



**Mwangi v Gitari alias Julius Mutugi Muchemi & 5 others (Environment and Land Case Civil Suit 281 of 2015) [2022] KEELC 15477 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15477 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 281 OF 2015  
SO OKONG'O, J  
DECEMBER 20, 2022**

**BETWEEN**

**FRANCIS KANYANJUA MWANGI ..... PLAINTIFF**

**AND**

**MUGO GITARI ALIAS JULIUS MUTUGI MUCHEMI ..... 1<sup>ST</sup> DEFENDANT**

**COMAT MERCHANTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EDWARD NDUNGU WAMBUI ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**PETER MAINA MUGAMBI ..... 1<sup>ST</sup> RESPONDENT**

**JANE MUTHONI MAINA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The plaintiff filed this suit against the defendants through a plaint dated April 7, 2015 which was amended on April 30, 2015 and further amended on December 8, 2015 seeking the following orders;
  1. A declaration that the plaintiff is the legal owner of the leasehold title comprised in a property known as Nairobi/ Block 93/1257.
  2. A declaration that the sale and transfer of Nairobi/Block 93/1257 from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and further to the 3<sup>rd</sup> defendant was unprocedural and illegal.
  3. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their servants, agents, employees or anybody claiming under them from entering into, evicting the plaintiff, depositing materials and or constructing any structures on, selling, charging, alienating,



disposing off, dealing with or in any way interfering with the plaintiff's quiet possession and/or title to the property known as Nairobi/Block 93/1257.

4. An order for the cancellation of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' names from the land register in respect of the property known as Nairobi/Block 93/1257 and rectification thereof to restore the plaintiff's name as the proprietor of the said land.
  5. In the alternative, an order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to execute and deliver up to the plaintiff for registration, a transfer and all other relevant documents in respect of the property known as Nairobi/Block 93/1257 to facilitate the transfer of the said property to the plaintiff within 14 days of the order hereof and in default thereof, the land registrar to execute the transfers and/ or other documents necessary to transfer ownership of the said property to the plaintiff at the defendants' costs.
  6. Damages for fraud and misrepresentation against the defendants.
  7. Costs of the suit.
  8. Any other order that the court may deem just and fit to grant.
2. The plaintiff averred that in November, 1989, he acquired a leasehold interest in the property known as Nairobi/Block 93/1257 (hereinafter referred to as "the suit property") for a period of 99 years commencing on July 1, 1989. The plaintiff averred that he had quiet, peaceful and uninterrupted possession of the suit property and paid land rates regularly to the relevant authorities. The plaintiff averred that on or about July 2009, the 1<sup>st</sup> defendant with intent to commit fraud filed a fictitious claim against the plaintiff in the High Court of Kenya at Milimani namely, HCCC No 555 of 2009 where he unlawfully and unprocedurally obtained *ex parte* judgment against him without his knowledge.
  3. The plaintiff averred that in execution of the said judgment in HCCC No 555 of 2009, a prohibitory order was registered against the title of the suit property on November 12, 2009 and the property transferred to the 2<sup>nd</sup> defendant on August 1, 2012 pursuant to a vesting order issued in the said suit. The plaintiff averred that he was not aware of HCCC No 555 of 2009 and was not notified of the said prohibitory order or any other order issued in the said suit. The plaintiff averred that he learned of all these developments on or about April 2015 when he carried out a search on the title of the suit property at the land registry.
  4. The plaintiff averred that after learning of these developments, he lodged a complaint with the Criminal Investigation Department of the National Police Service regarding interference with the title of the suit property. The plaintiff averred that the 2<sup>nd</sup> defendant conspired with the 1<sup>st</sup> defendant to fraudulently acquire title to the suit property since it knew or ought to have known that the purported sale and transfer of the suit property to it was tainted with illegality. The plaintiff averred that the suit property was subsequently transferred to the 3<sup>rd</sup> defendant who knew or ought to have known that the title to the suit property was tainted with illegality.
  5. The plaintiff averred that the 4<sup>th</sup> defendant registered the instruments of transfer in respect of the suit property in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants despite having knowledge that the suit property was under investigation by the Directorate of Criminal Investigations for having been acquired through fraudulent, illegal, and unlawful dealings. The plaintiff averred that the title for the suit property that was held by the 2<sup>nd</sup> defendant was void ab initio since the same was obtained pursuant to a fraudulent court decree. The plaintiff averred that the 3<sup>rd</sup> defendant did not get a better title since the title that was conveyed to him was a product of fraudulent, illegal, unprocedural and corrupt schemes.



