



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 412 OF 2018

PETER MUJUNGA GATHURU.....PLAINTIFF

VERSUS

HARUN OSORO NYAMBOKI.....1ST DEFENDANT

NESCO SERVICES LIMITED.....2ND DEFENDANT

RULING

1. This ruling relates to three applications. The Plaintiff filed the first application dated 27/9/2018 seeking orders of injunction to restrain the Defendants from trespassing, constructing or conducting any activity on land reference number (L.R. No.) 12767/44 (original 12767/11/2) being a subdivision of L.R. No. 12767/11 measuring approximately 1.0118 hectares (“the Suit Property”) pending hearing and determination of the main suit. Further, the Plaintiff sought to have the Defendants directed to demolish the wall built across the Suit Property and the gate that is on the access road to allow the Plaintiff access the Suit Property. The Plaintiff sought to have the Officer Commanding Karen Police Station assist in the demolition of the wall and the gate and in default that the Plaintiff would demolish the wall with the help of the OCS Karen Police Station with the Defendant bearing the cost of demolition.

2. The application was made on the ground that the Plaintiff was the legal and beneficial owner of the Suit Property and that the Defendants had encroached onto the Suit Property and constructed a gate and wall which would block the Plaintiff from accessing the Suit Property. When the Plaintiff filed the application he contended that the Defendants were in the process of excavating the top soil from the Suit Property and he was apprehensive that that would waste the land and render it useless for any purpose. The Plaintiff claimed that he would suffer irreparable loss if the Defendants were not stopped from interfering further with the Suit Property.

3. The application was supported by the Plaintiff’s affidavit filed in court on 27/9/2018 in which he deponed that he entered into a sale agreement with the 1st Defendant on 22/2/1983 for the purchase of 2 ½ acres from the larger parcel of land comprised in L.R. No. 12767/11. Following the 1st Defendant’s failure to transfer the land to him, the Plaintiff instituted **HCCC No. 2874 of 1997** which was decided by Kuloba J. in 1999. The court declined to grant the Plaintiff the remedy of specific performance.

4. The Plaintiff filed **Civil Appeal No. 184 of 2004** and in its determination of 30/1/2015, the Court of Appeal allowed his appeal and ordered that 2 ½ acres out of L. R. No. 12767/11 would be transferred to him if the land had not been transferred to a third party. The Defendant was directed to sign all the necessary documents to effect the transfer within 30 days of the judgment failing which the Registrar of the Court of Appeal was authorised to sign the documents. The court directed that in the event that the Suit Property had been transferred to a third party, the Plaintiff was to be refunded the current market value of the property, which was to be determined upon valuation by a competent valuer agreed upon by the parties. If they could not agree on the valuer, the valuation would be conducted by the Chief Government Valuer or his nominee who would be given the necessary instructions by the Registrar of the Court of Appeal. Further, the Court of Appeal ordered that a caveat would be registered against the suit land until completion and satisfaction of its order. The court directed that the costs of the valuation would be shared equally by the parties and a copy of the valuation report would be sent to the Registrar of the Court to form part of the record.

5. The Plaintiff averred that following the order of the Court of Appeal, he commenced the process of transferring 2 ½ acres out of L.R. No. 12767/11 to his name by first undertaking a survey and was issued with a deed plan for the final parcel being L.R. No. 12767/44. The 1st Defendant applied to the Court of Appeal for stay of execution and review of the orders of the Court of Appeal but his application was dismissed. The 1st Defendant filed an Originating Motion in the Supreme Court of Kenya being **Application Number 22 of 2017** which was pending for ruling at the time. The Plaintiff contended that in September 2018 the 1st Defendant erected a wall and a gate restricting his access to the Suit Property and was in the process of excavating and extracting the top soil from the land. The Plaintiff contended that these actions were in breach of the orders of the court.

