



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC NO. 108 OF 2013**

**IRIA-INI TEA FACTORY LIMITED.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JOHNSTONE MUCHAI MUTHANGA.....1ST DEFENDANT/APPLICANT**

**LEAH WANJIRU MURUGI.....2ND DEFENDANT/APPLICANT**

**MUCHASTONE LIMITED.....3RD DEFENDANT/APPLICANT**

**FREDRICK MUNYUA WAIYAKI.....4TH DEFENDANT/APPLICANT**

**RULING**

1. The 1st and the 2nd defendant, hereinafter called the applicants filed the applications dated **11th November, 2014** and **22nd October, 2014** respectively praying that their names be struck out of this suit and the suits against them struck out or be dismissed with costs to them.
2. The applications are premised on the grounds that they have been wrongly enjoined in the suit and that the suit discloses no cause of action against them. Explaining that they are merely directors of the company which entered into the transaction which is the subject matter of the suit, the applicants contend that no personal liability can attach on them.
3. Explaining that the 3rd party has a separate existence from its directors, the applicant's contend that enjoining them in the suit is tantamount to lifting the 3rd defendant's veil of incorporation without leave of the court.
4. The 1st defendant also contends that the suit is incurably defective because it offends **Order 4 Rule 4** of the Civil Procedure Rules (CPR). The plaintiff is also said to have failed to verify the contents of the plaint as by law required.
5. The applications are opposed through the replying affidavits of the plaintiff's factory unit manager, Mathias Kariuki Ithiga sworn on **13th January, 2015**. In those replying affidavits, reference is made to paragraph 5 of the plaint where it is pleaded that the 1st and 2nd defendant offered the suit property for sale in their personal capacity and deposed that the applicants did not present a resolution of the Board of the 3rd defendant authorizing the sale of the suit property. The deponent of the affidavits has further deposed that the applicants only introduced the 3rd defendant at the time of executing the sale

agreement and transfer of the suit property to the plaintiff. In view of the foregoing, the deponent contends that it is possible that the 3rd defendant was incorporated as a vehicle to fraudulently deal with the suit property.

6. Referring to the averments contained in the statement of defence of the 4th defendant, which show that the suit property was transferred long after the death of its original proprietor, the plaintiff contends that its only the applicants who can explain how the suit property was transferred to the 3rd defendant.

7. Concerning the contention that the suit is defective, Mr. Ithiga has deposed that the verifying affidavit sworn by his predecessor, George Ngugi Mwangi, is in accordance with the law.

8. Citing **Article 159(2)(c)** of the constitution and the overriding objectives of the Civil Procedure Act and the rules made thereunder, Mr. Ithiga terms the applications by the applicants misconceived and an abuse of the process of the court.

9. In reply and opposition to the applications herein, on behalf of the 4th defendant, Elizabeth Wairimu Waiyaki filed the replying affidavit she swore on **7th May, 2015** in which she contends that given the fact that the suit property was transferred to the 3rd defendant after the death of her mother, the original proprietor of the suit property, only the applicants can explain how the suit property was posthumously transferred to the 3rd defendant.

10. Whilst agreeing with the applicants' contention that the 3rd defendant is a separate legal entity capable of suing and being sued in its name, the deponent states that where fraud and improper conduct is imputed, as is the case in the instant case, the law allows courts to pierce the veil of incorporation. The deponent further submits that where a state of mind is pleaded, the particulars of fraud can only be against an individual as opposed to the company in its capacity as a corporate person.

11. Pointing out that the applicants have not denied executing the transfer documents on behalf of the 3rd defendant, the 4th defendant reiterates that the issues raised in the suit cannot be ventilated in the absence of the applicants.

12. The deponent further submits that any prejudice occasioned on the applicants by the impugned joinder, if any, is compensable by way of costs.

13. The applications were disposed of by way of written submissions.

14. At the time of writing this ruling, the submissions in the court file were those of the 4th defendant and those of the 1st and 3rd defendant. However, the submissions of the 1st and 3rd defendants were expunged from the court record for having been filed out of the time.

#### **Submissions for the 4th defendant**

15. In the submissions filed on behalf of the 4th defendant, a brief background of the circumstances leading to the case and the application is given and the following issues framed for the courts determination?

a) Whether the suit is incurably defective?

b) Whether the names of the 1st and the 2nd Defendant's should be struck out?

16. With regard to the 1st question, reference is made to the averments contained in paragraphs 8-11 of the 1st defendant's supporting affidavit to the effect that the suit violates **Order 4 Rule 4** of the CPR and that the verifying affidavit does not verify the contents of the plaint and submitted that **Order 4 Rule 4** of the CPR has no bearing in this suit, because it is not alleged that the plaintiff has sued in a representative capacity, as contemplated by the said rule (**Order 4 rule 4**).

