REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 228 OF 2001

R.M. PATEL & PARTNERS.....PLAINTIFF

-VERSUS-

RIFT VALLEY AGRICULTURAL

CONTRACTORS LIMITED.....DEFENDANT

AND

MAHESHKUMAR MANIBHAI PATEL.....RESPONDENT

RULING

[1] This ruling is in respect of the two applications dated **25 August 2017 (hereinafter, the 1st application)** and **5 February 2017 (the 2nd application).** The 1st application was filed by **M/s Mirugi Kariuki & Co. Advocates** on behalf of the Defendant/Applicant, **Rift Valley Agricultural Contractors Ltd.** The said application was brought pursuant to **Section 3A** of the **Civil Procedure Act, Order 1 Rule 10(2)** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010** for orders that:

> **[a]** the Court be pleased to lift the corporate veil in respect of the Defendant to facilitate the joinder of its former director, **Maheshkumar Manibhai Patel**, as a party in this suit;
>
> **[b]** That the Respondent **Maheshkumar Manibhai Patel** be enjoined in this suit as a Defendant or in any other capacity as the Court may deem just;
>
> **[c]** That the costs of the application be costs in the case.

[2] The application was premised on the grounds set out on the face thereof and the affidavit sworn by **Benson Thiru Karanja** on **22 August 2017;** the main ground being that this suit is in respect of a myriad of transactions that took place at a time when the Respondent was a director of the Defendant and was therefore involved in active and exclusive management of the company. It was therefore the contention of the Defendant that most, if not all, of the transactions giving rise to the cause of action herein were sanctioned, overseen, authorized and or done by the Respondent without the authority, approval and/or knowledge of the Defendant through its Board of Directors; and that in some instances, the Respondent flagrantly acted without authority, approval and/or knowledge of or against the interests of the Defendant in the hope that his acts would be cushioned by the veil of incorporation.

[3] It was further the contention of the Defendant that, as one of its founding members, the Respondent is in possession of a wealth of information and documentation relevant to this case; and that his presence and participation in the suit as a party will enhance the effectual and complete adjudication of the questions involved in this suit. The Defendant further asserted that, as one of the founding members of the both the Plaintiff and Defendant, the Respondent's role and involvement will be in issue herein; and therefore that he is a necessary party to this suit. In particular, the Defendant set out a chronology of events in the Supporting Affidavit sworn by one of its directors, **Benson Thiru Karanja,** alleging irregularities, illegalities and outright fraud on the part of the Respondent. Thus, in the Defendant's view, no prejudice will be suffered by any of the parties if the application is allowed, as each party will have the opportunity to ventilate its case from a position of knowledge.

[4] The application was opposed by the Respondent, **Maheshkumar Manibhai Patel**, vide his Replying Affidavit sworn on **19 September 2017** and filed herein on **20 September 2017**. He denied the specific allegations of fraud and improper conduct alleged by the Defendant against him. He further averred that, in any case, the same allegations are the subject of a pending suit, being **Nairobi High Court Civil Case No. 1535 of 1999**. He posited that this suit is part of the efforts by the Defendant, through its director, **Mr. Benson Thiru Karanja**, to

intimidate and humiliate him, as no criminal charges have ever been filed against him for fraud. While conceding that he was a director of the Defendant, the Respondent averred that he is no longer a director; that the Defendant is a separate legal entity capable of being sued in its own right; and therefore that no justification has been made for lifting of the corporate veil, as sought herein.

[5] The Respondent further averred that, having been actively involved in the running of the affairs of the Defendant, he was convinced that the Defendant's business during the period in which the Plaintiff's claim arose, was conducted with utmost diligence and fidelity to the Defendant's constitution and the law; and that all transactions by the company were sanctioned for and on its behalf by authorized persons, notwithstanding the temporary absence of his co-director, **Mr. Benson Thiru Karanja**. He denied the Defendant's allegations of conflict of interest, as a director of both the Plaintiff and the Defendant; and asserted that during the period he was running the affairs of the Defendant, he was never actively involved in the day to day management of the Plaintiff company. He accordingly postulated that the application has been brought in bad faith for the purpose of diverting attention from the substantive suit herein against the Defendant.

