



REPUBLIC OF KENYA



**Basil & another v Safari Leisure Motels Ltd & 5 others (Environment & Land
Case 229 of 2020) [2022] KEELC 13583 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13583 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 229 OF 2020
LL NAIKUNI, J
OCTOBER 3, 2022**

BETWEEN

SURJEET SINGH BASIL 1ST PLAINTIFF

SEEMA BASIL 2ND PLAINTIFF

AND

SAFARI LEISURE MOTELS LTD 1ST DEFENDANT

ELIUD MATU WAMAE 2ND DEFENDANT

PATRICK WAMAE 3RD DEFENDANT

KAMAU NJENDU 4TH DEFENDANT

LAND REGISTRAR, MOMBASA 5TH DEFENDANT

**SAMUEL MAZERA MWAMUNGA & JOSIAH CHOLA MWAMUNGA
(ADMINISTRATORS OF THE ESTATE OF ELIUD TIMOTHY
MWAMUNGA) 6TH DEFENDANT**

RULING

I. Introduction

1. The 1st, 2nd & 3rd Defendants herein moved this Honorable Court for its determination through the filed Chamber Summons application dated 7th March, 2022 and filed on 8th March, 2022. It's brought under the dint of Sections 1A & 1B of the [Civil Procedure Act](#) Cap 21 and Order 10 Rule (sic) of the [Civil Procedure Rules](#), 2010.



II. The 1st, 2nd & 3rd Defendants Case

2. Through the said Chamber Summons application the 1st, 2nd & 3rd Defendants herein seek for the following orders:

- (a) That the name of Eliud Matu Wamae and Patrick Wamae be struck out from this Suit as 2nd & 3rd Defendants herein respectively.
- (b) That the costs of this application be provided for.

The aforesaid Chamber Summons application is founded on the grounds, testimonial facts and averments made out under the nine (9) Paragraphed Supporting Affidavit of Patrick Wamae sworn and dated 7th March, 2022 and the one (1) annexure marked as “PW1” annexed hereto being a Sale Agreement dated 23rd September, 2016. Mr Wamae has deponed being a male adult of sound mind and understanding and the 3rd Defendant herein and with the authority of the 2nd Defendant to swear this Affidavit. He deposed that the subject matter of this suit was the sale of a parcel of land known as Land Reference No 13909/12 CR 25140 between the Plaintiffs and the 1st Defendant only.

He attached the Sale Agreement dated 23rd September, 2016 and marked as “PW1”. He argued that the 2nd Defendant and himself were not Parties to this sale of land transaction in other words they were never involved in their personal capacities and hence being joined in the Suit was malicious.

His contention was that there was no order for lifting the veil in this matter. For this reason, he deposed that being involved in the matter was a misjoinder.

III. The Replying Affidavit By The 1st and 2nd Plaintiff/respondent

3. On 1st April, 2022, the 1st & 2nd Plaintiffs/Respondents while opposing the Chamber Summons application filed a twenty one (21) Paragraphed Replying Affidavit sworn by Surjeet Singh Basil and dated 31st March, 2022. The Deponent held that he was the 1st Plaintiff and was authorized to swear this Affidavit by the 2nd Plaintiff who was his daughter.

He averred that from the annexed Sale Agreement marked “PW1” dated 23rd September, 2016 by the 2nd & 3rd Defendants was duly executed between the 1st & 3rd Defendants as the Vendor, themselves as the Purchasers. According to him the 1st, 2nd & 3rd Defendants knew that the Suit premises were subject to a long running dispute between the 1st Defendant and 4th Defendant. This dispute was subject to arbitration proceedings which had been pending since 1999.

4. The Deponent stated that the 1st, 2nd & 3rd Defendants had warranted in Clause 12 (iii) and (iv) of the Sale Agreement that the 1st Defendant were not engaged in nor to the best of its knowledge threatened by any litigation, arbitration or administration proceedings relating to the property and that there was no adverse claim on the Property, dispute regarding ownership, boundary, easement rights of way or such matters.

The warranty was false because the 1st, 2nd & 3rd Defendants knew of the arbitration and the caveat registered at the request of the 4th Defendant.

He argued that since the 1st Defendant was a limited liability company and therefore not a natural person and hence it was not capable of a guilty mind. The Person who executed the Sale Agreement and gave warranties they knew to be false were the 2nd & 3rd Defendants who are the Directors of the 1st Defendant they gave these warranties knowing well they were false.



