REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. O/S 8 OF 2021

IN THE MATTER OF THE DELIVERY AND COMPLETION OF 29, 3 BEDROOMED BUNGALOWS IN JUJA/JUJA EAST /BLOCK 1/444

AND

IN THE MATTER OF TOTAL REFUND OF MONIES RECEIVED BY THE 1ST DEFENDANT TO THE PLAINTIFFS

AND

IN THE MATTER OF A DECLARATION ON THE MANDATE OF THE CENTRAL BANK OF KENYA

BETWEEN

NAOMI NIMAZURI ZANI .....1ST PLAINTIFF/APPLICANT

OKWAKO EMMANUEL ALUM ..... 2ND PLAINTIFF/ APPLICANT

ONESMUS MUTUKU MUVENGEI ..... 3RD PLAINTIFF/APPLICANT

(All being the registered officials and the representatives of 25 other Lettas Riverview Two Investors in JUJA/JUJA EAST BLOCK 1/1444)

VERSUS

LETTAS DEVELOPMENT LTD..... 1ST DEFENDANT/RESPONDENT

CENTRAL BANK OF KENYA.....2ND DEFENDANT/RESPONDENT

RULING

There are two matters for determination. One is the **Notice of Motion Application** dated **12th February 2021,** by the Plaintiffs/ Applicants. The 2nd one is the **Notice of Preliminary Objection**, dated **15th June 2021,** by the 1st Defendant/ Respondent.

By the Notice of Motion Application dated **12th February 2021,** the Plaintiffs/ Applicants sought for the following orders against the Defendants/ Respondents;

> ***1. That this Honourable Court be pleased to issue Summons to the Director(s) of the 1st Defendant/Respondent to appear before Court to show cause why they should not furnish security for their appearance and the paid up investors monies amounting to Kshs.71.612,732/= of the project's value estimated at Ksjhs.87,081,700/=***

2. That upon appearance and hearing of the said Directors of the 1st Defendant/Respondent, this Honourable Court be pleased to order them to deposit all 29 Freehold Titles in Court and thereafter provide sufficient property to answer the Claim as against them.

3. That pending the hearing and determination of this application, an order be and is hereby issued by this Honourable Court for the immediate closure and/or freezing or the following Bank Account(s) belonging to the 1st Defendant/Respondent to the extent of the amount owed of Kshs.71,612,732/= to protect the suit amounts.

(i) NAME: Lettas Developers Limited

BANK: Equity Bank Limited

A/C NO: xxxxxxx

BRANCH: Supreme Westlands Branch

(ii) NAME: Lettas Developers Limited

BANK: Equity Bank Limited

A/C NO: xxxxxx and

A/C NO: xxxxxx

BRANCH: Supreme Westlands Branch

(iii) NAME: Lettas Developers Limited

BANK: Cooperative Bank of Kenya

A/C NO: xxxxxxxx

BRANCH: Westlands Branch

The said company has both Dollar and Kenya shillings accounts in the various other banks all within the Jurisdiction and supervision of the 2nd Defendant/ Respondents, which accounts as soon as disclosed should satisfy the suit amount.

4. That pending the hearing and determination of this Application an order be and is hereby issued by this Honourable Court for the immediate closure/freezing of any other accounts of the 1st Defendant/Respondent in Banks within the Jurisdiction of the Central Bank of Kenya, the 2nd Defendant/Respondent, to the extent that will satisfy the suit amount of Kshs.71,612,732/=.

5. That in the alternative to prayers (4) and (5), the 1st Defendant be ordered to immediately and/or within 14 days from the date of this Honourable Court's order to issue security for the suit amount in the sum of Kshs.71,612,732/=.

6. That the Court be pleased to grant any order that it may deem necessary in the interest of Justice.

The Application is premised on the grounds that the 1st Defendant Respondent entered into a formal agreement to build houses for the **28 Investors in Juja/Juja East /BLK/1444.** That the 1st Defendant/ Respondent has neglected, failed and or refused to put up the **29 housing units,** despite receiving payment upfront for the same. Further, that the 1st Defendant/ Respondent has extracted **Freehold titles for 29 units,** and has refused to forwarded the same to the Investors, who are now apprehensive that the said titles are being used for other egregious purpose. That the 1st Defendant/ Respondent was to deliver the units upon the payment of the deposits and the balance after **6 months,** which the 1st Defendant/ Respondent has failed to do. Further that despite most of the investors having made the full payment, the 1st Defendant/ Respondent has failed to adhere to the terms of the sale agreements and despite demand, the 1st Defendant/ Respondent has neglected to make their obligations.