[6] In response to the Respondent's Replying Affidavit, the Defendant filed a Supplementary Affidavit with the leave of the Court. In the said affidavit, sworn by **Benson Thiru Karanja** on **16 July 2018**, the Defendant reiterated its contention that the Respondent is best placed to respond to the Plaintiff's claim. Attention was drawn to Paragraphs 16, 24, 25, 28(b) among others, wherein the Respondent explicitly conceded that he was a director of the Defendant; and that he was exclusively in charge of the day to day management of the Defendant during the period in issue. It was further averred that it would be futile for the Defendant to call the Respondent as a witness, granted that he has demonstrated open bias against the Defendant through his statements. Paragraphs 30 and 32 of the Replying Affidavit were cited as examples of such bias and to show that the Respondent is looking forward to a finding of liability herein against the Defendant. The Defendant added that, as a director of the Plaintiff, the Respondent stands to gain from such a favourable decision.

[7] At paragraph 13 of the Supplementary Affidavit, the Defendant averred that it is immaterial that the Respondent is no longer a director of the Defendant; granted that he was a director in active management of the company when the transactions giving rise to the Plaintiff's perceived cause of action took place. **Mr. Karanja** further deposed that, in so far as the Respondent remains a director of the Company, the orders sought against him are tenable.

[8] On behalf of the Plaintiff, an affidavit sworn by one of its directors, **Mr. Patel Sanjev,** was filed herein on **13 September 2017**. It was the averment of the Plaintiff that the application is devoid of merit and has been brought in bad faith as it does not meet the required threshold for granting the orders sought. The Plaintiff pointed out that the application is a manifestation of the internal wrangles between the Defendant and the Respondent in respect of transactions to which it is not a party. From the Plaintiff's standpoint, the Defendant's directors, such as the Respondent herein, had the authority to bind it in the subject transactions; and that if there was a breach of the general duties of directors, the same would only be enforceable in a separate action by the Defendant against the Respondent; and not necessarily in this suit.

[9] Mr. Patel further denied that the Respondent has ever been an active director of the Plaintiff; adding that he held only one share until the sons of **Ramesh M. Patel**, now deceased, became of age and capable of assuming their respective positions as shareholders in their own right. He denied that any documents, cheques or LPOs were ever signed by the Respondent, as a director, on behalf of the Plaintiff; and that no complaints or objections were ever lodged by the Defendant in respect of the transactions that form the basis of the instant suit. Thus, **Mr. Patel** asserted that the application dated **25 August 2017** is not only lacking in merit, but has also been brought in bad faith.

[10] Directions were given herein on **22 September 2020** that the application be canvassed by way of written submissions; and while counsel for the Defendant duly complied, counsel for the Plaintiff opted to rely entirely on **Mr. Patel's** affidavit aforementioned and opted not to file any written submissions. On his part the Respondent's counsel neither attended court for directions in spite of service, nor filed any written submissions. In the Defendant's written submissions, which were filed herein on **16 October 2020** by **Ms. Badia**, one single issue was proposed for determination; namely, whether the Defendant's application dated **25 August 2017** has met the legal threshold for lifting/piercing the veil of incorporation in respect of the Defendant company. Counsel then proceeded to submit on the law governing incorporation and in particular, furnished an analysis of instances in which the corporate veil has been lifted. She relied on the following authorities:

[a] A Handbook of Company Law, Revised Edition, K.I. Laibuta; Law Africa;

[b] Post Bank Credit Ltd (In Liquidation) vs. Nyamangu Holdings Ltd [2015] eKLR;

[c] Arun C. Sharma vs. Ashana Raikundalia & 5 Others [2015] eKLR;

[d] Zingo Investment Ltd vs. Miema Enterprises Ltd [2015] eKLR;

[e] Joseph Isagi Nyando vs. Imagine IMC Limited [2018] eKLR;

[f] Joel Ndemo Ong'au & Another vs. Loyce Mukunya [2015] eKLR

[11] I have given careful consideration to the Defendant's application dated **25 August 2017**, the averments set out in the Supporting Affidavit filed therewith, the responses as per the Replying affidavits filed on behalf of the Respondent and the Plaintiff, as well as the written submissions filed herein by counsel for the Defendant. The brief background to the application is that the Plaintiff, a dealer in motor vehicle spare parts, sued the Defendant claiming the sum of **Kshs. 54,481,347.07; Kshs. 52,597,434.07 and Kshs. 38,103,905.07** (according to the Amended Plaint filed herein on **15 February 2017)**, being the sums due to it in respect of goods sold and delivered, work done, repair charges and spare parts supplied to the Defendant at its request between **1996 and 1998**.