6. The 1st Defendant filed a replying affidavit on 17/10/2018 in which he deponed that the Plaintiff’s application was an abuse of the court

process and was *res judicata* since there is a judgment in force. He stated that he was a director in the 2nd Defendant and that he transferred the entire parcel of land being L.R. No. 12767/11 measuring 2.536 ha to the 2nd Defendant on 11/10/2001. He argued that there were no encumbrances barring him from dealing with his land. He averred that at the time the land was charged to I&M Bank to secure a facility of Kshs. 35,000,000/=. He stated that he was fully aware of the judgment of the Court of Appeal and that the import of that judgement had been explained to him by his advocate. He added that the suit land was transferred to the 2nd Defendant on 11/10/2001 and emphasised that the 2nd Defendant was not a party to the proceedings before the High Court and the Court of Appeal. He maintained that order number 3 of the Court of Appeal was explicit that if the Suit Property had been transferred to a third party, then the Plaintiff was to be refunded the market value of the Suit Property. He urged that the title held by the 2nd Defendant over the Suit Property was indefeasible and protected by the law making the orders of the court futile. He urged that this court was bereft of jurisdiction because this matter was *res judicata*.

7. On his application dated 27/9/2018 seeking orders of injunction, the Plaintiff submitted that it was the legal and beneficial owner of the Suit Property and that its ownership came from the decision of the Court of Appeal in Civil Appeal No. 184 of 2004 where the court ordered that 2 and 1/2 acres out of L.R. No. 12767/11 be transferred to him. The Plaintiff submitted that after he succeeded in the Court of Appeal he took possession of the Suit Property and was in possession until the Defendant blocked his entry by erecting a wall blocking his access to the land. He added that the Defendants have been excavating and removing the top soil from the land which had the effect of partially wasting the Suit Property and may render it unfit for use once it is completely wasted.

8. The Plaintiff submitted that the transfer of the Suit Property to the 2nd Defendant was a well calculated scheme by the 1st Defendant to defeat his interest in the suit land. He urged that the evidence tendered before this court showed that the 1st Defendant was both a director and a shareholder of the 2nd Defendant. He added that previously the 1st Defendant was a majority shareholder of the 2nd Defendant but that subsequent to the decision of the Court of Appeal he had systematically transferred his shares to his co- shareholder, Esther Katheu Maingi. The Plaintiff urged that this was a ploy by the Defendants to defeat his interest in the land.

9. He further submitted that the transfer of the Suit Property to the 2nd Defendant was done with the full knowledge that he had lodged an appeal against the decision of the High Court and that the 1st Defendant filed two appeals before the transfer was effected which were struck out on procedural technicalities. He urged that 2nd Defendant was complicit in the ploy by the 1st Defendant to defeat the Plaintiff's interest and put the suit land out of his reach. He submitted that the 2nd Defendant's purported purchase of the Suit Property lacked bona fides. The Plaintiff urged the court to lift the veil of incorporation and look into the ownership of the 2nd Defendant and that it will find that there is no distinction between the 1st and 2nd Defendants.

10. The Defendants submitted that the Plaintiff had not satisfied the principles for grant of an injunction. They submitted that L.R. No. 12767/44 did not exist and that the 2nd Defendant owned the land known as L.R. No. 12767/11. They submitted that the order the Plaintiff relied on was against the former proprietor of the Suit Property while contending that the 2nd Defendant who is the current owner of the suit land was not a party in any proceedings in the High Court, Court of Appeal or Supreme Court. Further, that no order was directed at the 2nd Defendant and that all the orders were directed at the 1st Defendant who relinquished all his proprietary rights over the Suit Property on 11/10/2001.

11. The Defendants submitted that the orders of the Court of Appeal were unequivocal and that the Court of Appeal contemplated that the Suit Property may have changed hands and therefore provided an alternative on what would happen if the land had been transferred to a third party, which was, that the Plaintiff was to receive the market value of the land. The Defendants contended that the Plaintiff had elected to avoid this route and was instead dragging an innocent party to court.