That the Plaintiffs/ Applicants are apprehensive that from the conduct of the 1st Defendant's Chief Executive Officer one **Andrew Kamau** through telephone calls to individual members, that the 1st Defendant/ Respondent is likely not to honour its obligations. That the 1st Defendant/ Respondent's actions are marred with mischief as the developer keeps shuffling investors between their myriad of projects . That the 1st Defendant/Respondent's failure to deliver on their agreement is a serious breach and the Plaintiffs/ Applicants are apprehensive that their funds may be lost or laid to waste by the 1st Defendant/Respondent who has a poor history of handling public funds and failure to deliver. Further, that the 1st Defendant's/ Respondent's operations are opaque and efforts to seek audience have been rebuffed and they may find themselves unable to deliver due to the Countrywide uproar of their operations.

Further that the 2nd Defendant/ Respondent has failed in its legislative mandate of providing regulation and oversight in the financial

management in the offplan housing sector. Further that the 2nd Defendant/ Respondent has since demand, refused to take responsibility of their institutional mandate and gullible citizens will continue to suffer at the hands of rogue and dishonest developers, if it does not proclaim itself in the matter.

In their Supporting Affidavit the Plaintiffs/ Applicants averred that on various dates between **2017 and 2018,** the 1st Defendant/ Respondent entered into various sale agreements with **28 investors** for the construction of **29 units** of 3 bedrooms on L**.R Juja /Juja East Block 1/1444,** and they were to be issued with individual freehold titles. That the prices for the various units varied from **Kshs. 2,750,000/=** to **kshs. 3,300,000/=** depending on the time of purchase. Further, that it was a general understanding that the development was anticipated to be completed within **6 to 15 months,** from the date of signing the various agreements. That all the investors made substantial deposits representing **82%** of the total Project value. That the development has hardly taken off the ground since then, and though the Investors have pleaded with the officials of the 1st Defendant/ Respondent, the same has not borne any fruits. That due to the intransigence of the officials of the 1st Defendant/ Respondent, the Plaintiffs/Applicants are apprehensive that the 1st Defendant/ Respondent does not mean well, as they were informed that titles that were to be collected by members who had finished paying were instead forwarded to the 1st Defendant/ Respondent by their Advocates. That all assurances to the investors that the project would commence and brought to completion were meant to hoodwink them. That in **August 2020,** the CEO of the 1st Defendant/ Respondent promised a definite handover date for the project within **90 days.**

That one of the salient clauses in the terms of the agreement were that time was of essence, but the 1st Defendant/Respondent was in total breach of the agreement. That they have been advised by their Advocates, which advice they believe to be true, that the 2nd Defendant/ Respondent has been negligent and encouraging rogue developers . That the 2nd Defendant/ Respondent has the legal mandate to supervise all commercial banks and are enjoined in this suit to ensure that monies collected by the 1st Defendant/Respondent are protected, pending the determination of this suit .

The Application is opposed and the 2nd Defendant/ Respondent filed grounds of opposition dated **24th May 2021,** and urged the Court to dismiss the Application with costs against it on the grounds that; the 2nd Defendant/Respondent has been wrongly enjoined in the proceedings as it neither has a regulatory mandate over the offplan housing sector that forms the subject matter of the suit herein nor does it regulate the 1st Defendant/Respondent.

That the Plaintiffs / Applicants cause of action arises from its contractual relationship with the 1st Defendant/Respondent and the 2nd Defendant/ Respondent is not a party to the same. That the Plaintiff's / Applicant's cause of action is contractual in nature and it is therefore enforceable by or against the parties to the said Contract and the 2nd Defendant/ Respondent is not a necessary party to the proceedings as it is not privy to the agreements forming the subject matter of the suit herein. That the Plaintiffs/ Applicants have not established the threshold of the far and reaching mandatory Orders being sought and that the 2nd Defendant's/ Respondent's joinder in the suit is thus **frivolous** and **vexatious.**

The Application is further opposed by the 1st Defendant/ Respondent who filed a Replying Affidavit sworn by **Andrew Kamau**, on **18th June 2021,** and averred that the Application is unmerited and it should be treated with the contempt it deserves. That the suit has been instituted by people without authority to do so. That the Plaintiffs/ Applicants have automatically lifted the veil of Corporation in the prayers sought, where they seek that the Directors provide sufficient property to answer the claim as against them in their individual capacity. That if the Plaintiffs/ Applicants are desirous of suing the Directors of the Company, the law provides for clear guidelines as to when and how the incorporations veil is to be lifted, as the agreement was between the Plaintiffs/Applicants and the 1st Defendant/ Respondent. That the Applicants have sued the Directors directly, and therefore failed to follow the procedures. That based on terms of the Contract, the Application is premature in the sense that the Plaintiffs have not exhausted the available remedies before instituting the instant suit, as the terms of the Sale agreements specify that in case of claim or dispute arising under the agreement, the same ought to be referred for Arbitration.