[12] The Defendant, a limited liability company incorporated in **1974,** denied the Plaintiff's claim and contended, *inter alia*, that the suit is not only incompetent, but also untenable in so far as the alleged transactions are fictitious. The Defendant also filed a Counterclaim for **Kshs. 22,475,709.80** being monies deposited on account with the Plaintiff, and for which the Plaintiff allegedly failed to account. The Defendant

further prayed for:

> **[a]** An order that the Plaintiff do hand over the log books and transfer forms duly executed in its favour for **Combine Harvester Registration Numbers KAJ 302J, KAJ 901L, KAL 902L** and **KAJ 851G;**
>
> **[b]** Return of lorry **Registration No. KAH 312A** with **Trailer ZB 5620;** and lorry **Registration No. KAJ 275U** or their monetary equivalent.
>
> **[c]** Costs of both the suit and the Counterclaim.

[13] The Plaintiff denied the allegations in the Counterclaim; in particular, that it is in wrongful possession of the log books for the Tractors No. **KAJ 302J, KAJ 901L, KAL 902L** and **KAJ 851G.** According to the Plaintiff, the tractors rightfully belong to it and were only let on hire to the Defendant. The Plaintiff further denied that it is indebted to the Defendant in the aforestated sums or any lesser or greater sum or at all. Consequently, the Plaintiff prayed for the dismissal of the Counterclaim with costs; and that judgment be entered for it as prayed in the Plaint.

[14] One witness, **Sanjeer Ramesh Patel (PW1)** had testified by the time the instant application was filed; and the record shows that the trial was interruption so as to enjoin the Respondent, a co-director of the Defendant company with **Benson Thiru Karanja**, as a Defendant herein. In the premises, the issue for determination is whether sufficient cause has been made for the joinder of the Respondent as a the 2nd Defendant in this suit.

[15] The dispute is between two companies. It is a tested and tried principle that a limited liability company, such as the Defendant, is a legal entity in its own right, an entity that is distinct and separate from its shareholders and directors; notwithstanding that as a juristic person, it operates through human members, directors and employees. The principle was well explicated in **Salomon vs. Salomon & Co. Limited [1897] AC 22** thus:

> **"The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act..."**

[16] On account of this basic principle, a director ought to be held personally liable for the liabilities of the company of which he is a director unless a plausible justification has been made for the lifting of the corporate veil. Hence, at Paragraph 90 of **Halsbury's Laws of England, 4th Edition**, it is opined that:

> **"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 litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct, but in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. 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."**

[17] It was in recognition of this principle that the Defendant prayed that the corporate veil be first lifted to facilitate the joinder of the Respondent as a co-defendant herein. Hence, the question to pose at this stage is what are the circumstances that warrant the lifting of the corporate veil? This question was well-considered in the case of **Mugenyi & Company Advocates vs. The Attorney General [1999] 2 EA 199, in which the following list of ten such instances as recommended in Palmers Company Law Vol. 1 (22 ed), was adopted:**

> **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 company is founded on personal relationship between the members.

[18] None of these scenarios has been shown to exist in this case; and whereas it was the contention Mr. Benson Thiru Karanja that the Respondent ran the company single-handedly during the period in issue, it was never his contention that the membership/shareholders of the Defendant company fell below the legal minimum. Moreover, whereas learned counsel for the Defendant relied on Sections 1002, 1003 and 1004 of the Companies Act, No. 17 of 2015, as the basis for the application, those provisions to not cater for the peculiar facts presented by the instant application. Section 1002 is a penal provision, creating the offence and penalty for fraudulent trading. Thus, it envisages the invocation of the criminal process, including investigation, trial and conviction attendant thereto. Section 1003 of the Companies Act similarly provides for preventive action pending investigations with a view of prosecution or during ongoing prosecution, to preserve the assets of the company and conceal its assets from further dissipation. Section 1004 of the Act, on the other hand, gives the Court the power to grant injunction in certain instances. Thus, it is plain that those provisions have nothing to do with the lifting of the corporate veil in the circumstances contemplated by the instant application.