6. The plaintiff averred that in April 2015, the 3<sup>rd</sup> defendant pulled down the plaintiff's fence around the suit property and erected a new fence without the plaintiff's consent. The plaintiff averred that unless the defendants were restrained by the court, they would proceed to evict him from the suit property thereby occasioning him an irreparable loss.
7. The 2<sup>nd</sup> defendant filed a mended statement of defence and a response to the notice of claim against it by the 3<sup>rd</sup> defendant on January 25, 2016. The 2<sup>nd</sup> defendant denied the plaintiff's claim in its entirety and averred that it was a stranger to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant denied that it was a party to the proceedings in HCCC No 555 of 2009, Julius Mutugi Muchemi v Francis Kanyanjua Mwangi. The 2<sup>nd</sup> defendant averred that it purchased the suit property through a public auction sanctioned by the court in execution of a decree issued in the said suit where it emerged as the highest bidder.
8. The 2<sup>nd</sup> defendant denied the particulars of fraud, misrepresentation, illegality, negligence, corrupt scheme and conspiracy contained in the further amended plaint and averred that it acquired an indefeasible title to the suit property. The 2<sup>nd</sup> defendant averred that it became a bona fide purchaser for value of the suit property with absolute and indefeasible title at the fall of the hammer at the auction. The 2<sup>nd</sup> defendant averred that when it acquired the suit property, no investigations had been initiated in respect thereof by the Directorate of Criminal Investigations. The 2<sup>nd</sup> defendant averred that it had legal, registered and absolute title to the suit property before transferring the same to the 3<sup>rd</sup> defendant.
9. In response to the notice of claim by the 3<sup>rd</sup> defendant, the 2<sup>nd</sup> defendant denied liability to the 3<sup>rd</sup> defendant and reiterated that it was a bona fide purchaser of the suit property through a court process with absolute and indefeasible title. The 2<sup>nd</sup> defendant averred that in the event of it being held liable, it was entitled to full indemnity and/or contribution from the Judiciary of Kenya and the land registrar against whom it was entitled to institute third-party proceedings.
10. The 3<sup>rd</sup> defendant filed amended statement of defence and notice of claim against the 2<sup>nd</sup> defendant on January 19, 2016. The 3<sup>rd</sup> defendant denied that the plaintiff was in possession of the suit property. The 3<sup>rd</sup> defendant averred that he took possession of the suit property, fenced the same and commenced construction thereon after purchasing the same from the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant denied that the 1<sup>st</sup> defendant transferred the suit property to the 2<sup>nd</sup> defendant. He contended that the 2<sup>nd</sup> defendant bought the property through a public auction sanctioned by the court. The 3<sup>rd</sup> defendant denied the allegation that the plaintiff had no knowledge of the dealings involving the suit property. The 3<sup>rd</sup> defendant denied the allegations of fraud, misrepresentation and illegality pleaded in the further amended plaint. He averred that he acquired the suit property for valuable consideration after ascertaining the 2<sup>nd</sup> defendant's ownership of the same.
11. In his notice of claim against the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> defendant stated that under a sale agreement dated April 4, 2014 between him and the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant warranted to him that the 2<sup>nd</sup> defendant had a good and valid title to the suit property with no competing claims. In the alternative and without prejudice to his amended defence, the 3<sup>rd</sup> defendant sought indemnity against the 2<sup>nd</sup> defendant for;
  - a. Special damages of Kshs 82,408,155/-
  - b. General damages
  - c. Interests on (a) and (b) at court rates from the date of filing suit.
  - d. Mesne profits



- e. Costs of the suit.
12. In a judgment delivered on July 25, 2019, the court made the following orders;
1. “Judgment is entered for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in terms of prayers i, ii, iii, and iv of the amended plaint dated December 8, 2015 together with costs to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  2. The plaintiff’s suit against the 4<sup>th</sup> defendant is dismissed.
  3. Judgment is entered for the 3<sup>rd</sup> defendant against the 2<sup>nd</sup> defendant in the sum of Kshs 78,173,655/- together with costs and interest at court rates from the date hereof until payment in full.”
13. On whether the 3<sup>rd</sup> defendant had acquired a valid title from the 2<sup>nd</sup> defendant, the court stated as follows in part:
- “For the reasons which I have given above, it is my finding that the 3<sup>rd</sup> defendant did not acquire a valid title from the 2<sup>nd</sup> defendant. Since the 2<sup>nd</sup> defendant did not acquire a valid title at the auction sale, he had not title which he could transfer to the 3<sup>rd</sup> defendant. I wish to add that as at the time the 2<sup>nd</sup> defendant sold the suit property to the 3<sup>rd</sup> defendant, the 2<sup>nd</sup> defendant had notice that the process through which the suit property was sold to it was the subject of inquiry by the Directorate of Criminal Investigations.”
14. On the liability of the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant, the court stated as follows:
- “A notice of claim by a defendant against a co-defendant served under order 7 rule 8 of the [Civil Procedure Rules](#) is treated as a cross-suit and unless ordered otherwise, the court is supposed to determine the same at the same time as the claim between the plaintiff and the defendant. The 3<sup>rd</sup> defendant in his defence raised a claim against the 2<sup>nd</sup> defendant for special damages of Kshs 82, 408,155/-, general damages, mesne profits together with interest at court rates. The 3<sup>rd</sup> defendant averred that in the agreement for sale dated April 4, 2014 between him and the 2<sup>nd</sup> defendant in respect of the suit property, the 2<sup>nd</sup> defendant warranted to him that it had a good and valid title to the suit property with no competing claims. In its response to the 3<sup>rd</sup> defendant’s claim, the 2<sup>nd</sup> defendant denied that it was liable to the 3<sup>rd</sup> defendant for the warranty that it had given in the agreement for sale aforesaid. The 2<sup>nd</sup> defendant maintained that it had a valid and indefeasible title to the suit property when it sold the property to the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant averred that it was not liable for the developments that the 3<sup>rd</sup> defendant had carried out on the suit property and could not be called upon to indemnify the 3<sup>rd</sup> defendant in respect thereof.
15. I have already made a finding that the 2<sup>nd</sup> defendant did not have a valid title to the suit property. From the evidence on record, before the 2<sup>nd</sup> defendant sold the suit property to the 3<sup>rd</sup> defendant, the 2<sup>nd</sup> defendant was aware of the investigations that had been instituted by the Directorate of Criminal Investigations regarding the circumstances under which the suit property was transferred to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant’s director, DW1 admitted that he was summoned by the Directorate of Criminal Investigations and he recorded a statement in respect to the suit property. He stated in his evidence in cross examination that he was informed by the police that someone had complained about the sale of the suit property. He told the court that he did not bother to find out about the party who had an interest in the property. In his evidence, the 3<sup>rd</sup> defendant told the court that at the time