He further averred that he has been advised by his Advocates, which advice he believes to be true that once a matter is instituted in Court, it lapses upon the Defendant entering Defence and it is their position that the matter can still be referred to Arbitration. He further averred that they are still on schedule with the construction of the houses and the construction is still ongoing, a fact admitted by the Plaintiffs in their minutes. That the Plaintiffs'/ Applicants' claim to the title deeds before completion is baseless as they are not entitled to the same. That there is no proof that the 1st Defendant/ Respondent will use the title deeds in a manner that is pre judicial to the Plaintiffs/Applicants. That the title deeds are not encumbered, despite being in possession of the 1st Defendant/ Respondent. Further, that the prayers sought to freeze the account are prejudicial and in bad faith as it would result in great losses and potential multiple suits as against the 1st Defendant/Respondent by other investors. That the agreement was for an offplan agreement and which means that the 1st Defendant/ Respondent would use the monies deposited by the Plaintiffs and the Plaintiffs consented to the same.

The Plaintiffs/ Applicants through **Naomi Nimazuri**, swore a further Affidavit on **22nd June 2021,** and averred that the 1st Defendant/ Respondent has been sued in its legal capacities and any reliefs sought shall be against the 1st Defendant / Respondent, and should there be lifting of the veil, they shall do so at the appropriate time. Further, that Civil process and procedure provides for the Application of Arbitration and in this case, there is nothing to arbitrate . That they have been advised by their Advocates, which advise they believe to be true that the 1st Defendant/ Respondent has chosen not to put their substantive Defence. That the deponent forgets that all his promise to start and complete the units have never come to fruition, That the Application to freeze the account is made in good faith as it is supported by grounds and the deponent has shown that the 1st Defendant/ Respondent is not concerned about the investors . That they may seek from Court an order of full refund of the deposits made due to the bad blood and shoddy works done by the 1st Defendant/ Respondent and that the 1st Defendant/ Respondent is not keen on expedient conclusion of this mater.

The 1st Defendant/ Respondent filed a **Notice of Preliminary Objection** dated **15th June 2021,** and objected to the hearing of the Application on the grounds that the Court lacks **jurisdiction** to hear and entertain the issues articulated in the Application as;

1. That the prayers made by the Application invite the Court to delve into issues of piercing the corporate veil which issues would be invoked by different procedures of law that are beyond the jurisdiction of this Court. The effect of the prayers sought is to saddle the Directors of the 1st Defendant with alleged debt and improprieties of a Company which amount to piercing of the Corporate veil.

2. That the Jurisdiction as is determined within the 4 corners of Section 13 of the Environment & Land Court Act read with Article 162 of the Constitution of Kenya 2010 and the provision of subordinate legislature as quoted and relied upon by the Applicant cannot vest and or endow this Court with jurisdiction to pierce the Corporate veil.

The Notice of Preliminary Objection is opposed and the Plaintiffs/ Applicants filed a response to the Notice of Preliminary Objection and opposed it on the ground that it does not meet the threshold as espoused in **Mukisa Biscuit Versus Westend Distributors**. That the Preliminary Objection is not anchored on any ground nor is it supported by way of Affidavit, precedence or reference to any statute. That it is meant to necessarily increase costs and waste of Court's and parties time.

The Applications were canvassed by way of written submissions which the Court has carefully read and considered and the Court renders itself as follows;

Various issues have been raised by the 1st Defendant/ Respondent including whether or not the Plaintiffs/ Applicants have the legal capacity to sue and therefore the requisite **locus standi** and further whether the Court has **jurisdiction** to hear and determine the issue. That there is an Arbitration clause that is contained in the parties agreement. All these go to the Jurisdiction of this Court to hear and determine the matter and even before the Court can make a determination as to whether the Preliminary Objection is merited and whether the Plaintiffs/ Applicants are entitled to the orders sought, the Court must first make a determination of the said issues, which goes to its Jurisdiction, since without jurisdiction the Court must then down its tools. See the case of ***Owners of the Motor Vessel 'Lillian' (S) ….Vs… Caltex Oil (Kenya) Ltd [1989] KLR1,*** where the Court held that;-

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction…'

The 1st Defendant/Respondent has contended that the Plaintiffs do not have **locus standi** as the suit has been instituted by the Plaintiffs/Applicants without the authority of other alleged Plaintiffs. In the case of ***Kipsiwo Community Self Help Group …Vs… Attorney General and 6 Others [2013] eKLR*** the Court **(Munyao J)** stated as follows:

"38. I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued."