5. He asserted that the Plaintiff included a claim for punitive and aggravate damages, which properly due and payable by the 2nd & 3rd Defendants who made false declarations and warranties. He argued that it was better to retain the 2nd & 3rd Defendants in this Suit so that damages against who had had the criminal mind to receive money by false pretences.

He argued that the 2nd & 3rd Defendants have been directly involved in this transaction and hence need to be liable.

He cited the Provisions of Order 1 Rule 10 of the Civil Procedure Rules whereby there had been no determination by this Court that the 2nd & 3rd Defendants were improperly joined. He reiterated that the presence by the 2nd & 3rd Defendants was required for them to explain to the Court and to other Parties why they executed the Agreement and the Transfer to sell and transfer the Suit premises with the full knowledge of the 3 preexisting encumbrances namely:

- (i) a Caveat by the 4th Defendant; (ii) a caveat by Eliud Timothy Mwamunga; and (iii) a prohibitory order issued by the High Court at the Suit of Eliud Timothy Mwamunga. They must bear personal responsibility.
6. There are serious allegations of fraud meted out by the 2nd & 3rd Defendants and hence for a fair trial under Articles 25 9 (c) and 50 (1) of Constitution of Kenya they need to remain as Parties herein.

He informed Court that the 2nd Defendant had never filed any Witness Statement nor sworn any affidavit in support of the Chamber Summons. He never gave any authority to his son the 3rd Defendant to file any document or make any application on his behalf.

He had never complained of being enjoined improperly to this case.

He held that the Witness Statement dated 4th March, 2022 the 3rd Defendant alleged in Paragraph 11 that his own conduct and the conduct of his father the 2nd Defendant together with their company, the 1st Defendant was in a professional manner and was guided by legal advisers.

The said Witness Statement was drawn by Prime Lawyers LLP and there was no name of any Witness in the entire Statement hence it appears to be a Witness Statement by the Prime Lawyers LLP who inserted their names where the name of the witness should be.

For these reasons he urged Court to dismiss the Chamber Summons application.

IV. Submissions

7. On 23rd March, 2022 whilst in the Presence of all the Parties, the Honorable Court directed that the Chamber Summons application dated 7th March, 2022 be disposed off by way of Written Submissions.

Pursuant to that all the Parties complied and the Honorable Court reserved a date for delivering of the ruling accordingly.

A. The 1st, 2nd & 3rd Defendants Written Submissions

8. On 13th June, 2022 the Learned Counsels for the 1st, 2nd & 3rd Defendants the law firm of Messrs. Prime Lawyers LLP Advocates filed their Written Submissions. Mr. Muchiri Advocates commenced his submissions by stating that on 23rd September, 2016 the Plaintiffs entered into a Sale Agreement with the 1st Defendant herein for the Sale of Suit land. It was his submission that the 2nd & 3rd Defendants were not Parties to the Sale Agreement in their individual Capacities but as Directors of the 1st Defendant. His contention was that there had been no application made by the Plaintiffs seeking for lifting of the veil of the 1st Defendant as a Company by limited liability.



There had been no particulars of fraud or improper conduct of the Directors to purport to pierce the veil of the company. The Learned Counsel elaborately submitted on a very important concept of company law “Piercing the Corporate veil”.

He held that the circumstances under which the corporate veil would be pierced were discussed in Paragraph 90 of *Halsbury’s Laws of England 4th Edition* Volume 7 (1) 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 person who controls it, 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. However, where this is not the position even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”. (emphasis is mine)

9. The Learned Counsel submitted further on the concept of the separate corporate personality being the best innovation ever in the Company Law. He relied on the decision of “*Salomon & Co Limited v Salomon* [1897] AC 22 HL and where it was held that:

“A Company is different person altogether from the subscribers and directors..... That separate legal personality of a company can never be departed from except in instances where the statutes or the law provides for the lifting or 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”. (emphasis is mine)

He also relied on the case of “*Multichoice Kenya Limited v Mainkam Limited & another* (2013 eKLR which held:

“To my mind, there is no doubt that ever since the famous case of Salomon versus Salmon, Courts have applied the principles of corporate personality strictly, but exceptions to the Principles have also been made where it is too flagrantly opposed to justice. Other instances include when a fraudulent and improper decision by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as an entity”.

10. According to the Learned Counsel no evidence had been entered to demonstrate any fraud or any improper conduct to warrant suing the 2nd & 3rd Defendants in this Suit. Thus none of these principles of incorporation lifting or piercing of veil in exceptional circumstances may be applicable herein.