[19] It is also instructive to note that the applicant in this instance is not the Plaintiff, but the company itself, spearheaded by one director against another. It is manifest therefore that there is an internal dispute between the two directors of the Defendant; a dispute that they are already grappling with in separate cases, notably Nairobi HCCC No. 1535 of 1999: Benson Thiru Karanja vs. Maheshkumar Manibhai Patel and Rift Valley Agricultural Contractors Ltd. As far as the Plaintiff is concerned, it had certain business transactions with the Defendant for which it has not been paid. It is perfectly reasonable for it to resist the attempt by the Defendant to drag it into the internal affairs of the Defendant. Indeed, it is a well-established principle that a third party, such as the Plaintiff herein, is not under obligation to concern itself with whether or not the Defendant company complied with its internal management rules and procedures. The principle, as enunciated in the case of Royal British Bank vs. Turquand [1856] 119 ER 886 is that:

> **"While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings - what Lord Hatherley called "the indoor management" and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has and if he is acting bona fide he will, even though the sanction has not been obtained, stand in good position as if it had been obtained."**

[20] Likewise, the authors of **Gower's Principles of Modern Company Law** proffered the rationale that:

> **"...business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company ... would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf."**

[21] Needless to say that the aforesaid posturing now has statutory backing in **Section 34** of the **Companies Act, 2015**, which provides that:

> **"(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorize others to do so, is free of any limitation contained in the company's constitution.**
>
> **(2) For purposes of subsection (1)**
>
> **(a) a person deals with a company if the person is a party to a transaction or other act to which the company is a party; and**
>
> **(b) a person dealing with a company -**
>
> **(i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorize others to do so;**
>
> **(ii) is presumed to have acted in good faith unless the contrary is proved.**
>
> **(iii) is not to be regarded as having acted in bad faith only because the person knew that a particular act is beyond the powers of the directors under the constitution of the company."**

[22] And in **Sub-sections (4) and (5)** of **Section 34,** it is stipulated that**:**

> **"(4) This section does not affect a right of a member of the company to bring proceedings to restrain the doing of an act that is beyond the powers of the directors, but no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.**
>
> **(5) This section does not affect a liability incurred by the directors, or by any other person, because the directors have**

exceeded their powers." (emphasis supplied)

[23] Thus far, the Defendant's liability is yet to be ascertained; and the alleged misdeeds of the Respondent in his capacity as a director, if any, are yet to be made manifest. Clearly then, no justification has been made for this Court to come to the conclusion that he is liable for the sums claimed herein by the Plaintiff. Accordingly, it seems to me that perhaps the most appropriate stage for seeking the lifting of the corporate veil in this matter would be after Judgment, for purposes of execution under Order 22 Rule 35 of the Civil Procedure Rules. In this connection, I share the viewpoint expressed by Hon. Ringera, J. (as he then was) in Nairobi High Court Civil Case No. 1287 of 2000: Ultimate Laboratories vs. Tasha Bioservice Limited, that:

> ***While I agree with the defendant's/judgment debtor's advocate that the objective of an examination of a company's director or officer under Order XXI Rule 36 is to obtain discovery, for the purpose of execution of a decree against the company, as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what property or means of satisfying the decree, I don't agree that the court does not have the power in an application in execution which is grounded under the above provisions as well as the inherent power of the court and all other provisions of the law to lift the corporate veil of the company and order the director to personally discharge the debts of the company''.***

[24] Likewise, in **Masefield Trading (K) Ltd vs. Rushmore Company Limited & Another [2008] eKLR, Hon. Kimaru, J.** held thus while interpreting **Order 22 Rule 35** of the **Civil Procedure Rules:**

> ***"I think the above rule grants this court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation."***

***[*25]** Accordingly, a director need not be a party to a suit to be made liable for the debts of the company in which he serves as a director; but nevertheless runs the risk of liability on the basis of proof of any of the ten instances aforementioned or similar circumstances warranting the lifting of the corporate veil. Accordingly, having considered the application dated **25 August 2017,** I am not convinced that sufficient cause has been shown at this stage for the lifting of the Defendant's corporate veil. To that extent, the application is premature; and without the lifting of the corporate veil, there cannot be any justification for joinder of the Respondent as a defendant in this suit in which the Plaintiff is clear in its mind as to which party it transacted with. Thus, the application dated **25 August 2017** must fail and is hereby dismissed with an order that the costs thereof be costs in the cause.