of entering into an agreement for sale with the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant did not disclose that there were ongoing investigations on the manner in which the 2<sup>nd</sup> defendant acquired the property. With full knowledge that there was ongoing criminal investigation on the circumstances under which it acquired the suit property, the 2<sup>nd</sup> defendant warranted to the 3<sup>rd</sup> defendant that it had a valid title to the property and agreed to indemnify the 3<sup>rd</sup> defendant in the event that its title to the property was found to be wanting.

16. The court having found that the 2<sup>nd</sup> defendant did not have a valid title to the suit property when he entered into agreement for sale with the 3<sup>rd</sup> defendant in respect thereof and that the 3<sup>rd</sup> defendant did not acquire a valid title to the property, the 2<sup>nd</sup> defendant is liable to the 3<sup>rd</sup> defendant on its warranty. The 3<sup>rd</sup> defendant is entitled to be indemnified in respect of the entire loss he has incurred as a result of the 2<sup>nd</sup> defendant's breach of the said warranty. The 3<sup>rd</sup> defendant has in the circumstances established his claim against the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant claimed a sum of Kshs 82,408,155/- as special damages. The law on special damages is settled that the same must be pleaded, particularised and strictly proved. The 3<sup>rd</sup> defendant set out in his notice of claim the particulars of the said amount claimed as special damages. With regard to proof, the 2<sup>nd</sup> defendant did not support some of the expenditures with receipts or invoices. I found the claims for legal fees; agency fees; change of user fees; Architectural design, drawings and submission fees; architectural supervision fees; structural design, drawing and submission fees; structural engineer supervision fees; mechanical design fees; electrical design fees and NEMA documentation fees not proved. The remaining claim in the sum of Kshs 78,173,655/- was proved to the required standard. With regard to general damages, the 3<sup>rd</sup> defendant did not prove that he suffered any damages over and above special damages as a result of the 2<sup>nd</sup> defendant's breach of the said agreement for sale. As concerns the claim for mesne profits, no basis was laid for the same."

#### **The Application Before The Court:**

17. What is before the court for determination is the 3<sup>rd</sup> defendant's amended notice of motion application dated May 30, 2022 in which the 3<sup>rd</sup> defendant has sought orders that the veil of incorporation of the 2<sup>nd</sup> defendant be lifted and the directors of the 2<sup>nd</sup> defendant, Peter Maina Mugambi and Jane Muthoni Maina, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein jointly and severally be made personally liable for the debt owed by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant and be ordered to settle the decretal sum of Kshs 78,173,655/= together with interest thereon from August 22, 2019 until payment in full and the costs of the application.
18. The application is supported by the affidavit of the 3<sup>rd</sup> defendant, Edward Ndungu sworn on May 30, 2022. The 3<sup>rd</sup> defendant has averred that on July 25, 2019, judgment was entered against the 2<sup>nd</sup> defendant in favour of the 3<sup>rd</sup> defendant in the sum of Kshs 78,173,655/= together with interest at court rates from that date until payment in full. The 3<sup>rd</sup> defendant has averred that a decree was extracted from the said judgment on August 22, 2019. The 3<sup>rd</sup> defendant has averred that since obtaining the said judgment in his favour, he had made attempts to execute the decree against the 2<sup>nd</sup> defendant but the attempts had been unsuccessful since the respondents, Peter Maina and Jane Muthoni Maina (hereinafter referred to only as "the respondents") in their fiduciary capacities as directors of the 2<sup>nd</sup> defendant have failed and/or refused to make good the decretal sum.
19. The 3<sup>rd</sup> defendant has averred that he sought the court's intervention through an application dated April 22, 2020 in which he sought orders compelling the directors of the 2<sup>nd</sup> defendant to attend court for examination on whether the 2<sup>nd</sup> defendant had property or means of satisfying the decree issued by the court herein on August 22, 2019 and to produce books of accounts and other documentary evidence showing that the 2<sup>nd</sup> defendant was in a position to satisfy the decree.



