



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL CASE NO. 7 OF 2015

MARULA ESTATES LIMITEDPLAINTIFF

-VERSUS-

JIM FOXTON.....1ST RESPONDENT

FOXTON AGRI LIMITED.....2ND RESPONDENT

R U L I N G

1. The Plaintiff, Marula Estates Limited sued Jim Foxtton and Foxtton Agri Limited, the two Defendants for payment of a sum of Shs. 12,831,377.02 allegedly outstanding pursuant to an agreement of lease. The Defendants denied liability in their defence, the 1st Defendant specifically pleading with regard to the agreement that he only acted in his capacity as the director of the 2nd Defendant but was not a party thereto. Hence he was not personally liable for the actions of the 2nd Defendant.
2. Subsequently, the 1st Defendant brought a Motion under Order 1 Rule 10 of the Civil Procedure Rules, principally seeking to have the 1st Defendants name struck out from the plaint. The grounds on the face of the application reiterated the pleadings in the defence statement regarding the 1st Defendant. These matters are further deponed in the supporting affidavit by the 1st Defendant.
3. The Plaintiff filed a Replying affidavit on 19/8/2013 confirming that while the 1st Defendant is a natural person the 2nd Defendant is a legal person. Paragraphs 5 – 10 of the affidavit appear to question the legal status of the 2nd Defendant and the true standing of the 1st Defendant in regard to the 2nd Defendant.
4. The Plaintiff also alludes to “craftiness” on the part of the 1st Defendant and asserts that the veil of incorporation of the 2nd Defendant “can be lifted for a just conclusion of the matter and claims against the 2nd Defendant.” Also revealed is Plaintiff’s intentions to obtain the particulars regarding directorship, shareholding and incorporation of the 2nd Defendant, interalia.
5. The power of the court to strike out the name of any party is provided for under **Order 1 Rule 10 (2) of the Civil Procedure Rules**, which states:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of

any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

6. The 1st Defendant’s application hinges upon the fact that the 1st Defendant was not a party to the lease agreement, and further that he is a separate legal entity from the 2nd Defendant. At a glance, these facts can be discerned from the annexed agreement. It is also true, however as stated by the Plaintiff, that there are exceptions where circumstances may justify the lifting of the veil of incorporation. This happens where fraud, for example, is alleged against the company and/or its directors.
7. The Replying affidavit of the Plaintiff appears to raise doubts regarding the status and actual relationship between the 1st and 2nd Defendants. Indeed an element of suspected ‘craftiness’ was alluded to. Although the Plaintiff appears to lack clear information on the incorporation of the 2nd Defendant and its shareholding, no request for particulars appears to have been served upon Defendants.
8. The case of **Bachoo Patel T/A K. G. Patel Shop Limited –Vs- Stanley George Wamaita** cited by the respondents had gone to full hearing. It did not seem that there was any question regarding the existence of the company therein as a legal entity as the Plaintiff herein appears to indicate.
9. I take the view that it may not be just to strike out the name of the 1st Defendant at this stage. In my opinion, there is a window under Rule 7 and 9 of Order 1 of the Civil Procedure Rules for the court to sustain the suit against him pending remedial action by the Plaintiff.
10. In the circumstances, I direct that the Plaintiff does serve upon the Defendants an appropriate request for particulars within 14 days and to amend its pleadings accordingly in order to demonstrate the cause of action against each Defendant so that the issues between the parties can be determined. Such remedial actions shall be taken within 45 days of today’s date failing which the 1st Defendant’s application will be deemed as allowed with costs to the Applicant.

Delivered and signed at Naivasha this 18th day of March, 2016.

In the presence of :

For the Plaintiff : Mr. Mburu

For the Defendants : Mr. Terer holding brief Mr. Juma

Court Assistant : Barasa

C. W. MEOLI

JUDGE