12. The Defendant maintained that the Court of Appeal did not direct the Plaintiff to initiate a subdivision of the suit land and that what the Plaintiff had attempted to do was extra judicial. The Defendant contended that the Plaintiff was neither the legal nor beneficial owner of L.R. No. 12767/44 (original 12767/11/2) being a division of L.R. No. 12767/11 which they contended does not exist. The 2nd Defendant reiterated that it was the sole and absolute legal owner of L.R. No. 12767/11. The Defendants maintained that the Plaintiff had not made a case against the 2nd Defendant. They submitted that the balance of convenience heavily tilted towards the 2nd Defendant who is the current registered owner of the land with an absolute and indefeasible title and who is a stranger to the claim in this suit.

13. The Defendant submitted that the whole suit was *res judicata* and that the Plaintiff should have sought execution of the order of the Court of Appeal instead of retrying an already determined suit. The Defendant relied on the decision in **Nguruman Limited v Jan Bonde Nielsen and 2 others [2014] eKLR**.

14. The Plaintiff filed further submissions. The Plaintiff submitted that he had established that he had a prima facie case in that he had a legal right against the 1st Defendant's property which arose from the Court of Appeal order that directed the 1st Defendant to transfer 2 1/2 acres to the Plaintiff or in the alternative refund to the Plaintiff an amount equivalent to the current market value of the Suit Property. The Plaintiff submitted that the 1st Defendant's actions amounted to contempt of the court order issued on 30/1/2015 and infringed on his rights to own property. The Plaintiff maintained that he had legitimate interest in the Suit Property having entered into an agreement with the 1st Defendant who breached the agreement and failed to transfer the land to him. The Plaintiff submitted that he continued to suffer injustice meted out on him by the 1st Defendant for almost 30 years. The Plaintiff submitted that the transfer of the Suit Property to the 2nd Defendant was done to defeat his interest in the land. He only got to learn that the 1st Defendant was no longer the registered owner of the Suit Property when he attempted to execute the judgement of the Court of Appeal. The Plaintiff submitted that the Supreme Court dismissed the 1st Defendant's application on 5/10/2018.

15. In the further submissions, the Plaintiff relied on various decisions on the instances in which the court will pierce the corporate veil. He relied on the decisions in **Aster Holdings Limited v City Council of Nairobi and 4 others, De Ruiters Roses East Africa Limited v Alora Flowers Limited [2006] eKLR**. The Plaintiff submitted that the Defendants should not be allowed to keep what they illegally acquired and added that no court should allow a person to keep an advantage which he has obtained through fraud.

16. The two main issues for determination in this application are whether this suit is *res judicata* and whether the court should grant the orders of injunction which the Plaintiff seeks to have in place until the suit is heard and determined. The background to this longstanding dispute spanning almost forty years is that the Plaintiff purchased land measuring 2 ½ acres from the 1st Defendant, which was to be excised from L.R. No. 12767/11 which the 1st Defendant owned at the time. The 1st Defendant failed to transfer the land to the Plaintiff who filed a suit seeking specific performance. The High Court dismissed the Plaintiff's claim and a few days after he lodged his appeal before the Court of Appeal the 1st Defendant transferred the Suit Property to the 2nd Defendant in which he is both a shareholder and director. The Court of Appeal allowed the Plaintiff's claim in 2015 and directed that the 1st Defendant transfer 2 ½ acres of the land to the Plaintiff or in the event that the land had been transferred to a third party then the 1st Defendant was to refund to the Plaintiff the value of 2 ½ acres. The 1st Defendant withheld the information that he had transferred the Suit Property to the 2nd Defendant in 2001 during the proceedings before the Court of Appeal. A valuation of the land was done but the 1st Defendant has failed to pay the sum assessed to the Plaintiff.

17. One of the ingredients for the doctrine of *res judicata* to apply is that the former suit must have been between the same parties or parties claiming through them. This court does not agree that this suit is *res judicata* as the 1st Defendant contends for the simple reason that the 2nd Defendant, which is a separate legal entity from the 1st Defendant, was neither a party in **HCCC No. 2874 of 1997** nor in **Civil Appeal No. 184 of 2004**.