20. The 3<sup>rd</sup> defendant has averred that the 2<sup>nd</sup> defendant confirmed that it had no attachable assets or bank accounts. The 3<sup>rd</sup> defendant has averred that this admission is contained in a sworn affidavit of Peter Maina Mugambi , a director of the 2<sup>nd</sup> defendant dated November 1, 2021. The 3<sup>rd</sup> defendant has averred that despite that admission, the Deputy Registrar declined to hold the directors of the 2<sup>nd</sup> defendant personally liable to satisfy the decree issued herein. The 3<sup>rd</sup> defendant has averred that in her ruling dated November 17, 2021, the Deputy Registrar held that the court’s role under order 22 rule 35 was merely to undertake an oral examination of the judgment debtor or any other person ordered to be examined and to order the production of books or documents.
21. The 3<sup>rd</sup> defendant has averred that from the said ruling, it is clear that the 2<sup>nd</sup> defendant has no attachable assets capable of satisfying the decree issued herein. The 3<sup>rd</sup> defendant has averred that a cursory look at the 2<sup>nd</sup> defendant’s statement of nominal share capital shows that the 2<sup>nd</sup> defendant company had a nominal share capital of Kshs 100,000/= that was under the direct control of the respondents who have never accounted for the same. The 3<sup>rd</sup> defendant has averred that the respondents have admitted that the 2<sup>nd</sup> defendant has no attachable assets or any money in a bank account capable of satisfying the decree of the court.
22. The 3<sup>rd</sup> defendant has averred that the respondents in their capacities as directors of the 2<sup>nd</sup> defendant have mismanaged the assets of the 2<sup>nd</sup> defendant and as such, it would only be fair if the corporate veil of the 2<sup>nd</sup> defendant is lifted and the 3<sup>rd</sup> defendant allowed to execute the decree of the court against the said directors of the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant has averred that that was the only way in which the 3<sup>rd</sup> defendant can enjoy the fruits of his judgment.
23. The application is opposed by the 2<sup>nd</sup> defendant through a notice of preliminary objection dated June 15, 2022. The 2<sup>nd</sup> defendant has objected to the application on the following grounds:
  1. That the 3<sup>rd</sup> defendant’s application is res judicata as the issues raised therein were canvassed in the 3<sup>rd</sup> defendant’s previous application dated April 22, 2020 that was heard and determined by the Deputy Registrar Hon I.N Barasa in a ruling delivered on November 17, 2021.
  2. That order 8 rule 3 of the [Civil Procedure Rules](#) only permits amendments of pleadings with leave of the court at any stage of proceedings and not after judgment had been entered and an appeal preferred and determined.
  3. That the amendments proposed by the 3<sup>rd</sup> defendant are extensive as the 3<sup>rd</sup> defendant has sought to add new parties to the suit as defendants after judgment in which they were not heard.
  4. That the 3<sup>rd</sup> defendant’s application is unprocedural as the 3<sup>rd</sup> defendant is attempting to execute a decree more than one year after the decree was issued.

### **The 3<sup>rd</sup> Defendant’s Submissions:**

24. The 3<sup>rd</sup> defendant’s application was heard by way of written submissions. In his submissions dated June 20, 2022, the 3<sup>rd</sup> defendant framed one issue for determination by the court namely, whether the 3<sup>rd</sup> defendant has established a basis for the lifting of the 2<sup>nd</sup> defendant’s corporate veil. The 3<sup>rd</sup> defendant has submitted that the respondents as directors of the 2<sup>nd</sup> defendant have a fiduciary duty of settling any debts owed to the 2<sup>nd</sup> defendant’s creditors. The 3<sup>rd</sup> defendant has relied on [Multinational Gas and Petro-Chemical Co v Multinational Gas Services Ltd](#) (1983) CL 258,299 in support of this submission.



