by the Employment Act, 2007. The court is invited to take its special jurisdiction by him being a director and shareholder and be made to satisfy the decree. In the case of **Justine Nyambu versus Japsa Logistics [2017] eKLR** and employer is not shielded by the corporate veil. A director or agent of a company by dint of section 2 of the Employment Act is an employer.

In **Civil Appeal No.213 of 2013 Nyandarua Progressive Agencies Limited versus Cyrus Wahome Nduhiu & another [2017] eKLR** the court applied the Gower's Principles of Modern Company Law and held that directors and agents of the company rather than trustee of it or

its property. As agents the directors stand in fiduciary relationship to their principal, the company.

The directors of a company are liable to pay to the claimant the sum decreed by the court on behalf of the employing company until and without having to lift the corporate veil.

The claimant also submitted that the respondent has been made aware of the court decree and has failed to address and only fair that the properties listed in Nyandarua/Olarangwai/3432 and Kajiado/Olchoro – Onyore/9095 be secured for the satisfaction of the same.

The claimant also submitted that a director of a company can be called for examination on the books of accounts. the respondent has transferred movable assets and there is nothing attachable on site which is improper conduct and fraud as held in **Civil Appeal No.5 of 2017 Stephen Njoroge Gikera & another versus Econite Mining Company Limited & 7 others [2018] eKLR.**

The respondent is not opposed to the core orders sought. There is judgement herein and the decree is not satisfied. The respondent is not in business as alleged and nothing is offered to settle the judgement debt. The next step should be to examine the directors before the lifting of the corporate veil as held in **Civil Appeal No.537 of 2014 Ahmed Shakeel Shabir versus Samuel Musa Ndolo.** In this case there is good basis to lift the corporate veil as it is clear the respondent is not able to settle the decretal sum.

The respondent submitted that a director of a company cannot be held liable for company debts as there is no fraud involved in this case. On the affidavit of Mr Kariamburi he confirms that he is majority shareholder of the respondent which company is a different legal person from himself. The company has two directors and he cannot be held liable.

The respondent also submitted that company assets were moved following theft at the premises and the matter reported to the police. The assets moved are with Mr Kariamburi where he resides. These are the spray unit and a compressor unit as other assets were stolen.

It is also the respondent's submissions that there was no proclamation notice served as alleged and where it had been done the auctioneer ought to have assessed the movable assets and ascertained the value. Mr Kariamburi has the safekeeping of the available assets. He has not been served with the decree or Certificate of Costs and thus not aware of the outcome of the suit and judgement. The respondent relied on the case of **Electrowatts Limited versus Countryside Suppliers Limited & another [2014] eKLR** the claimant has not pleaded fraud or exhausted all means of execution to allow for the lifting of the corporate veil.

The titles cited are encumbered and there are other proprietary interests ranking in priority to the claimant and the orders issued ex parte with regard to Nyandarua/Olarangwai/3432 and Kajiado/Olchoro – Onyore/9095 should be vacated.

On the application by the claimant and the nature of orders sought, it is important to revisit the history of the matter for context.

On 5th December, 2016 the claimant filed his Memorandum of Claim against the respondent. The respondent entered appearance on 10th April, 2017 but no defence was filed. The claimant applied to proceed with hearing by way of formal proof.

On 10th April, 2017 the respondent attended court and was allowed time to file defence. On 15th November, 2017 the respondent was added 21 days to file defence and there was no compliance.

The claimant was heard on his case on 30th July, 2018.

Effectively, by the respondent failing to file a defence, the claimant was denied key work records required under the provisions of section 10(6) and (7) of the Employment Act, 2007.

The above is crucial as an employer who fails to address the mandatory provisions of section 10(6) and (7) of the Employment Act, 2007 leaves the employer exposed in terms of the applicable terms and conditions of employment.

The employee is not without recourse. On its own motion and where invited the court under the provisions of **section 3 read together with section 20 of the Employment and Labour Relations Court Act, 2011 (the Act)** the court is given general powers to address any matter before court as is deemed just considering the facts and relevant matters arising from the proceedings;

20. General Powers of the Court

(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities:

Provided that the Court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings.

(2)...

(3) ...

(4) For the purpose of dealing with any matter before it, the Court may by order in writing signed by or on behalf of the Court require any person to—

(A) *Furnish in writing or otherwise, such particulars in relation to such matters as it may require;*

(b) *Attend before it;*

(c) *Give evidence on oath or otherwise; and*

(d) *Produce any relevant documents.*

(b)

(5) *An order made under subsection (4) may include a requirement as to the date on which or the time within which the order is to be complied with.*

(6) *An order purporting to be signed by or under the authority of the Judge conducting the proceedings of the Court shall be presumed, until the contrary is proved, to have been given by the Court.*

Therefore for good order and where the court is moved or on its own motion and taking into account this is the Employment and Labour Relations Court unlike the proceedings applicable before any other superior court, the court may require any person to attend and furnish, attend, give or produce any records, materials or evidence necessary for the attention of the court.