Therefore, in conclusion it’s the Learned Counsel that the Court should consider granting the orders sought of striking out the names of 2nd & 3rd Defendants from the Suit.



B. The Plaintiffs' Written Submissions

11. On 27th June, 2022, the Learned Counsel for the 1st & 2nd Plaintiffs herein the law firm of Messrs. Kinyua Munyaa & Co. Advocates filed their Written Submissions. Mr. Kinyua Advocate submitted that it would rely on the Replying Affidavit sworn by the 1st Plaintiff on 3rd March, 2022 and filed on 1st April, 2022. He held that the 2nd & 3rd Defendants were Directors of the 1st Defendant, where the 1st Defendant was not a natural person and hence with no "Mens rea" or being guilty to commit a crime. He submitted that the 2nd & 3rd Defendants as Directors of the 1st Defendant gave false and fraudulent warranties and conceded information that the 1st Defendant had been involved in a long running arbitration concerning the suit premises from the year 1999 which to date had not been resolved. Further, they were aware of caveats and Court Order registered against the title which they failed to disclose.

According to the Learned Counsel, he applauded the Learned Counsel for the 1st, 2nd & 3rd Defendants for undertaking such a meaningful research and citing useful authorities on the principles of piercing the veil of incorporation.

He concurred that the Plaintiffs had met all the conditions and tests from the cited authorities, for instances, the Plaintiff had produced evidence the 1st, 2nd & 3rd Defendants knew of the existence of an arbitration dispute and the caveats registered on the Suit property.

When the 2nd Defendant signed an indemnity as a Director in favour of the Government for the reconstruction of the file but failed to disclose the preexisting encumbrances; the 2nd & 3rd Defendants knew the Plaintiff had conducted an official search prior to executing the agreement of Sale and prior to the payment of the Purchase Price. The Plaintiffs had given the Particulars of the fraud meted by the 2nd & 3rd Defendants.

The Learned Counsel contention was that the 1st, 2nd & 3rd Defendants had filed Defences dated 12th February, 2021 which supported the Plaintiffs' decision to join them in this Suit. He cited a few instances and/or relating them to these allegations.

For instances, their claim the agreement had been completed; they never took part in the conduct of the searches; them claim they were not aware of the encumbrances yet they participated in the arbitration proceedings from the year 1999; them denying not having any duty of care to the Plaintiffs concealment of material facts; the misconduct and fraud; their intention not to complete the agreement.

In summary the learned Counsel submitted that the 2nd & 3rd Defendants ought to remain as parties in this matter for several reasons which include:

- a. They have failed to file their Written Submissions on their own behalf;
- b. Holding that the encumbrances were unmerited, illegal and time barred;
- c. The contents of the statement is informed by ignorance;
- d. Based on the principles of fair hearing under Article 25 (c) and 50 (1) & (2) of *Constitution of Kenya* and Order 1 Rule 10 of *Civil Procedure Rules*, 2010 there was need to have the 2nd & 3rd Defendants remain as Parties to the Suit;
- e. It was risky to remove 2nd & 3rd Defendants from the matter as they would withdraw all financial proceeds from the account of the 1st Defendant leaving the 1st Defendant as a shell with no assets.



Thus, he urged Court to find the Chamber Summons without merit and hence should be dismissed with costs to the Plaintiffs.

V. Analysis and Determination

12. I have carefully assessed all the filed pleadings with relation to the Chamber Summons dated 7th March, 2022, the Supporting Affidavit, Replying Affidavit, Written Submissions, myriad cited authorities by the Parties herein, the relevant Provisions of the *Constitution of Kenya*, 2010 and Statutes.

In order to arrive at an informed, just, fair and reasonable decision, the Honorable Court has framed the following salient issues to be relied on for its determination. These are:

- a. Whether the orders sought in the Chamber Summons application dated 7th March, 2020 to strike out the 2nd & 3rd Defendants from the Suit under Order 1 Rule 10 for being a misjoinder and based on the principles of company being a separate corporate legal entity is valid and/or justifiable;
- b. Whether there are any exceptions to the principles of the company as a separate legal entity being the principles of piercing or lifting the corporate veil of a Company;
- c. Whether the Parties are entitled to the relief sought; and
- d. Who will bear the costs of the Chamber Summons application.

Issue No (a) Whether the orders sought in the Chamber Summons application dated 7th March, 2020 to strike out the 2nd & 3rd Defendants from the Suit under Order 1 Rule 10 for being a misjoinder and based on the principles of company being a separate corporate legal entity is valid and/or justifiable.

