



**Kenagen Contractors Kenya Ltd v Abogno, Church of Christ In Africa & 4 others  
(Environment & Land Case 192 of 2015) [2024] KEELC 5111 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5111 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 192 OF 2015**

**SO OKONG'O, J**

**JULY 4, 2024**

**BETWEEN**

**KENAGEN CONTRACTORS KENYA LTD ..... PLAINTIFF**

**AND**

**BISOP HABAKUK ONYANGO ABOGNO, CHURCH OF CHRIST IN  
AFRICA ..... 1<sup>ST</sup> DEFENDANT**

**TRUSTEES OF CHURCH OF CHRIST IN AFRICA ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KISUMU ..... 4<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff filed this suit against the defendants through a plaint dated 28<sup>th</sup> July 2015. The plaint was amended on 18<sup>th</sup> July 2015 and further amended on 20<sup>th</sup> August 2015. The plaintiff averred that it was the registered proprietor of all that parcel of land known as Kisumu/Municipality/Block 10/725 (hereinafter referred to as “the suit property”). The plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> defendants unlawfully entered the suit property and started interfering with the plaintiff’s quiet enjoyment of the suit property. The plaintiff sought judgment against the defendants for among others; a declaration that the plaintiff was the legal owner of the suit property and that the title held by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in respect of the suit property was fraudulent and should be cancelled, an injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from interfering with the suit property, and damages for trespass.
2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed separate statements of defence on 25<sup>th</sup> November 2015 in which they denied the plaintiff’s claim. The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that the 2<sup>nd</sup> defendant was the registered proprietor of the suit property and that it had a title for the same. The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that



the plaintiff had no title to the suit property and that if it had any, the same was obtained fraudulently and illegally.

3. The suit was fixed for hearing on 26<sup>th</sup> July 2016 when the plaintiff and its advocates failed to turn up in court and the suit was dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants for non-attendance. On 5<sup>th</sup> August 2016, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed party and party bill of costs for taxation. The bill was taxed at Kshs. 2,078,231.80 on 23<sup>rd</sup> November 2016 and a certificate of taxation for the said amount issued on 30<sup>th</sup> November 2016.
4. On 9<sup>th</sup> December 2019, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an application under Order 22 Rule 35 of the Civil Procedure Rules seeking an order that the plaintiff's director, John Kennedy Ageng'o does attend court to produce and be cross-examined on; the plaintiff's certificate of incorporation, memorandum and articles of association and personal identification number(pin), audited accounts and tax returns, title deeds and certificates of leases for the parcels of land owned by the plaintiff, log books for the motor vehicles owned by the plaintiff, and bank statements in respect of the accounts operated by the plaintiff since incorporation. On 5<sup>th</sup> March 2020, the court granted the orders as prayed in the application. The plaintiff's said director, John Kennedy Ageng'o did not appear in court for cross-examination.

The application before the court

5. What is before the court for determination is the 1<sup>st</sup> and 2<sup>nd</sup> defendants' Notice of Motion application dated 13<sup>th</sup> December 2023 in which the 1<sup>st</sup> and 2<sup>nd</sup> defendants have sought orders that the veil of incorporation of the plaintiff be lifted and its director, John Kennedy Ageng'o be made personally liable and ordered to settle the costs of Kshs. 2,078,231.80 awarded to the 1<sup>st</sup> and 2<sup>nd</sup> defendants with interest from 30<sup>th</sup> November 2016 until payment in full. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have sought a further order that the execution proceedings be taken out against the said John Kennedy Ageng'o for the recovery of the said judgment debt and all costs attendant thereto.
6. The application which was supported by the affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' advocate, Ms. Monica Otieno sworn on 13<sup>th</sup> December 2023 was brought on the grounds that, John Kennedy Ageng'o was at all material times a director and a shareholder of the plaintiff and had in his possession the relevant and crucial information necessary for the satisfaction of the judgment debt against the plaintiff and that the plaintiff did not appear to have any property capable of being attached to settle the said debt. The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that it was in the interest of justice that the orders sought be granted so that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not prejudiced further.
7. In the affidavit of Ms. Monica Otieno in support of the application, she stated that John Kennedy Ageng'o who swore a verifying affidavit accompanying the plaint did not place before the court a resolution of the Plaintiff authorising him to file a suit in the name of the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' advocate stated further that the plaintiff did not respond to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' contention that it was a briefcase company that had engaged in elaborate and massive fraud and forgery in an attempt to grab the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> defendants. She stated that although the plaintiff claimed to have been allocated the suit property on 26<sup>th</sup> December 1983, the records from the company registry showed that the plaintiff was incorporated on 9<sup>th</sup> November 2011. She stated that the plaintiff's purported letter of allotment and purported receipts for the payments made for the allotment were all forged and back dated to the dates prior to the date of the allotment of the suit property to the 2<sup>nd</sup> defendant on 3<sup>rd</sup> April 1984. The 1<sup>st</sup> and 2<sup>nd</sup> defendants said advocate stated that upon realising that its acts of fraud and forgery had been laid bare, the plaintiff abandoned the suit which was subsequently dismissed on 26<sup>th</sup> July 2016 as mentioned earlier.