18. The law is settled on the principles to be met for the grant of an interlocutory injunction, which are that the applicant must have a prima facie case, stands to suffer irreparable harm if the orders are not granted and if in doubt the court will determine in whose favour the balance of convenience tilts. It is not in dispute that the 1st Defendant has not paid the market value of the Suit Property to the Plaintiff as directed by the Court of Appeal, which was the alternative the court gave in the event that the suit land had been transferred to a third party. The Plaintiff averred that he took possession of the 2 ½ acres of land after succeeding in the Court of Appeal and got the land subdivided to create L.R. No. 12767/44 (original 12767/11/2) from L.R. No. 12767/11 measuring approximately 1.0118 hectares. The process of effecting a transfer of the 2 ½ acres to the Plaintiff cannot possibly be concluded because the whole land was transferred to the 2nd Defendant. This is what prompted the Plaintiff to file the instant suit seeking orders to restrain the Defendants from interfering with his use and possession of the Suit Property.

19. The Plaintiff's claim to the Suit Property is not a frivolous one, he has a prima facie case with a probability of success now that the 1st Defendant has refused to pay the Plaintiff the market value of the 2 ½ acres in accordance with the directions of the Court of Appeal. The Plaintiff stands to suffer loss if the Defendants are not stopped from constructing or conducting any activity on the land the Plaintiff lays claim to. If the Defendants do not demolish the wall that they built across the Suit Property and remove the gate that is on the access road, the Plaintiff will not have access to the Suit Property. The Defendants should be stopped from excavating soil or wasting the Suit Property if for no other reason than the fact that it will lead to environmental degradation yet the Constitution enjoins every person to protect and conserve the environment and use land in an efficient and sustainable manner.

20. The 2nd Defendant filed the application dated 30/10/2018 seeking an order to cancel or remove the caution which the Plaintiff registered against L.R. No. 12767/11. The application was based on the grounds that the 2nd Defendant conducted a search on its property and discovered that the Plaintiff lodged a caveat at the lands registry on 19/8/2015 against its title on the strength of a court order. It urged that the court order was against the 1st Defendant who previously owned the Suit Property which was transferred to the 2nd Defendant on 11/10/2001. The 2nd Defendant contended that by the time the Court of Appeal made its order, the 1st Defendant had legally transferred the Suit Property to it and it contended that the Plaintiff had no rights over the title it held hence he had no right to lodge a caution over its property.

21. The application was supported by the affidavit of Esther Katheu Maingi who produced a copy of the title over the Suit Property. Entry number 13 dated 11/10/2001 shows that the land was transferred to Nesco Services Limited. The caveat registered by the Plaintiff was registered as entry number 17 on 15/10/2018. The 2nd Defendant urged that the caveat lodged was illegal and prejudiced its proprietary rights yet the Plaintiff had no claim against it.

22. The Plaintiff filed a Replying affidavit on 19/12/2018 in response to the 2nd Defendant's application dated 30/10/2018. The Plaintiff deponed that the application was an abuse of the court process for it sought to have this court overturn an order of the Court of Appeal. He filed a further affidavit on the same date and urged that the application was not *res judicata* because the cause of action he seeks against the Defendants was trespass which was never canvassed before the High Court or Court of Appeal. The Plaintiff urged that the 1st Defendant was a majority shareholder in the 2nd Defendant hence the 2nd Defendant was not a third party. The Plaintiff annexed form CR12 dated 12/3/2017 which gave the shareholders of the 2nd Defendant as the 1st Defendant and Esther Katheu Maingi as holding 128,000 and 122,000 shares in the 2nd Defendant respectively.

23. The Plaintiff contended that the transfer of the suit land to the 2nd Defendant was done to defeat his interest and put the Suit Property out of his reach so as to defeat the course of justice. He urged that even though there were no encumbrances barring the 2nd Defendant from dealing with the Suit Property, the transfer was done 5 days after service of his application to lodge an appeal out of time against the decision of the High Court. He added that the appeal was lodged in court on 27/9/2001 while the transfer was registered on 5/10/2001. Further, that throughout the proceedings in the Court of Appeal no third party emerged to claim ownership of the suit land and that the 1st Defendant portrayed himself as the owner of the Suit Property in the court proceedings.