13. Under this subheading, it is not in doubt that the 1st Defendant is an incorporated company by limited guarantor under the Provisions of the *Company Act* Cap. 486 of Laws of Kenya. Ideally, the 1st Defendant is operated and governed under the diction of the *Company Act* with Articles and Memorandum of Association. It has a Certificate of Incorporation issued accordingly. Further that the 2nd & 3rd Defendants are its Directors and Shareholders.
14. From the Principles of corporate liability, the 1st Defendant is a separate body from its Directors. I do fully concur with the Learned Counsel for the 2nd & 3rd Defendant citing from the now famous case of ‘Salmon & Co. Limited v Salmon (Supra) that: “The Company is different person altogether from its subscribers and directors. Although it’s a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved”.

Based on this reasoning its trite law that the Directors are generally not personally liable on contract purporting to bond their company if the Directors have authority to make a contract, then only the company in this case the 1st Defendant is liable on it.

In the Court of Appeal (Mombasa) case of “*Stephen Njoroge Gikera & Punit Dipak Vadgama v Econite Mining Co. Ltd* Civil Appeal No 5 of 2017 – (2018) (eKLR) Court emphasized that the company is said to be cloaked in a veil of incorporation which means that in its dealings, it is directly and independently responsible for its acts. Indeed, that its directors are not personally liable. For these reason alone then, the Court may be persuaded to agree with the Learned Counsel for the 2nd & 3rd Defendant to the effect that they were erroneously joined in this matter.



15. But be that as it may be, this Honorable Court now wishes to critically assess the concept of joinder and misjoinder of Parties in a Suit. These are provided for under the Provisions of Order 1 Rule 1 to 10 of the Civil Procedure Rules, 2010.

Order 1 Rules 1 & 3 provides:

“All persons may be joined in one suit as Plaintiff in whom any right to relief of or arising out of the same act or transaction or series of acts or transaction is alleged to exist, whether jointly, severally or alternative where if such persons brought separate suit, any common question of law or fact would arise”

Order 1 Rule 9 –

“No suit shall be defeated by reason of the misjoinder or nonjoinder of Parties and the Court may in every Suit deal with the Matter in controversy so far as regards the right and interests of parties actually before it”.

16. In the instant case, the Plaintiffs have argued that they joined the 2nd & 3rd Defendants to the Suit based on their roles of having alleged falsehoods, fraudulent and concealments of material facts being the signing of the warrants and the sale agreements of the sale of the Suit land with Plaintiffs while knowing very well the existence of the three (3) encumbrances, the caveats and prohibition order by High Court registered against the suit property making them personally liable and not the 1st Defendant which has no human brain to commit a “Mens rea” of guilty conscience. These are the exceptions of the rule of Lifting the Corporate veil of where things have been done and where there are cases of fraud or improper conduct, as clearly envisaged under “The Halsbury’s Laws of England, 4th Edition Paragraph 90” and rightfully cited by Mr. Muchiri, the Learned Counsel for the 1st, 2nd and 3rd Defendants herein of deeds happening within the Company which undoubtedly is a separate entity.

Further Order 1 Rule 10 provided that:

“10(1) where a Suit has been instituted in the name of the wrong person as Plaintiff or where it is doubtful whether it has been instituted in the name of the right Plaintiff the Court may at any stage of the Suit, if satisfied that the Suit has been instituted through a bona fide mistake and that it is necessary for the Determination of the real matter on dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks fit.

The afore stated provision will come in to the aid of the Parties in this matter in the course of this ruling later on.

Issue No (b) Whether there are any exceptions to the principles of the company as a separate legal entity being the principles of piercing or lifting the corporate veil of a Company.

17. Having deliberated on the Principles of the separate corporate personality on the veil personality as ably discussed in the Company Law and the famous case of “Salmon & Co. Limited Case (*Supra*)”, however, this Court wishes to venture to the instances when the veil of incorporation may be lifted. In such instances the law goes behind the corporate personality to attach direct responsibility to the individual Directors or shareholders thereby ignoring the separate personality of the company in favour of the economic reality prevailing in the circumstances, what has been termed as “the issue of piercing the veil of incorporation”.