17. Concerning the contention that the contents of the plaint are not verified as by law, reference is made to the case of Kenya Oil Company Ltd v. Jayantilal Dharamshi Gosrani (2014) e KLR where the Court of Appeal observed:-

**“The requirement that the plaint should be accompanied by an affidavit is retained in the renamed Order 4 Rule (1)(2) of the CPR. However, the new rule does not require the affidavit to verify all the contents of the plaint. The only particulars to be verified by the affidavit are averments that there is no other suit pending; that there have been no previous proceedings in any court between the plaintiff and the defendant; and the cause of action relates to the plaintiff named in the plaint”,** and submitted that the verifying affidavit sworn by George Ngungi Mwangi meets all the requirements of the law.

18. Pointing out that vide its further list of documents dated 15th January, 2015 the plaintiff has introduced a resolution by its Board of Directors to file a suit and authorising the deponent to plead on its behalf, the 4th respondent submits that there is no danger of an unauthorised person instructing an advocate to file the suit or claims being incorrectly captured in the plaint.

19. Based on the decision of **Odunga J.**, in the case of Nur Nassir Abdi v. Ali Wario & 2 Others (2013)e KLR it is submitted that the current applications fall within the ambit of “unnecessary interlocutory applications”.

In Nur Nassir Abdi v. Ali Wario & 2 Others (*supra*) it was stated:-

**“...the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time....”**

20. In the circumstances this case, the court is urged to dismiss the suit against the 1st and 2nd defendant firstly on the ground that being mere directors of the 3rd defendant, no personal liability can attach on them and secondly, on account that the suit is incurably defective on the grounds stated herein above.

21. Since the question as to whether personal liability can attach on the applicants will be revisited in the question as to whether the applicant’s have made a case for their names to be strike out, I will consider it alongside that question.

22. On whether there are defects in the plaintiff’s suit and whether those defects render the suit incurably defective, I wish to point out that I have read and considered the verifying affidavit filed in this suit alongside the provisions of **Order 4 Rule (1) (2)** of the CPR which provide as follows:-

**“The plaint shall be accompanied by an affidavit sworn the plaintiff verifying the correctness of the averments contained in rule 1(1)(f).”**

**Order 4 Rule 1(1)(f)** aforementioned provides:-

**“(1) The plaint shall contain the following particulars-**

**(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.”**

23. It is clear from the above cited section of the law and the authority of Kenya Oil Company Ltd v. Jayantilal Dharamshi Gosrani *supra* that the plaintiff is only required to verify the correctness of the matters stated in **Rule 1(1)(f)** above.

Does the verifying affidavit sworn on behalf of the plaintiff satisfy those legal requirements?

24. To determine that question, it is necessary to reproduce the verifying affidavit accompanying the plaint herein, which is as follows:-

**“I, George Ngugi Mwangi, of P.O Box 308 Othaya in the Republic of Kenya make oath as state as follows:-**

**1. That I am the factory unit manager and the secretary to the Board of Directors of the plaintiff, duly authorized to swear this affidavit.**

**2. That I have read and understood all the facts contained in the plaint filed herewith.**

**3. That there is no other suit pending and there have been no previous proceedings, in any court between the plaintiff and the defendants over the same subject matter and the cause of action relates to the plaintiff named in the plaint.**

**4. That what is deposed to herein is true to the best of my knowledge, information and belief.”**

25. A wholistic reading of paragraphs 3 and 4 of the verifying affidavit leaves one without doubt that the verifying affidavit satisfies **Order 4 Rule 2** of the CPR aforementioned.

26. Concerning reference to **Order 4 Rule 4**, of the CPR, I agree with the submissions by counsel for the 4th defendant that they are inapplicable in the circumstances of this case, the current suit not being a representative one. In this case the plaintiff has capacity to sue and the defendants have capacity to be sued. There is no averment in the plaint to the effect that any of the parties in the suit has been sued as a representative of another.

27. Under **Order 9 Rule 1** as read with **Rule 2 (c)** of the CPR the recognized agent in respect of a corporation for the purpose of appearing or acting in court is-

**“an officer of the Corporation duly authorized under the Corporate seal.”**

28. In the verifying affidavit herein, the deponent has described himself as the Secretary of the Board of Directors of the Plaintiff, duly authorised to swear the affidavit.

29. There being no evidence provided to swear that the deponent did not swear the affidavit in the alleged capacity, I find and hold the applicants’ contention that the suit is defective for want of compliance with the law regarding pleadings to be baseless and to that extent to be incapable of forming the basis of issuance of the orders sought.