25. The 3<sup>rd</sup> defendant has submitted that directors' breach of fiduciary duty amounts to improper conduct which is a ground on which the corporate veil of a company may be pierced. The 3<sup>rd</sup> defendant has submitted that being the controlling managers and directors of the 2<sup>nd</sup> defendant, the respondents have breached the fiduciary duty they owed to the 2<sup>nd</sup> defendant by failing to pay to the 3<sup>rd</sup> defendant the decretal sum of Kshs 78,173,655/=. In support of this submissions, the 3<sup>rd</sup> defendant has relied on [Stephen Njoroge Gikera & another v Econite Mining Company Limited & 7 others](#) [2018] eKLR and [Robert Kinaga Waweru v Northcorr Enterprises](#) [2021] eKLR and [Lucy Mukembura Kimani v Nzuri Feeds Supplies Ltd](#)[2021] eKLR.
26. The 3<sup>rd</sup> defendant has submitted that the respondents are inseparable from the 2<sup>nd</sup> defendant and in such circumstances, the strict adherence to the legal personality doctrine would greatly prejudice the 3<sup>rd</sup> defendant as the same would promote injustice. The 3<sup>rd</sup> defendant has relied on [Jiang Nan Xiang v Cok Fas-St Company Limited](#) [2018] e KLR in support of this submission.
27. The 3<sup>rd</sup> defendant has submitted that the respondents being the directors of the 2<sup>nd</sup> defendant failed to produce the requisite records/documents of the 2<sup>nd</sup> defendant as required under order 22 rule 35 of the [Civil Procedure Rules 2010](#) despite having been accorded an opportunity to do so. The 3<sup>rd</sup> defendant has submitted that the court should find no difficulty in piercing the corporate veil of the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant has relied on [Petrol Oil \(K\) Ltd v Hosborne Arunga & 2 others](#) [2013] eKLR in support of this submission.
28. The 3<sup>rd</sup> defendant filed further submissions dated July 19, 2022 in response to the 2<sup>nd</sup> defendant's notice of preliminary objection dated June 15, 2022. The 3<sup>rd</sup> defendant has submitted that the preliminary objection predominantly raises issues of fact rather than law. The 3<sup>rd</sup> defendant has submitted that the reliefs that he sought in his previous application dated April 22, 2020 were substantially different from the prayers sought in the instant application. The 3<sup>rd</sup> defendant has submitted that in his previous application, it sought to have the directors of the 2<sup>nd</sup> defendant compelled to attend court and be examined on whether the 2<sup>nd</sup> defendant had any property or means of satisfying the decree herein.
29. The 3<sup>rd</sup> defendant has submitted that the 2<sup>nd</sup> defendant filed an affidavit in which it stated that it neither held any bank account nor did it have any property registered in its name. The 3<sup>rd</sup> defendant has submitted that the two applications are distinct from each other. The 3<sup>rd</sup> defendant has submitted that the objection is an attempt to undermine the 3<sup>rd</sup> defendant's right to enjoy the fruits of successful litigation. In support of this submission, the 3<sup>rd</sup> defendant has relied on [Nathaniel Ngure Kibiu v Housing Finance](#) [2018] eKLR.
30. The 3<sup>rd</sup> defendant has submitted that a plea of res judicata cannot be sustained when the facts on which a party is relying were not in existence at the time of the former application. The 3<sup>rd</sup> defendant has submitted that the 2<sup>nd</sup> defendant's inability to satisfy the decree was not within the knowledge of the 3<sup>rd</sup> defendant and could not be brought to the court's attention at the time when the initial application dated April 22, 2020 was filed. In support of this submission, the 3<sup>rd</sup> defendant has relied on [Saifudeen Abdulla Bhai & Hussein Abdulla Bhai v Zainabu Mwinyi](#) [2014] eKLR.
31. On the issue of whether the joinder of the respondents to the suit was proper, the 3<sup>rd</sup> defendant has submitted that leave for the joinder of the respondents was granted by the court in the presence of both parties on March 16, 2022. The 3<sup>rd</sup> defendant has submitted that on that date, the 3<sup>rd</sup> defendant was granted leave to amend his notice of motion application to add the respondents who were the directors of the 2<sup>nd</sup> defendant as parties to the application.



32. The 3<sup>rd</sup> defendant has submitted that the respondents in their fiduciary capacities as directors of the 2<sup>nd</sup> defendant have failed and/or refused to make good the payment of the decretal sum owed to the 3<sup>rd</sup> defendant and are out to frustrate the efforts by the 3<sup>rd</sup> defendant to pursue the recovery of the same. The 3<sup>rd</sup> defendant has submitted further that lifting the corporate veil is concerned with unmasking the company to see the true persons behind the company and is by no means a mode of executing a decree. The 3<sup>rd</sup> defendant has urged the court to allow the amended notice of motion application dated May 30, 2022 and to dismiss the 2<sup>nd</sup> defendant's notice of preliminary objection dated June 15, 2022 with costs.