Further in the case of ***Shadrack Mwamuu Nzioka & 2 others (suing on their behalf as officials of Crescent Self Help Group) ….Vs… Tropical Blooms Limited [2020] eKLR,*** the Court held that;-

21. In the case of Kahindi Katana Mwango & Another vs. Cannon Assurance K. Ltd (2013) eKLR, this Court stated as follows:

"Indeed, Order 4 Rule 4 of the Civil Procedure Rules requires that where the Plaintiff sues in a representative capacity, the Plaint shall state the capacity in which he sues. The Plaintiff's Originating Summons does not state whether the Jeuri Community Based Organization, through the two Plaintiffs, suing on behalf of 41 others is a representative suit or not. That, in my view, renders the suit incurably defective. As at the time of filing the suit, the Plaintiffs were under an obligation to show the written authority entitling them to sue on behalf of "JEURI COMMUNITY BASED ORGANISATION" or on behalf of 41 others in accordance with the provisions of Order 1 Rule 13 of the Civil Procedure Rules, 2010. The Applicant cannot just annex a list of the inhabitants on whose behalf he purports to be acting which is not signed by any of the persons listed therein."

22. The Plaintiffs in this suit have filed the suit in their own capacity and on behalf of an organization calling itself Crescent Self Help. Although the members of the Crescent Self Help Group have not given the three Plaintiffs written authority to swear Affidavits and plead on their behalf, the 2nd and 3rd Plaintiffs have done so.

23. To the extent that the three Plaintiffs have pleaded that the suit is brought on their own behalf, and the other two Plaintiffs having given the 1st Plaintiff authority to sign the Affidavit on their behalf, this suit is sustainable, but only in respect to the three Plaintiffs, and not any other member of Crescent Self Help Group.

The Plaintiffs have brought the instant suit as official of **Lettas Riverview Two Investors.** They are also **investors** and have the right to institute the suit too. Given that they have brought the suit in a **Representative capacity,** the Plaintiffs are required to produce a written authority. However, the suit may also be sustained in their own names. Therefore, this Court finds and holds that the Plaintiffs have the requisite capacity.

As to whether the Court has jurisdiction, it is the 1st Defendant's contention that it cannot file its Defence as filing the same would be admitting the Court's jurisdiction and therefore bound by the same. The 1st Defendant has contended that this Court has **no jurisdiction**, over the issue as the Plaintiffs/Applicants have not exhausted all the available remedies as provided in their Agreements.

The Court has gone through the Sale agreements produced in evidence by the Plaintiffs and under **Clause H** of the said sale agreements titled **Arbitration**, the same states;

> ***"All claims and disputes whatsoever arising under this agreement shall be referred to Arbitration in accordance with the provisions of Arbitration Act of Kenya ……"***

In determining this issues, **Section 6(1) of the Arbitration Act No. 4 of 1995** is key. It provides:-

> ***"(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—***
>
> ***(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or***
>
> ***(b)that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."***

From the sale agreements, the **Arbitration clause** provides that all claims and disputes whatsoever ought to be referred to Arbitration. The basis of this suit is the alleged breach by the 1st Defendants/Respondent to complete and deliver the **29 units** as per the sale agreements. Therefore, the instant dispute falls under the realm of **Clause H** on **Arbitration** of the said Agreement.

It is not in doubt that Parties are bound by their **terms of Contract** and the Court cannot rewrite the said Contract. The said agreements between the parties provided for the **Arbitration of disputes** and the same ought to be guided by the provisions of Arbitration Act. See the case of **Wringles Company (East Africa) –v- Attorney General & 3 Others (2013) eKLR** where the Court held:-

> ***"that Courts cannot re-write what has already been agreed upon by the parties as set out in the agreement. The parties had agreed that in the case of a dispute arising as to the validity of the agreement, then the same would be subject to arbitration and the Court cannot re-write the same."***