24. The Plaintiff further averred that the Court of Appeal delivered a judgement in its favour on 30/1/2015 vide which it ordered the 1st Defendant to transfer 2½ acres to the Plaintiff or in the alternative refund the Plaintiff an amount equivalent to the current market value of the Suit Property. The Court of Appeal dismissed the 1st Defendant's application for stay of execution, review and setting aside of the judgement.

25. Mr. Gathuru deponed that the 1st Defendant had taken full advantage of the land in dispute and yet at the same time has kept the entire purchase price paid to him for over 36 years. Further that he had heavily borrowed and used the whole land measuring 7 acres as security. He deponed that he stood to suffer extreme injustice if the caveat were removed by the court. He made reference to the valuation undertaken by the Government valuer which was to form part of the record of appeal. He urged that he stood to suffer great prejudice and injustice if the caveat is removed before the 1st Defendant either pays him the full market value for the 2/1/2 acres or transfers that portion to him as ordered by the Court of Appeal on 30/1/2015. He annexed copies of the title for L.R. No. 12767/11 and the search done on 2nd Defendant which gives the shareholders as Haron Osoro Nyamboki and Esther Kathei Maingi holding 128,000 and 122,000 shares respectively as at 20/3/2017. The search dated 10/1/2019 shows that Esther Katheu Maingi held 200,000 shares in the 2nd Defendant while Haron Osoro Nyamboki held 50,000 shares. He also attached copies of the judgement and the ruling dated 17/11/2017 given by the Court of Appeal.

26. The suit land is now registered in the 2nd Defendant's name and it contends that as the legal and indefeasible owner of the land there is no basis for maintaining the caveat registered against its land. The Defendants submitted that the Plaintiff had no known apparent reason for placing a caution against the 2nd Defendant's property and urged that for the sanctity of the title of the 2nd Defendant, the caution should be withdrawn.

27. The Plaintiff urged the court to dismiss it with costs the Defendant's application dated 30/10/2018 on the basis that it reeked of mischief in that it sought to overturn a decision of the Court of Appeal yet this court lacked jurisdiction to overturn a decision of the Court of Appeal. The Plaintiff maintained that the caveat against the Suit Property was registered pursuant to the orders of Court of Appeal in **Civil Appeal Number 184 of 2004**.

28. Looking at the judgement which the Court of Appeal delivered on 30/1/2015, the court ordered that 2 ½ acres out of L.R. No. 12767/11 was to be transferred to the Plaintiff if it had not been transferred to a third party. In the event that the land had been transferred to a third party, the court ordered that the 1st Defendant was to refund the market value of the land at the time to the Plaintiff. The court ordered that a caveat was to be registered against the parcel of land until completion and satisfaction of its order. Since the orders made by the Court of Appeal have not been completed and satisfied, the caveat registered against the Suit Property must remain in place until the 1st Defendant either causes 2 ½ acres of the suit land to be transferred to the Plaintiff or refunds the Plaintiff the market value of the 2 ½ acres. The court agrees with the Plaintiff that this court cannot sit on appeal against the decision of the Court of Appeal.

29. The Plaintiff filed the application dated 29/6/2020 seeking leave to lift the corporate veil of the 2nd Defendant and to lift the corporate powers of the 2nd Defendant as a legal personality. The Plaintiff sought to have the 1st and 2nd Defendants as directors of the 2nd Defendant ordered to transfer to the Plaintiff L.R. No. 12767/44 (original 12767/11/2 pending hearing and determination of the application and the suit. In default of this the Plaintiff sought to have the registrar of the court sign all the documents on behalf of the Defendants that would be necessary to effect a transfer of the Suit Property to the Plaintiff pending hearing and determination of the suit and the application.