On this single point of law, I wish to applaud the Learned Counsel for the Plaintiffs. At the same time, I fully concur with the Learned Counsel Mr. Muchiri for the 1st, 2nd & 3rd Defendants from the robust and elaborate reference made on the Paragraph 90 of the *Halsbury's Laws of England* 4th Edition Volume 7 (1) the decision of “*Kolaba Enterprises Limited v Shamsbudin Hussein Varvani & another* [2014] eKLR, ‘*Salomon Co. Limited v Salomon* (supra) and *Multichoice Kenya Limited* (supra) to the effect that:

“Separate legal personality of a company can never be departed from except in instances where the statutes or law provides for the lifting or piercing of the corporate veil, say when the Directors or members of the Directors or members of the company are using the company as a vehicle to commit fraud or other criminal actions.....”

..... Exceptions to the principles of corporate personality have been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its binding company as one entity”.

18. In the instant case, the Plaintiffs entered into a Sale Agreement for the sale of the suit land with the 1st Defendant whereby it's the 2nd & 3rd Defendants who duly executed the transfer documents; it's alleged by the Plaintiff the Directors concealed certain information and which has necessitated the filing of this Suit. They have argued that the 2nd & 3rd Defendants cannot hide behind the concept of veil incorporation and the old adage goes “you cannot eat your cake and have it”. It is precisely this kind of situation that the principle of lifting the corporate veil seeks to obviate in this Court view that the corporate persons of a company is not a human being with such a brain to think and act as such on its own. I rely on the case of “*Jones v Lipman & another* (1962) 1 ML ER 442 & *HL Bolton/Engineering Co Limited v T. J Graham & Sons Limited* (1956) 3 ALC ER where it was held:

“A Company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. Which hold tools and act in accordance with direction from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind and will of the company and control what they do. The State of mind of these managers is a state of mind of the company and is treated by law as such”.

19. By the end of the day, and based on the principle of natural justice this Honourable Court would like to hear and fully appreciate the testimonies adduced by the 2nd and 3rd Defendants in order to arrive at fair, informed and reasonable decision on this matter whatsoever. The Learned Counsel for the Plaintiffs has argued that the 2nd & 3rd Defendants who have even filed separate Statements of Defence and Witness Statements. Thus, they ought to be personally held liable in this Suit. His contention is that the risk arises where they are removed or their names get struck out from the Suit they proceed to withdraw all the finances from the 1st Defendant and it's left as an empty shell, it will then be travesty of justice and exercise in the long run. This Court cannot agree with the Counsel more.



Issue No (c) Whether the Parties are entitled to the relief sought.

20. Arising from the deliberation held from this ruling, this Honorable Court is fully in concurrence that there will be need to retain the 2nd & 3rd Defendants in this suit as provided for in the Provisions of Order 1 Rule 10 (2) to wit:

“The Court may at any stage of the proceedings, either upon or not 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”. (Emphasis is mine)

From these reasoning, this Court for the interest of justice, equity and conscience would wish to fully hear the evidence to be adduced by both the Plaintiff, 1st 2nd & 3rd Defendants on the matters before it so that effectually be enable it arrive at an informed decision this being a land matter with it’s usual and ordinary sensitivities. This case is not an exception in any way.

Issue No (d) Who will bear the costs of the Chamber Summons application.

21. The issue of Costs is at the discretion of the Court. Costs means the award after the conclusion of any legal action, proceedings and litigation process. The proviso of Section 27 (1) of the Civil Procedure Act, 21 provides that costs follow the event. The event means the result of the said any legal action, proceedings and litigation process.

A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise. See the case of “*Hussein Janmohammed & Sons v – Twentsche Overseas Trading Company Limited* (1967) EA 287. In the instant case, since the suit is yet to be heard and determined, the Court is of the opinion that Costs should be in the cause.

VI. Conclusion and Disposition

22. Consequently, after the indepth and intense critical analysis of all the framed issues hereof, this Honorable Court wishes to proceed to make the following orders:
- a. That the Chamber Summons application dated 7th March, 2022 be and is hereby dismissed for lack of merit.
 - b. That for expediency sake, this matter which is part heard should proceed on for further hearing on 14th October, 2022 as already scheduled.
 - c. That the costs for the Chamber Summons application to be in cause.

RULING DELIVERED, SIGNED AT MOMBASA AND DATED ON THIS 3RD DAY OF OCTOBER 2022

JUSTICE HON. (MR) L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:



- a. M/s Yumna Hassan Court Assistant;
- b. Mr. Muthuri Advocate holding brief for Mr. Kinyua Advocate for the Plaintiffs/Applicants;
- c. Mr. Muchiri Advocate for the 1st, 2nd, 3rd & 6th Defendants/Respondents;
- d. Mr. Achoka Advocate for the 4th Defendant; and
- e. No appearance for the 5th Defendant.