8. The 1<sup>st</sup> and 2<sup>nd</sup> defendants said advocate stated that the street on which the plaintiff's registered office was said to be situated did not exist. She stated that the plaintiff was a brief case company that John Kennedy Ageng'o walked around with and that the same was incorporated solely for the purposes of dispossessing the 1<sup>st</sup> and 2<sup>nd</sup> defendants of the suit property. She stated that the plaintiff carried no legitimate business and was being used by John Kennedy Ageng'o as a mask to conduct unlawful and illegal business. She stated that the plaintiff had no known assets and as such the outstanding judgment debt could only be recovered from the said Plaintiff's director, John Kennedy Ageng'o.
9. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' application was served upon John Kennedy Ageng'o and he did not respond to the same. When the application came up for hearing on 23<sup>rd</sup> April 2024, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' advocate relied entirely on the affidavit in support of the application and urged the court to allow the same.

#### Analysis and determination

10. I have considered the 1<sup>st</sup> and 2<sup>nd</sup> defendants' application together with the supporting affidavit. It is not disputed that the plaintiff's suit was dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 26<sup>th</sup> July 2016 and that the said costs were subsequently taxed at Kshs. 2,078,231.80. It is also not disputed that the plaintiff has not settled the said judgment debt and that it has no known assets or properties that can be attached in execution of the said decree on costs in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. What the 1<sup>st</sup> and 2<sup>nd</sup> defendants are seeking from the court is to hold the Plaintiff's director and shareholder, John Kennedy Ageng'o liable for the said debt.
11. It is settled in law that the plaintiff is a separate legal entity from its directors and shareholders. The directors and shareholders of the plaintiff are therefore not personally liable for the debts incurred by the plaintiff save where the corporate veil/legal personality of the plaintiff 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 plaintiff. The courts have over the 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.
12. 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. ”



13. 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”.

14. 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] A.C. 22 H.L 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.”

15. As mentioned earlier, the court made an order on 5<sup>th</sup> March 2020 for the plaintiff's director and shareholder, John Kennedy Ageng'o to attend court and be examined on the status of the plaintiff as a company and whether the plaintiff had property or means of satisfying the decree of the court against it and to produce books of accounts and any other documentary evidence on the plaintiff's financial standing. From the record, the said director of the plaintiff neither attended court nor produced the documents he was required to produce under Order 22 Rule 35 of the Civil Procedure Rules. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not therefore have an opportunity to examine the said director of the plaintiff on their management of the affairs of the plaintiff.
16. In their affidavit in support of the present application, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have averred that the plaintiff does not exist at its registered physical address. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have also averred that the plaintiff has no known assets. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have averred further that the plaintiff is a brief case company which the said John Kennedy Ageng'o moves around with for fraudulent and criminal purposes. In other words, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended that John Kennedy Ageng'o is using the plaintiff as a vehicle to commit fraud and other criminal activities. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended that the attempt to dispossess the 1<sup>st</sup> and 2<sup>nd</sup> defendants of the suit property was an example of John Kennedy Ageng'o's fraudulent use of the plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> defendants produced a letter from the registry of companies dated 21<sup>st</sup> September 2015 in which the Registrar of Companies stated that the plaintiff was incorporated on 9<sup>th</sup> November 2011. The documents annexed to the affidavit of John Kennedy Ageng'o sworn on 18<sup>th</sup> August 2015 filed herein in support of the plaintiff's interlocutory application for injunction showed that; the suit property was allocated to the plaintiff on 10<sup>th</sup> January 1983, the plaintiff accepted and paid for the allotment on 26<sup>th</sup> December 1983 and it was registered as the owner of the property on 18<sup>th</sup> September 2000 when it was also issued with a certificate of lease. All these took place before the plaintiff was incorporated on 9<sup>th</sup> November 2011. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have contended that all these documents were fraudulently obtained by



John Kennedy Ageng'o to grab the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> defendants and that the plaintiff was merely used in the scheme as a cover for John Kennedy Ageng'o. Neither the plaintiff nor John Kennedy Ageng'o responded to these accusations.

17. The burden was upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants to establish the grounds upon which the plaintiff's corporate veil should be lifted. It was up to the 1<sup>st</sup> and 2<sup>nd</sup> defendants to satisfy the court that the plaintiff was not being run professionally as a corporate entity but as an alter ego of John Kennedy Ageng'o. The onus was upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants to demonstrate that John Kennedy Ageng'o used the plaintiff as a medium for committing fraud or criminal activities and that they were victims of such activities or fraud.
18. The application before the court was not opposed. I am satisfied from the material before me that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have discharged the burden of proof that was upon them. I am also satisfied that a case has been made for the lifting of the plaintiff's corporate veil and holding John Kennedy Ageng'o personally liable for the judgment debt due to the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein.
19. In conclusion, I find merit in the Notice of Motion application dated 13<sup>th</sup> December 2023. The application is allowed as prayed.

DELIVERED AND DATED AT KISUMU ON THIS 4<sup>TH</sup> DAY OF JULY 2024

S. OKONG'O

JUDGE

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

N/A for the Plaintiff

Mr. Otieno D. for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

N/A for the 5<sup>th</sup> Defendant

Ms. J. Omondi-Court Assistant

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