30. In the alternative, the Plaintiffs sought to have the Defendants directed to refund to the Plaintiff the equivalent of the current market value of the Suit Property with interest on the sum of Kshs. 110,000,000 from 30/1/2015 until payment in full. The Plaintiff further sought an order to consolidate Nairobi HCCC No. 2874 of 1987 with this suit for purposes of execution of the orders in Civil Appeal Number 184 of 2004.

31. The application was made on the grounds that the Plaintiff entered into a sale agreement with the 1st Defendant on 22/2/1983 for the purchase of 2 and ½ acres from the larger parcel of land comprised in L.R. No. 12767/11. The Plaintiff filed suit when the 1st Defendant refused to transfer the 2 and ½ acres to him. The other grounds relied on are a repetition of the averments in support of the other two applications that are the subject of this ruling. The Plaintiff averred that when he filed **HCCC No. 2874 of 1987** seeking specific performance the 2nd Defendant did not exist as a legal entity. It was a legal entity when judgement was entered against the Plaintiff who filed Civil Appeal No. 184 of 2004. The Plaintiff urged that there was sufficient ground for this court to pierce the corporate veil to enable it do justice since the 1st Defendant is a shareholder and controls the 2nd Defendant. The Plaintiff urged that lifting the corporate veil would unmask the veil so that the true persons behind the company would be known.

32. The Plaintiff maintained that the 1st Defendant dishonestly transferred the Suit Property to its company to prevent the Plaintiff from accessing the land. The Plaintiff added that the 2nd Defendant was a mere cloak, sham and a device which the 1st Defendant is holding to his face to avoid recognition by the eyes of equity. The Plaintiff argued that the corporate veil is lifted by the courts in situations where it is used as a mask for fraud or improper conduct. The Plaintiff opined that the 2nd Defendant was formed to mask the carrying on of business of the 1st Defendant with its aim being to perpetrate fraud.

33. The Plaintiff averred that the Registrar of the Court of Appeal ordered the Government valuer on 24/6/2019 to undertake the valuation of the Suit Property within 30 days and file a report for the court's adoption. He submitted that the valuation of the 2 and 1/2 acres was undertaken by the Chief Government Valuer who gave the value of Kshs. 110,000,000/= which the 1st Defendant was to pay within 30 days. The Plaintiff stated that despite demands being made of him, the 1st Defendant had not paid that sum.

34. The Plaintiff averred that this matter had been conclusively determined by the Court of Appeal and that it was at the execution state. He added that this court had jurisdiction under Section 4 of the Appellate Jurisdiction Act to issue the orders for execution.

35. The application was supported by the Plaintiff's affidavit filed in court on 1/7/2020. The Plaintiff relied on the CR 12 of 20/3/2017 and CR 12 of 2019 regarding the shareholding in the 2nd Defendant. He submitted that there was sufficient ground for this court to pierce the corporate veil in order to do justice against the 1st Defendant as the main shareholder of the 2nd Defendant and who controls it. He urged that the court can pierce the corporate veil of the 2nd Defendant in order to do justice by treating the company as identical with the person who controls it. He maintained that the 2nd Defendant was a mere cloak for the 1st Defendant to avoid recognition by the eyes of equity. He reiterated that throughout the proceedings in the Court of Appeal no party came to claim ownership of the Suit Property and added that he Defendant had always portrayed himself as the owner of the suit land. He urged that the suit had been conclusively determined by the Court

of Appeal and that it was at the execution stage.

36. Esther Katheu Maingi swore the affidavit on 10/7/2020 in opposition to the application by the Plaintiff to lift the corporate veil of the 2nd Defendant. She maintained that the 2nd Defendant was wrongly sued since there was no judgment or order against it in favour of the Plaintiff. She averred that the Plaintiff had misconstrued and misinterpreted the doctrine of corporate personality propounded in **Salomon v Salomon**. She argued that when the suit land was transferred to the 2nd Defendant there was no encumbrance prohibiting the transfer. She urged that the 2nd Defendant's title could only be challenged under Section 56 of the Land Registration Act. She urged that it was wrong for the Plaintiff to pursue incompatible orders, that is, the land and the market value of the land.