The Court having found that the dispute can be referred to Arbitration, it must then make a determination as to whether the 1st Defendant has complied with the provisions of the Sections of the Arbitration Act, that would then enable the Court refer the matter for Arbitration. Section 6 (1) of the Arbitration Act provides that;

> ***"A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-***
>
> *(a)* ***That the arbitration agreement is null and void, inoperative or incapable of being performed; or***
>
> *(b)* ***That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."***

It is not in doubt that the 1st Defendant/Respondent appeared on ***16th April 2021****. It later filed a* ***Notice of Preliminary Objection*** *dated* ***15th June 2021,*** *and filed a Replying Affidavit dated* ***18th June 2021,*** *in response to the Plaintiffs/ Applicants Application. The 1st Defendant has not in any way filed an Application to stay the proceedings of this Court and refer the matter to Arbitration.*

The provisions of ***Section 6(1)*** *of the* ***Arbitration Act*** *requires a party to file for stay of proceedings not later than the time of entering Appearance. Further when a party files pleadings in Court, not only a defense as alluded by the 1st Defendant, but any pleading, then that party has admitted the Plaintiffs claim and the jurisdiction of the Court . See the case of* ***Mt. Kenya University …Vs…Step Up Holdfing (K) Ltd [2018] eKLR*** where the Court of Appeal held that;-

> ***"We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the Respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the Respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed."***

Further in the case of ***Diocese of Marsabit Registered Trustees v Technotrade Pavillion Ltd*** **[2014] eKLR** it was held: -

> ***"By these provisions of the Constitution and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such a section 6(1) of the Arbitration Act forfeits his right to apply for and have proceedings stayed or matter***

referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right to the other party from availing itself of the judicial process of the Court. With that understanding, a delay of fourteen (14) days becomes unreasonable in the eyes of the law and the circumstances of the case. On that ground alone, the application herein having been made fourteen days after the filing of appearance, should fail."

Consequently, the Court finds and holds that though the dispute is one which could be referred for Arbitration, the Court declines to do so for failure by the 1st Defendant/ Respondent to comply with the provisions of ***Section 6(1) of the Arbitration Act*** *and thereby vesting the Court with jurisdiction.*

Having held that this Court is well vested with the requisite jurisdiction, the Court must further determine the following issues.

1. Whether the 2nd Defendant/ Respondent has been wrongly enjoined

2. Whether the Notice of Preliminary Objection dated 15th June 2021 is merited

***3. Whether the Notice fog Motion Application dated* 12th February 2021 is merited**

1. <u>Whether the 2nd Defendant/ Respondent has been wrongly enjoined</u>

The 2nd Defendant/ Respondent has sought to be struck off from the Suit by the Plaintiffs/ Applicants on the grounds that it has wrongly been joined in the suit as it neither has a regulatory mandate over offplan housing sector, nor is it a party to the contract between the Plaintiffs/ Applicants, and the 1st Defendant/ Respondent and therefore not a necessary party in the proceedings. That its joinder in the suit is frivolous. The Court notes that the instant grounds of opposition were raised in opposition to the Plaintiffs/ Applicants Notice of Motion Application seeking interim injunctive orders.

The Court further notes that in their Originating Summons dated ***12th February 2021****, the Plaintiffs/ Applicants have sought for orders against the 2nd Defendant/ Respondent. It is the Court's considered view that if it were at this point to decide whether or not there is no cause of action as against the 2nd Defendant / Respondent whose orders against has been sought at the main trial, the Court would be determining the issues that are to be addressed at the substantive stage at this interlocutory stage. Consequently, the Court finds and holds that the same cannot be determined at this stage and therefore not merited.*

4. <u>Whether the Notice of Preliminary Objection dated 15th June 2021 is merited</u>

The 1st Defendant/ Respondent/Objector has filed a Notice of Preliminary Objection on the grounds that the Applicants have invited the Court to devolve into issues of piercing the corporate veil which issues should be invoked by different procedures and are beyond the jurisdiction of this Court as this Court's jurisdiction is determined within the four corners of section 13 of the Environment & Land Court.

What constitutes a Preliminary Objection is set out in the case of ***Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd*** **(1969) EA 696,** *where it was held that:*

"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration… a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

The Preliminary Objection calls onto question the jurisdiction of this Court and the same raises a pure point of law which must not be ascertained by way of probing of evidence as it challenges the jurisdiction of the Court to hear and determine the dispute.