Where there is no attendance as required, a sanction shall issue in accordance with section 20(7) of the Act;

(7) *A person who—*

(a) *Without reasonable cause fails to comply with an order duly given under subsection (4); or*

(b) *is required by an order made under subsection (4) to furnish information, and who makes any statement or furnishes any information which the person knows, or has reasonable cause to believe, to be false or misleading in material particular. commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.*

Where the proceedings apply to a corporate, section 20(8) of the Act provides that;

(8) If an order made under subsection (4) is directed to a—

(a) *Firm or to a body corporate, every partner of the firm, and every director and officer of the body corporate shall comply with the order; or*

(a)

(b) *Trade union, employers' organisation or federation, every official or officer of the trade union, employers' organisation or federation shall comply with the order.*

This is the law since the year 2011. It has not changed.

At paragraph 1, 4, and 5 of Mr Kariamburi's Affidavit dated 25th September, 2019 he confirms that he is a shareholder of the respondent company and there are other 4 directors and two shareholders and he is the majority shareholder. Effectively he holds majority interest in the respondent company.

In CR 12, extract under the Companies Act, 2015 the respondent [Afriscan (Kenya) Limited] being Company Number CPR/2011/3819 has four (4) directors;

1. Edwin Amos Awuor Tongoi with zero (0) shares;
2. Charles Maina Mwangi with zero (0) shares;
3. Ezekiel Ndichu Kimatu Wanjama with zero (0) shares; and
4. Lars Frederiksen with zero (0) shares.

The respondent company has two (2) shareholders being;

1. African A/S with 3309 ordinary shares and

2. Benjamin Kariamburi Mwangi with 3585 ordinary shares.

Mr Kariamburi as majority shareholding has the largest interest in the respondent company.

There is judgement and decree of the court issued on 17th September, 2018; and a Certificate of Costs dated 14th February, 2019.

The respondent avers that the judgement and decree of the court and the Certificate of Costs have never been brought to the attention for the payment of the judgement amount. However, at paragraph 7 of Mr Kariamburi's affidavit he avers that;

... a closer look at the proclamation notice herein marked as ?BKM1? seems to suggest that amongst the movable properties subject to attachment are fertigation unit and fertigation spray unit which the auctioneer indicates their condition as unknown.

Mr Kariamburi as of 25th September, 2019 was aware of the proclamation notice. Such proclamation relates to execution proceedings herein.

He further avers at his paragraph 12 that;

... The respondent's properties which compelled the managing director to transfer central spray unit and the compressor pump to avert theft ...

Of the proclaimed properties, the main shareholder of the respondent being aware of execution proceedings has since caused to be moved these asserts for safekeeping at an undisclosed location.

More fundamentally Mr Kariamburi avers at his paragraph 20 that

Despite the business operations of the respondent being hampered, the company is still active and had not shown any indications of winding up that might warrant an application for lifting of the veil by this court.

Thus invited by the respondent, that the respondent is active and has no possibility of a winding up, the respondent ought to attend and address the settlement of the decree herein. To thus move attachable properties from the respondent for whatever reasons and being aware of the execution proceedings since the date of his Affidavit on 25th September, 2019 and effectively as of November, 2017 when a report was lodged with Murungaru Police station, the respondent through its officers, the directors and shareholders shall settle the decretal sum.

Mr Kariamburi retains majority interests in the properties relating to Land Title Nyandarua/Olarangwai/3432 and Kajiado/Olchoro – Onyore/9095. It is imperative that pending the court addressing the attendance of the respondent to settle he decretal sum that such interest(s) be secured from any further encroachment and or alienation to the detriment of the claimant's interests therefrom.

Pursuant to the provisions of section 20 of the Employment and Labour Relations Act, 2011 the Notice of Motion dated 22nd August, 2019 and on the affidavit of Mr Benjamin Kariamburi Mwangi that the respondent is still active and in its business operations; the court directs as follows;

(1) the respondent shareholders and directors shall attend and furnish the court with the books of account;

- a. attend before court on 9th December, 2019 for (1) above;**
- b. be available for examination by the claimant;**
- c. Avail to the court any other and relevant document(s) for the settlement of the decretal amount.**

(2) For the above to complete, the court hereby issues an injunction directed at;

- a. the District Registrar, Nyahururu Land Registry not to allow any further registration, dealings or entries in the register relating to Land Title Nyandarua/Olarangwai/3432; and**
- b. the District Registrar, Ngong Land Registry not to allow any further registration, dealings or entries in the register relating to Land Title Kajiado/Olchoro – Onyore/9095**

(3) In the alternative to (1) above, the respondent is at liberty to settle the decretal sum on or before the 9th December, 2019 and upon which (3) above shall be vacated; and

(4) Costs herein awarded to the claimant.

Delivered at Nakuru this 21st day of November, 2019.

M. MBARU

JUDGE

In the presence of:

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