37. She averred that she did not understand why the Plaintiff sued the 2nd Defendant against which it did not have any grievance. She argued that the application was baseless and unsubstantiated and its purpose was to disparage and defame the 2nd Defendant. She urged the court to dismiss the application.

38. The Defendants filed a notice of preliminary objection dated 10/7/2020. The main grounds were that the court lacked jurisdiction to determine the Plaintiff's application dated 29/6/2020. Further, that the execution process was the preserve of the Deputy Registrar but not this court. Lastly, they urged that the application was an abuse of the court process.

39. The Plaintiff filed submissions in which he deponed that he continued to suffer injustice for almost 36 years and that the 1st Defendant had not taken any steps to comply with the decision of the Court of Appeal. The Plaintiff submitted that he registered a caveat against the title over the suit land in line with the Court of Appeal judgement. He submitted that since the 1st Defendant had completely failed to execute the transfer instruments it was proper that the Deputy Registrar of the court executes that transfer.

40. He relied on paragraph 90 of Halsbury's Laws of England 4th Edition on the instances where the court will pierce the corporate veil to enable it do justice by treating a particular company for the purpose of litigation before it as identical with the person or persons who control that company. This is done where there is fraud or improper conduct. He relied on the case of **Mugenyi and Company Advocates v the Attorney General [1992] EA 199** where the court gave instances in which the veil of corporate personality could be lifted. He also relied on **Zingo Investment v Miema Enterprises Limited [2015] eKLR** on the issue that the corporate veil may be lifted where the private company was founded on personal relationship between the members. The Plaintiff submitted that the 1st Defendant was hiding his unlawful or illegal act under the corporate veil and that it was only upon lifting that veil that the 1st Defendant could be held accountable for breach of his fiduciary duty.

41. The Plaintiff submitted that this court had power to execute the judgement of the Court of Appeal under the legal framework stipulated in Section 4 of the Appellate Jurisdiction Act. The Plaintiff submitted that the only way the judgement would be effected is by the court authorizing the Deputy Registrar to sign all instruments of transfer of the suit land to the Plaintiff within the confines of the law. The Plaintiff relied on Article 159 (2) (d) of the Constitution. He urged that the issues raised in the preliminary objection could not be determined as a preliminary point. The Plaintiff urged the court that as a successful litigant he was entitled to enjoy the fruits of a successful litigation but was being restricted because the 1st Defendant had transferred the Suit Property to the 2nd Defendant.

42. The Defendants submitted that the only issue for determination was whether this court had jurisdiction to entertain the application and the suit brought by the Plaintiff. The Defendants contended that the origin of the suit and the application was an order from the Court of Appeal issued on 30/1/2015. The Defendants maintained that there were no execution proceedings before this court and that what was there was a new suit against the Defendants because the 2nd Defendant was not a party in the Court of Appeal proceedings. Further that there was an introduction of a new parcel number being L.R. No. 12767/44 which was not part of the proceedings in the Court of Appeal.

43. The Defendants contended that this court lacked jurisdiction because it was being asked to vary the orders of the Court of Appeal to suit the convenience of the Plaintiff under the disguise of a new suit. The 1st Defendant admitted that there was an order against it in favour of the Plaintiff but contended that the Suit Property was transferred to the 2nd Defendant in 2001 before there was any judgement in favour of the Plaintiff. In that regard, they urged that the order for the transfer of 2 ½ acres to the Plaintiff became obsolete once the land was transferred to the 2nd Defendant.

44. The Defendants urged that the Court of Appeal provided an alternative for the Plaintiff to be refunded the current market value of the land in the event that the suit land had been transferred to a third party. The Defendants maintained that the option of the transfer of 2 ½ acres to the Plaintiff was not available to the Plaintiff because the valuation of the land had been conducted and the value of Kshs. 110,000,000 given. The Defendants submitted that this court could only help with the execution of the orders of the Court of Appeal but could not vary or modify those orders to suit the Plaintiff.