30. On whether the applicants’ names should be struck out from the suit, the 4th defendant begins by acknowledging that a company being a separate legal entity from the directors who manage it, ordinarily the directors cannot be personally held responsible for the actions of the company. In this regard reference is made to the celebrated case of **Salomon v. Salomon & Company Limited (1995-1899) ALL ER 33** and the case of **Anastacia Mulwa v. Fridah K. Riungu & another (2014) e KLR** where the principle is acknowledged. Nevertheless, it is submitted that there are exceptions to that general rule. In this regard reference is made to the cases of **National Social Security Fund Board of Trustees v. Ankhan Holding Ltd & 2 Others (2006) e KLR; Multichoice Kenya Ltd v. Mainkam Limited & Another (2013) e KLR; and Electrowatts Limited v. Country Site Suppliers Limited & Another (2014) e KLR** and submitted that the position in our law is that the corporate veil of incorporation will be pierced if a company is thought to be a mere sham or a mask to hide the defendant from the eye of equity.

31. Explaining that in this case fraud or improper design has been imputed on the applicants both in the plaint and the fourth defendant’s statement of defence, it is submitted that only the applicants who executed the transfer documents can explain how the 3rd defendant and themselves acquired the suit

property.

32. Given the peculiar circumstances of this case, it is submitted that it is just and fair the applicants remain parties to the suit.

33. In determining the propriety or otherwise of joinder of the applicants in this suit, I begin by pointing out that under **Order 1 Rule 9** of the CPR misjoinder or non-joinder of parties does not defeat a suit.

34. Under that section of the law, the court is given power to deal with the matter in controversy so far as it relates to the rights and interests of the parties actually before it. In this regard see the said provision of the law which provides as follows-

**“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”**

35. **Order 1 Rule 10(2)** of the CPR, on the other hand, gives the court power, on application by either party or on its own motion, to 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.

36. **Order 4 Rule 5** of the CPR, on the other hand, imposes an obligation on the claimant to show, in his plaint who the defendant is and show that the defendant is liable to be called upon to answer to his demand.

37. In the instant suit, the plaintiff has in his plaint averred that the applicants' played a role in the process that ultimately led to execution of the agreement and transfer of the suit property to it by the 3rd defendant. In the replying affidavits sworn in opposition to the applications herein, it is deposed that the applicants are important parties to the suit because they are the only ones who can explain how the suit property transferred from its previous owner to the 3rd defendant.

38. Upon considering the issues raised in the current suit, the replying affidavits sworn in opposition to the applications, the witness statements of the applicants', the above cited provisions of the law concerning joinder and misjoinder of parties, I find and hold that the applicants are important parties to this suit for the purpose of assisting the court understand how the suit property was transferred from Naomi Wanjiku Waiyaki to the 3rd defendant. In this regard it is noteworthy that the 1st defendant does not deny having been involved in the impugned transfer of the suit property to the 3rd defendant and the subject transfer of the property to the plaintiff. See the 1st defendant's witness statement dated 28th August, 2013 where he has, *inter alia*, stated as follows:-

**“I bought the land in 1998 from one Naomi Wanjiku but I never transferred the same to myself and I only did it in the year 2012 as I had all the documents of consent to transfer and title given to me by Naomi Wanjiku...Vacant possession was granted to the plaintiff herein despite them having failed to fulfil their promise of making good the payment of the balance of the purchase price.”**

39. In her statement of defence, the 2nd defendant states that the impugned transactions concerning the suit property were carried out by the principal director of the 3rd defendant and the 1st defendant. She however, does not disclose who the principal director of the company is or was. In view of the foregoing, and despite her statement that she was not personally involved in the impugned dealing, I find her to be a necessary party in the suit for the purpose of assisting the court properly and effectually determine all the issues raised in the suit.

40. Whereas the applicants have challenged the enjoinder in the suit on the ground that the 3rd defendant is a separate legal entity capable of suing and being sued separately, having found the applicants to be necessary parties to the suit for the purpose of just and effectual determination of the

issues raised therein, I need not consider the issue of whether or not a case has been made for piercing the corporate veil of incorporation of the 3rd defendant. In any event, I hold the view that the said issue would only be pertinent if the plaintiff had brought an application for lifting of the 3rd defendant's veil of incorporation.

41. The upshot of the foregoing is that the applications herein are found to be without merit and dismissed with costs to the respondents.

**Dated, signed and delivered at Nyeri this 18th day of November, 2015.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Mr. Kassam for the 4th defendant

Ms mwai for the plaintiff

N/A for 1st, 2nd and 3rd defendants

Court clerk - Lydia