### **The 2<sup>nd</sup> Defendant's Submissions:**

33. In its submissions dated July 13, 2022 in respect of the 3<sup>rd</sup> defendant's notice of motion application dated May 30, 2022 and the 2<sup>nd</sup> defendant's preliminary objection dated June 15, 2022, the 2<sup>nd</sup> defendant has framed two issues for determination. The first issue is whether the 3<sup>rd</sup> defendant's application is *res judicata*. In its submissions on this issue, the 2<sup>nd</sup> defendant has cited *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited* [1969] EA 696.
34. The 2<sup>nd</sup> defendant has submitted that its preliminary objection raised points of law that should be determined by the court. The 2<sup>nd</sup> defendant has relied on section 7 of the [Civil Procedure Act](#) and submitted that the 3<sup>rd</sup> defendant's application raises the same issues which were raised, heard and determined in the previous application dated April 22, 2020.
35. The 2<sup>nd</sup> defendant has submitted that in the application dated April 22, 2020, the 3<sup>rd</sup> defendant had moved to court under order 22 rule 35 of the [Civil Procedure Rules](#) seeking to have the corporate veil of the 2<sup>nd</sup> defendant pierced and the directors of the 2<sup>nd</sup> defendant held personally liable for the decretal sum. The 2<sup>nd</sup> defendant has submitted that the Deputy Registrar, Hon Isabella Barasa who heard the application declined to order the respondents herein, Peter Maina Mugambi and Jane Muthoni Maina to personally pay the decretal sum due to the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant has submitted that a competent court having heard and determined an application by the 3<sup>rd</sup> defendant seeking to lift the corporate veil of the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant having not appealed against the decision, it is not open to the 3<sup>rd</sup> defendant to move the court through a fresh application seeking the same orders against the same parties.
36. The second issue framed by the 2<sup>nd</sup> defendant is whether the 2<sup>nd</sup> defendant's corporate veil should be lifted. The 2<sup>nd</sup> defendant has submitted that the court should find that the 3<sup>rd</sup> defendant has not met the threshold for lifting of a corporate veil. In support of this submission, the 2<sup>nd</sup> defendant has relied on *Salomon v Salomon & Co* (1897) AC 22. The 2<sup>nd</sup> defendant has submitted that there are circumstances when a veil of incorporation may be lifted. The 2<sup>nd</sup> defendant has submitted that in such cases, the law essentially goes behind the corporate personality of a company to attach responsibility to the individual directors thereby ignoring personality of the company in favour of the reality of the prevailing circumstances. In support of this submission, the 2<sup>nd</sup> defendant has relied on [Halsbury's Laws of England](#), 4<sup>th</sup> Edn para 90 which addresses the issue of piercing of a corporate veil.
37. The 2<sup>nd</sup> defendant has submitted that the 3<sup>rd</sup> defendant has claimed that the directors of the 2<sup>nd</sup> defendant breached their fiduciary duties without placing any evidence before the court in proof of the allegation. The 2<sup>nd</sup> defendant has submitted that in considering an application for the piercing of a corporate veil, the courts have held that it must be established that a company is a mere instrument or alter ego of the shareholder or director in question such that there is such unity of interest and



ownership that one is inseparable from the other and that the facts must be such that adherence to the fiction of separate entity would under the circumstances sanction a fraud or promote injustice.

38. The 2<sup>nd</sup> defendant has submitted that other factors the court should look out for to determine if the two requirements have been met are whether the company is adequately capitalized, whether there is a failure to maintain adequate corporate records or to comply with corporate formalities, whether there has been demonstrated commingling of funds or assets between the company and the asserted alter ego, and whether the alter ego has treated the assets or finances of the corporation as his own.
39. The 2<sup>nd</sup> defendant has submitted that the 3<sup>rd</sup> defendant's application is *res judicata* and that the 3<sup>rd</sup> defendant has failed to place any evidence in support of his application for the lifting of the corporate veil of the 2<sup>nd</sup> defendant and holding the respondents personally liable for the payment of the decretal amount due to the 3<sup>rd</sup> defendant herein. The 2<sup>nd</sup> defendant has submitted that the 3<sup>rd</sup> defendant has failed to demonstrate that there was any fraud or improper conduct by the 2<sup>nd</sup> defendant or its directors.

#### **Analysis And Determination:**

40. I have considered the 3<sup>rd</sup> defendant's application, the notice of preliminary objection filed by the 2<sup>nd</sup> defendant in opposition thereto and the submissions by the advocates for the parties. In my view, the following issues arise for determination;
  - a. Whether the application is *res judicata*.
  - b. Whether the joinder of the respondents to the suit was proper.
  - c. Whether the 2<sup>nd</sup> defendant's corporate veil should be lifted.
  - d. Who should pay the costs of the application?