[26] The 2nd application is said to be an application dated **19 September 2017;** but what is on record is a Notice to Cross-examine **Benson Thiru Karanja**, the deponent of the affidavit filed in support of the 1st application, dated **25 August 2017**. The Defendant opposed the application on the basis of the Grounds of Opposition dated **16 October 2020,** namely:

> ***[a]*** *That the Respondent has not made any application before the Court seeking leave to cross-examine one* ***Mr. Benson Thiru Karanja*** *as envisaged under the provisions of* ***Order 19 Rule 2(1)*** *of the* ***Civil Procedure Rules.***
>
> ***[2]*** *That the Respondent has not laid proper legal basis/foundation to justify leave to cross-examine one* ***Mr. Benson Thiru Karanja****.*
>
> ***[3]*** *That the Notice to Cross-Examine does not demonstrate and/or disclose any substantive and/or cogent purpose that cross-examination of one* ***Mr. Benson Thiru Karanja*** *shall serve to the merits either of the application currently under consideration or the main suit.*
>
> ***[4]*** *That the Notice to Cross-Examine is an abuse of the court process and an attempt to stagnate, scuttle and/or defeat the expeditious prosecution and conclusion of the main suit.*

[27] Further to the foregoing, counsel for the Defendant filed written submissions dated **16 October 2020** as well as a List and Bundle of Authorities to augment the aforementioned Grounds of Opposition. I have given due attention to the written submissions as well as the authorities filed therewith from the backdrop of **Order 19 Rule 2(1)** of the **Civil Procedure Rules;** which provision is explicit that:

> **"Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examinatio*n of the deponent."***

[28] *Since cross-examination on an affidavit in support of an interlocutory application is a discretionary power, it can only be allowed in special circumstances. Thus, in* **Invesco Assrance Co. Ltd v Commissioner of Insurance & others [2016] eKLR**

for instance, it was held that:

> ***"With respect to cross-examination on affidavits, cross-examination on the affidavit is a discretionary power conferred upon the court by the provisions of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words, a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent's affidavits otherwise if the courts become too willing to allow cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined."***

[29] Moreover, **Rule 9** of **Order 19** states that applications under the Order be made by chamber summons or orally in court. Thus, having failed to file an application by way of chamber summons or orally in court for leave to cross-examine, the Defendant lost the opportunity to satisfy the court that there was good cause for the cross-examination of **Mr. Benson Thiru Karanja** to warrant the exercise of discretion in its favour. A similar position was taken by **Hon. Waweru, J.** in the case of **Nancy Wanja Gatabaki vs. Ashford Muriuki [2013] eKLR** thus:

> **"5. …In litigation governed by the Civil Procedure Act and Rules, the grant of leave to cross-examine the maker of an affidavit is a discretionary power of the court under Order 19 Rule 2 of the Civil Procedure Rules, 2010. Likewise, the leave to cross-examine sought herein is at the discretion of the court. It bears remembering, however, that the exercise of discretion by the court must have a sound basis; it should not be exercised in a whimsical or capricious manner. See the case of National Bank of Kenya Ltd & 2 others –vs- Kisumu Paper Mills Ltd (2009) e KLR. See also the case of Mbogo –vs- Shah (1968) EA 93. The question to ask is whether any material has been placed before the court which would assist in the exercise of its discretion.**
>
> **6. an applicant to cross-examine the deponent of an affidavit must lay a proper basis for such application. He must state which specific paragraphs and allegations in the affidavit in question give rise to the need for cross-examination".**
>
> **7. The Applicant herein should have demonstrated which portions of the two affidavits of the Respondent she needed to cross-examine him upon and why it was necessary to cross-examine. The Applicant has not discharged this burden. It is not sufficient merely to request for leave to cross-examine. There must be a proper basis for it."**

[30] In any event, having already ruled on the application dated **25 August 2017**, it would follow that the Notice to Cross-examine has been overtaken by events; and it is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 2ND DAY OF MARCH 2021

OLGA SEWE

JUDGE