45. The Defendants submitted that the Plaintiff did not need to file a new suit but should have filed execution proceedings in the existing file being HCCC No. 2874 of 1987 then seek to have it transferred to the Environment and Land Court. They submitted that this was not really necessary as the execution was for a monetary decree. They faulted the Plaintiff for including the 2nd Defendant which was not a party in the proceedings before the High Court and Court of Appeal. The Defendants contended that the Plaintiff was actuated by malice when he sued the 2nd Defendant. They argued that the title held by the 2nd Defendant had not been challenged in any court as being illegal, unprocedural or having been acquired through a corrupt scheme as stipulated in Section 26 of the Land Registration Act.

46. The Defendants reiterated that order number 3 of the Court of Appeal directions only came into play if order number 1 was not available as was the case here. The Defendant argued that the Plaintiff was an active participant in the proceedings before the Registrar when the ruling was made that only order number 3 was available for enforcement which necessitated the direction of the government valuer to value the Suit Property.

47. The Defendants submitted that the plaint upon which this application to lift the corporate veil is anchored seeks a permanent injunction over L.R. No. 12767/44 which the Defendants contend is non-existent. The Defendants filed a counter claim in the suit. They contended that out of the blues the Plaintiff was now seeking to pierce the corporate veil of the 2nd Defendant without justification yet the title held by the 2nd Defendant was indefeasible and had not been challenged. They pointed out that the plaint does not seek transfer of any land but only asserts ownership over L.R. No. 12767/44.

48. The Defendants argued that HCCC No. 2874 of 1987 could not be consolidated with this suit because it was before the High Court and had already been concluded. The Defendants urged the court to uphold their preliminary objection and dismiss the application and suit with costs to the Defendants. They urged that if the court found that it had jurisdiction to entertain the application then it should dismiss it with costs to the Defendants for being defective and lacking merit.

49. This court agrees with the Defendants that HCCC No. 2874 of 1987 which is already concluded, cannot be consolidated with this suit. The Plaintiff's frustrations in pursuing and enforcing his rights over the Suit Property are very evident from the application he made to lift the 2nd Defendant's corporate veil following the 1st Defendant's refusal to comply with the orders the Court of Appeal made on 30/1/2015. The 1st Defendant does not deny that he is a shareholder and director in the 2nd Defendant to which he transferred his interests in the suit land while the dispute was pending in court. In this court's view, the Plaintiff could only have made its application to pierce the corporate veil as part of the execution process in HCCC No. 2874 of 1987 but not in the instant suit. In this suit, the Plaintiff does not challenge the legality or otherwise of the transfer of the suit land by the 1st Defendant to the 2nd Defendant, he only challenges the interference by the Defendants of his quiet use and possession of the Suit Property.

50. A temporary injunction is granted to restrain the Defendants or their agents from trespassing, constructing or conducting any activity on L.R. No. 12767/44 (original 12767/11/2) being a subdivision of L.R. No. 12767/11 pending hearing and determination of this suit. The Defendants are directed to demolish the gate that is on the access road to allow the Plaintiff access to L.R. No. 12767/44 (original 12767/11/2). If the Defendants fail to demolish the wall and gate within 14 days of the date of this ruling, the OCS Karen Police Station will assist the Plaintiff in carrying out the demolitions, and the costs for that demolition shall be borne by the 1st Defendant. The costs of the application dated 27/9/2018 shall be in the cause.

51. The application dated 30/10/2018 is dismissed with costs to the Plaintiff.

52. The court declines to grant the orders sought in the application dated 29/6/2020. The costs of that application shall be in the cause. Parties are directed to comply with pretrial requirements so that they can expedite the hearing of the instant suit.

Delivered virtually at Nairobi this 6th day of May 2021.

K. BOR

JUDGE

In the presence of: -

Ms. M. Wanjiku holding brief for Mr. H. Lakhicha for the Plaintiff

Mr. Michael Manyara for the Defendants

Mr. V. Owuor- Court Assistant