Is the Preliminary Objection then merited? It is the 1st Defendant's /objector's contention that this Court does not have jurisdiction to hear and determine matter based on the lifting of the **Corporate veil.** The concept of lifting the veil is a judicial process, whereby the Court will usually disregard the immunity of corporate officers or entities from liability from wrongful corporate activities . In this doctrine, the law therefore goes behind the mask or veil of incorporation to determine the real person or group of people behind the Company.

The law on lifting the veil of incorporation is now settled. The Court is guided by **Halsbury's Laws of England, 14th Edition Volume 7, Paragraph 90** which states;

"Piercing the corporate veil 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 purposes of litigation before it as identical with a 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 is a relevant feature. In such a 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 agents, directors and controlling the activities of the company".

It is not in doubt from the above, that the Court will pierce the corporate veil in order to do justice for a purpose of litigation before it. It cannot be said that an ***Environment and Land Court*** *does not have jurisdiction to pierce the veil of incorporation, when the dispute before it is within the confines of the jurisdiction of the Environment and Land Court. The Court finds and holds that if necessary, it has jurisdiction to determine whether or not to pierce the veil of incorporation.*

The Notice of Preliminary Objection further seeks to dismiss the Application based on the fact that the prayers delve into issues of piercing the corporate veil which ought to be invoked by a different procedure. The Court finds that this is not a pure point of law as the same is not capable of disposing the suit summarily. See the case of ***Oraro …Vs… Mbaja (2005) 1KLR 141***, where it was held that:-

> ***"Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence."***

From the above analysis, this Court finds and holds that the Notice of Preliminary Objection is **not merited.**

3. Whether the Notice of Motion dated 12th February 2021 is merited.

The Court having carefully perused the Notice of Motion Application herein notes that while the Application has sought for various orders, some of the said orders were sought pending the hearing and determination of the Application and hence the same are spent. . The only prayers that still remain for determination and the ones listed above seeking to issue summons to the Directors of the 1st Defendant/ Respondent and ordering them to deposit the title deeds in Court.

Before the Court can determine whether the said prayers are merited , the Court must first determine whether the orders as sought are capable of being granted. It is not in doubt that the 1st Defendant/ Respondent is a Limited Liability Company and hence it is a separate personality from its members and the Directors of the said Company cannot be liable for the acts and or Contracts entered into by the 1st Defendants . See the case of ***Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Ano (2014) eKLR*** **which** the Court held 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 altogtheer 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 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."***

In the case of **Multichoice Kenya Ltd …Vs… Mainkam Ltd & Anor. (2013) eKLR** the Judge held that;

> ***"I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of Salomon v Salomon (1897) A.C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose 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 holding company as one entity."***

Further in the case of **Peter O. Ngoge T/A O P Ngoge & Associates ….Vs…Ammu Investment Company Limited [2012] eKLR.** the Court held that

> **"It follows that the mere fact that one is a director or shareholder of a corporation does not, *ipso facto*, make the director or shareholder liable for the actions or omissions of the Company unless the circumstances are such that the corporate veil of the Company can be lifted. The case of Mugenyi & Company Advocates vs. The Attorney General [1999] 2 EA 199 following Palmers Company Law Vol. 1 (22 ed) lists 10 instances under which the veil of corporate personality may be lifted or as is sometimes put, look behind the company as a *legal persona* and these are:-**
>
> **1. Where companies are in the relationship of holding and subsidiary companies;**
>
> **2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;**
>
> **3. In certain matters relating to taxation;**
>
> **4. In the law relating to exchange control;**
>
> **5. In the law relating to trading with the enemy;**
>
> **6. In the law of merger control in the United Kingdom;**

7. **In competition of the European Economic Community;**

8. **In abuse of law in certain circumstances;**

9. **Where the device of incorporation is used for some illegal or improper purpose; and**

10. **Where the private comp**

This Application was brought at the institution of the suit, and the Court has not had a chance to make a determination on whtheer or not the Corporate veil can be lifted. As the Orders sought are against the Directors as opposed to the 1st Defendant . Therefore, this Court finds and holds that the said prayers are not tenable. Consequently, the Court finds that the Notice of Motion Application dated 1st February 2021 is not merited.

Having now carefully read and considered the pleadings by the parties, the Notice of Motion Application herein, the Notice of Preliminary Objection, the Affidavits sworn by the parties, the written submissions and the relevant provisions of law, the Court finds and holds that the Notice of Motion Application dated 12th February 2021, is not merited and the same is dismissed entirely.

Further the Court finds and holds that the Notice of Preliminary Objection dated 15th June 2021, is equally not merited and the same is dismissed entirely. Further each party should bear its own costs.

Let the matter be set down for hearing and be determined on merit.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy