



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 12 OF 2018

TATA AFRICA HOLDINGS (KENYA) LTD.....PLAINTIFF

-VERSUS-

JULIUS NYAKUNDI NYAGUOKA.....1ST DEFENDANT/ APPLICANT

EMILY CHEPGETICH.....2ND DEFENDANT /APPLICANT

KENYA TRACTORS AND EQUIPMENT.....3RD DEFENDANT

RULING

1. This is a ruling on application dated **27th May 2019** seeking to strike out the 1st and 2nd defendant as the 1st and 2nd defendant respectively and the cost of the application be borne by the plaintiff/respondent.
2. Grounds on the face of the application are that the 3rd defendant is a corporate entity with the capacity of being sued and suing in its own name and the 1st and the 2nd defendants are no longer directors of the 3rd defendant as their share in the company was purchased by one **Samuel Kiprop Tuiyot, Harry Mutuma, and Stanley Guntai Mukinda**, who are the current directors.
3. Further that the debts claimed by the plaintiff arise from goods sold to the 3rd respondent who later sold them to 3rd parties and were subsequently sold to various customers; that the 1st and 2nd applicants are unnecessary parties to the suit and their continued misjoinder is to their detriment.
4. The application is supported by affidavit sworn by the 1st defendant/applicant. He averred that on 25th January 2013 him and 2nd defendants ceased being directors of the 3rd defendant/respondent as their stake were transferred and taken over by **Samuel Kiprop Tuiyot, Harry Mutuma, and Stanley Guntai Mukinda** who are currently the directors of the 3rd defendant as shown by copies of oath and statutory declaration of applicants resigning from the company, certificates of transfer of shares and notification of change of directors and secretary.
5. He averred that the suit was filed on 9th March 2018 almost 5 years after their resignation from the management of the 3rd defendant and there is no connection whatsoever between the applicants and the 3rd defendant and restated grounds on the face of the application as captured above.
6. In response the plaintiff/respondent filed replying affidavit sworn by **Edwin Too** on 28th November 2019. He averred that the 1st defendant used his position with plaintiff to invoice the 3rd defendant for machines which were delivered to the 3rd defendant company and thereafter resigned from his position with the plaintiff and despite numerous demands the 3rd defendant failed to pay for the machines.
7. Parties proceeded by way of written submissions.

1ST AND 2ND APPLICANTS' SUBMISSIONS

8. The 1st and 2nd applicants submitted that the 3rd defendant entered into an agreement with the plaintiff to market and distribute the plaintiff's tractors and submitted that the 3rd defendant is a separate entity that acquired the tractors which is the basis of the dispute.
9. On whether the 1st and 2nd are necessary parties to the suit, they submitted that the basics of a contract entail capacity, terms, and conditions, consensus *ad idem* which were present in the contract entered into by the plaintiff and the 3rd defendant; and submitted that the

3rd defendant is a legal person with the capacity to be sued and sue in its own name.

10. The applicants further submitted that the plaintiff engaged the defendant in its own name and the 3rd defendant has a separate legal entity with that of its directors and or employees and should be held liable for its breach.

11. The applicants further submitted that they were employees of the 3rd defendant and the current case does not warrant the lifting the veil of incorporation of the company.

12. They cited the case of **Charles Ray Makuto vs Almakony limited & another (2016)** which provides circumstances where the corporate veil may be lifted.

13. They further submitted that they ceased being directors of the 3rd defendant as early as 25th January 2013 and the 3rd defendant is capable of settling its own liabilities and it is not therefore proper to enjoin the 1st and 2nd defendants since they had performed their duties in good faith and cited the case of **Pinnacle Tours and Travel Limited & 3 others vs Pauline Ngigi t/a Safari Market Tours (2019) eKLR** where the court held that the corporate veil can be lifted only in exceptional circumstances both under express statutory provisions and under the judicial intervention principally if the corporate personality is being used as a mask for fraud or improper conduct.

14. The Applicants submitted that plaintiff has failed to prove on a balance of probability their involvement in the fraud allegation and thus they were wrongly enjoined in the suit.

15. On whether the plaintiff has any plausible cause of action and/or prayer against the applicants, the applicants submitted that the plaintiff admitted that it entered into a contract with the 3rd defendant and there is therefore no direct relationship between the applicants and the plaintiff; and there being no prayers against the 1st and 2nd defendants, they have been wrongfully enjoined as parties to the suit.

16. The applicants submitted that the plaintiff has not moved the court properly and should not therefore be allowed to hold the 1st and 2nd defendants personally liable for the actions of the 3rd defendant.

RESPONDENT/PLAINTIFF'S SUBMISSIONS

17. The plaintiff/respondent submitted that the 1st defendant was employed by the plaintiff as a Business Development Manager and during his employment with the plaintiff, the 1st defendant incorporated the 3rd defendant company and incorporated his wife as a co-director of the company.

18. The plaintiff further submitted that while was in his position with the plaintiff's company, the 1st defendant sold the plaintiff's machinery to the 3rd defendant and resigned from the 3rd defendant company when he learned of the recovery proceedings in an attempt to defeat the end of justice.

19. The plaintiff further submitted that the applicants being directors of the 3rd defendant benefited from the sale of the machinery and enjoyed all the corporate privileges but the assets of the 3rd defendant are unknown and/or incapable of satisfying the judgment in the event the court order the striking out of the names of the applicants in this suit.

20. The plaintiff submitted that this suit was filed against 1st and 2nd defendants jointly for their fraudulent activities which resulted in defrauding the plaintiff Kshs. 20,367,205/= and submitted that the presence of the 1st and 2nd defendants will be necessary to settle all questions involved in the suit.

21. The plaintiff cited the case of **Werrot & Co. Ltd & 3 others vs Andres Douglas Gregory & 2 others (1988) eKLR** where the court held as follows:-

“in determining the question of who is a necessary party there are two tests:-

(1) there must be a right to some relief against such party I respect of the matter involved in the proceeding in question,

2) it should not be possible to pass an effective decree in the absence of the party.”

22. The plaintiff further submitted that when the suit was filed before this court, the 1st and 2nd defendants had fraudulently ceased being directors of the 3rd defendant and piercing the corporate veil is not therefore necessary.

23. The plaintiff also cited the case of **Multi Choice Kenya limited vs Mainland limited & Anor (2013) elk** and submitted that the 1st and 2nd defendants have set out the allegations of fraud which is the subject for determination.

ANALYSIS AND DETERMINATION

24. I have considered averments by parties herein and submissions filed and what I consider to be in issue is whether the 1st and 2nd

defendants are necessary parties in this suit.

25. In the case of **Meme v. Republic, [2004] 1 EA 124**, the High Court observed that a party could be enjoined in a matter for the reasons set out hereunder:-

“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation.”

26. The applicants argue that they were no longer directors of the 3rd defendant at the material time. On perusal of the plaint, I note that the plaintiff raised particulars of fraud by the 1st and 2nd defendants in respect to the transfer of their shares in the 3rd defendant’s company, filing of returns of the company and further allege improper business practise by the applicants among other others listed in paragraph 12 of the plaint.

27. In my view, these are issues that can be determined with the involment of the applicants in the full trial of this matter. It would not be proper for me to determine the issues above and the issue as to whether the corporate veil should be pierced at this stage of the trial.

28. From the foregoing, I find that it would be difficult for court to make a finding on issues raised in the plaint without participation of the applicants in this suit. I see no merit in this application.

29. FINAL ORDERS

1. Application dated 27th May 2019 is hereby dismissed.

2. Costs to the respondent/plaintiff.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 29TH DAY OF JULY, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

No appearance for Appellant

Mr. Muchiri for Omari for 1st defendant