#### **Whether the application dated May 30, 2022 is res judicata:**

41. As mentioned earlier, the 2<sup>nd</sup> defendant's *res judicata* argument is based on an earlier application by the 3<sup>rd</sup> defendant dated April 22, 2020 that was heard by the Deputy Registrar and a ruling delivered on November 17, 2021 by Hon I. N Barasa. In the application, the 3<sup>rd</sup> defendant sought orders that the court compels the respondents herein, Peter Maina Mugambi and Jane Muthoni Maina as directors of the 2<sup>nd</sup> defendant to attend court; for examination as to whether the 2<sup>nd</sup> defendant/judgment debtor had property or means of satisfying the decree of the court, and to produce books of accounts and other documentary evidence showing that the 2<sup>nd</sup> defendant was in a position to satisfy the decree failing which the said the directors of the 2<sup>nd</sup> defendant to personally pay the decretal amount due to the 3<sup>rd</sup> defendant or be committed to civil jail for a period not less than 6 months. The Deputy Registrar in her ruling aforesaid declined to order Peter Maina Mugambi and Jane Muthoni Maina the respondents herein to personally pay the decretal sum due to the 3<sup>rd</sup> defendant.
42. In the present application, the 3<sup>rd</sup> defendant has sought orders that the veil of incorporation of the 2<sup>nd</sup> defendant be lifted and the directors of the 2<sup>nd</sup> defendant, Peter Maina Mugambi and Jane Muthoni Maina the respondents herein be made jointly and severally liable for and ordered to settle the decretal amount due to the 3<sup>rd</sup> defendant in the sum of Kshs 78,173,655/= together with interest from August 22, 2019 until payment in full.
43. I am of the view that the 3<sup>rd</sup> defendant's previous application dated April 22, 2020 that was heard and determined by the Deputy Registrar is different from the application dated May 30, 2022 before me. In the previous application, the 3<sup>rd</sup> defendant did not seek the lifting of the corporate veil of the 2<sup>nd</sup> defendant. I doubt if the Deputy Registrar had jurisdiction to make such order even if it had been



sought. Such order could only be made by the court that was seized of the matter. The Deputy Registrar had no jurisdiction to grant the order in exercise of her powers under order 49 of the Civil Procedure Rules. As stated in the ruling, the Deputy Registrar's jurisdiction was limited only to undertaking oral examination of the directors of the 2<sup>nd</sup> defendant and ordering the production of books and/or documents to ascertain whether the 2<sup>nd</sup> defendant had property or means of satisfying the decree against it. In the present application, the 3<sup>rd</sup> defendant has sought the lifting the corporate veil of the 2<sup>nd</sup> defendant and an order that the directors of 2<sup>nd</sup> defendant are personally liable to satisfy the decretal amount. Although in the previous application, the 3<sup>rd</sup> defendant had also sought an order that the directors of the 2<sup>nd</sup> defendant be made personally liable for the payment of the decretal amount due from the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant, the order was not sought on the basis of the lifting of the 2<sup>nd</sup> defendant's corporate veil. For the foregoing reasons, it is my finding that the application before the court is not res judicata.

#### **Whether the joinder of the respondents to the suit was proper:**

44. I am of the view that the respondents, Peter Maina Mugambi and Jane Muthoni Maina were not joined herein as parties to the suit. From the record, they were joined to the application before the court as it sought orders against them. The 3<sup>rd</sup> defendant sought and was granted leave on March 16, 2022 to amend the notice of motion application dated February 2, 2022 for the purposes of joining to the application the directors of the 2<sup>nd</sup> defendant. It was pursuant to that leave that Peter Maina Mugambi and Jane Muthoni Maina were added to the amended notice of motion dated May 30, 2022 before the court. I therefore find no merit in the 2<sup>nd</sup> defendant's objection to the application herein based on the misjoinder of the respondents, Peter Maina Mugambi and Jane Muthoni Maina to the same.

#### **Whether the 2<sup>nd</sup> defendant's corporate veil should be lifted:**

45. It is common ground that judgment was entered herein on July 25, 2019 for the 3<sup>rd</sup> defendant in the sum of Kshs 78,173,655/= against the 2<sup>nd</sup> defendant. It is also common ground that the 2<sup>nd</sup> defendant has not settled the said judgment debt and has no assets or property that can be attached in execution of the decree in favour of the 3<sup>rd</sup> defendant to recover the said decretal amount. What the 3<sup>rd</sup> defendant is seeking from the court is to hold the respondents who are the directors and shareholders of the 2<sup>nd</sup> defendant liable for the said debt. It is common ground that the 2<sup>nd</sup> defendant is a separate legal entity from its directors and shareholders. The directors and shareholders of the 2<sup>nd</sup> defendant are therefore not personally liable for the debts incurred by the 2<sup>nd</sup> defendant save where the corporate veil/legal personality of the 2<sup>nd</sup> defendant is lifted and a finding made by the court that the said directors are liable for such debts. This court has been called upon to lift the corporate veil of the 2<sup>nd</sup> defendant. The courts and legal scholars have over years laid down the grounds upon which a corporate veil of a company may be lifted. I will only refer to few cases on the issue.
46. In *Aster Holdings Limited v City Council of Nairobi & 4 others* [2019] eKLR the court stated that:
- “ There is no doubt that a company is at law a separate legal entity which is different from its shareholders and subscribers. However, in some instances, the corporate veil of a company can be pierced. The circumstances under which the corporate veil of a company may be pierced were well set out in paragraph 90 of *Halsbury's Laws of England* 4<sup>th</sup> Edition Vol 7 (1) which states as follows: -"Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is



fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. "

47. In *Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd* [2002] 1 EA 41 the court stated that:

"The veil of incorporation is not to be lifted merely because the company has no assets or is unable to pay its debts and thus insolvent. In such a situation, the law provides a remedy other than the director of the company being saddled with the debts of the company".

48. In *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & another* [2014] eKLR the court stated that:

"It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd v Salomon* [1897] AC 22 HL that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality."

49. Following the application dated April 22, 2020 by the 3<sup>rd</sup> defendant, the Deputy Registrar on April 23, 2021 ordered the directors of the 2<sup>nd</sup> defendant, Peter Maina Mugambi and Jane Muthoni Maina to attend court and be examined on whether the 2<sup>nd</sup> defendant had property or means of satisfying the decree of the court and to produce books of accounts and any other documentary evidence of the financial status of the 2<sup>nd</sup> defendant. From the record, the said directors of the 2<sup>nd</sup> defendant neither attended court nor produced the documents they were required to produce under order 22 rule 35 of the *Civil Procedure Rules*. Peter Maina Mugambi in a further affidavit sworn on November 1, 2021 stated that the 2<sup>nd</sup> defendant had no attachable asset or bank account. The 3<sup>rd</sup> defendant although given the opportunity to examine the said directors on their management of the affairs of the 2<sup>nd</sup> defendant did not do so. He was comfortable with the affidavit evidence of the said directors.

50. The burden was upon the 3<sup>rd</sup> defendant to establish the grounds upon which the 2<sup>nd</sup> defendant's corporate veil should be lifted. It was up to the 3<sup>rd</sup> defendant to satisfy the court that the 2<sup>nd</sup> defendant was not being run professionally as a corporate entity but as an alter ego of the respondents. The onus was upon the 3<sup>rd</sup> defendant to demonstrate that the respondents used the 2<sup>nd</sup> defendant as a medium for committing criminal activities or fraud and that he was a victim of such activities or fraud. The application before the court was brought on two grounds only namely; that the 2<sup>nd</sup> defendant is unable to pay its debts and has no attachable assets and that the directors of the 2<sup>nd</sup> defendant breached their fiduciary duties to the 3<sup>rd</sup> defendant. I am in agreement with the authorities that I have cited above that the mere fact that a company has no attachable asset or is unable to pay its debts alone is not sufficient



ground to lift its corporate veil for the purposes of making its directors personally liable for its debt. I am also in agreement with the 2<sup>nd</sup> defendant's submission that no evidence was placed before the court of the alleged breach of fiduciary duties by the directors of the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant has not come out clearly as to the fiduciary duties that were owed to him by the directors of the 2<sup>nd</sup> defendant and how the same were breached. I am unable to see how failure on the part of the 2<sup>nd</sup> defendant to pay the debt owed to the 3<sup>rd</sup> defendant could amount to a breach of fiduciary duty on the part of the directors of the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant's claim that the directors of the 2<sup>nd</sup> defendant had mismanaged the assets of the 2<sup>nd</sup> defendant was also not proved.

51. I am of the view that the 3<sup>rd</sup> defendant missed a golden opportunity to interrogate the manner in which the respondents were managing the affairs of the 2<sup>nd</sup> defendant at the time the 2<sup>nd</sup> defendant sold the suit property to the 3<sup>rd</sup> defendant. It is common ground that the 2<sup>nd</sup> defendant sold to the 3<sup>rd</sup> defendant the suit property at a consideration of Kshs 50,000,000/- on April 4, 2014. The 3<sup>rd</sup> defendant paid the said amount in full to the 2<sup>nd</sup> defendant through the 2<sup>nd</sup> defendant's advocates. The 3<sup>rd</sup> defendant had an opportunity to interrogate whether this amount was paid into the 2<sup>nd</sup> defendant's account or the accounts belonging to the 2<sup>nd</sup> defendant's directors and if it was paid to the accounts of the 2<sup>nd</sup> defendant, how it was disbursed. This would have shed some light on how the 2<sup>nd</sup> defendant was being managed and whether the 2<sup>nd</sup> defendant was used as a façade to defraud the 3<sup>rd</sup> defendant. The directors of the 2<sup>nd</sup> defendant having claimed that the 2<sup>nd</sup> defendant has no assets or bank accounts, the 3<sup>rd</sup> defendant should have inquired where the said sum of Kshs 50,000,000/- was banked and how it was spent. The 3<sup>rd</sup> defendant was not supposed to be satisfied with a response by the directors of the 2<sup>nd</sup> defendant that it had no assets or bank accounts. The essence of the examination of the said directors was to obtain information as to what became of the said assets and bank accounts. The examination of the directors of the 2<sup>nd</sup> defendant would have provided the 3<sup>rd</sup> defendant with information that would have formed a sound basis for the application before the court. As things stand now, I find no basis for the orders sought.
52. The upshot of the foregoing is that the amended notice of motion application dated May 30, 2022 has no merit. The application is dismissed. Each party shall bear its own costs of the application and the preliminary objection.

**DELIVERED AND DATED AT KISUMU ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2022**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

Ms. Kalaine for the 2<sup>nd</sup> Defendant

Mr. Obura h/b for Mr. Muchemi for the 3<sup>rd</sup> Defendant

N/A for the 4<sup>th</sup> Defendant

Ms. J.Omondi-Court Assistant

