

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC CASE NO. E004 OF 2023

**RIYAZHASSAN FAZALHUSEIN FAZEL 1ST PLAINTIFF/
RESPONDENT**

**FEMIDA RIYAZHASSAN FAZEL 2ND
PLAINTIFF/RESPONDENT**

FAZALABBAS RIYAZHASSAN FAZEL 3RD PLAINTIFF/ RESPONDENT

VERSUS

MORU RIDGE LIMITED 1ST DEFENDANT/ APPLICANT

HOME AFRIKA COMMUNITIES LIMITED 2ND DEFENDANT/ APPLICANT

ENG. MBUGUA KAMAU 3RD DEFENDANT/ APPLICANT

ROBERT MUCHOKI 4TH DEFENDANT/ APPLICANT

STEPHEN GICHOHI 5TH DEFENDANT/ APPLICANT

RULING

Introduction

1. By a Notice of Motion Application dated 29th September 2025, the Applicants moved this court seeking the following Orders:

1. *This Honourable Court be pleased to stay any further proceedings and refer the dispute to arbitration in accordance with the express terms of the Reservation Letter between the Respondents and the 1st Applicant*
2. *This Honourable Court be pleased to strike out the 3rd 4th and 5th Applicants from the proceedings from want of capacity.*

3. *In the alternative to order (1) and (2) sought herein, this Honourable Court be pleased to admit and deem as duly filed and served the Statement of Defence dated 25th September 2025 filed herein and extend time to the Applicants to comply with pre-trial modalities.*
4. *The Honourable Court be pleased to make such orders as it deems mete and just.*
2. The application is premised on the grounds on the face of it and the supporting affidavit of Sally Ileri sworn on even date.
3. The Applicants contend that the Reservation Letter relied upon by the Defendants/Respondents unequivocally stipulates, under clause 13, that any dispute arising from or relating to the conditions set forth therein shall be submitted to arbitration.
4. In essence, the Applicants challenge the jurisdiction of this court.
5. Moreover, it is the Applicants' contention that the 3rd 4th and 5th Defendants are directors of the 1st Defendant/Applicant and as such, possess no legal capacity to be sued in their personal capacities.
6. It bears emphasis that the present application was brought only after the Plaintiff had already commenced the presentation of its case.
7. The Applicants, despite ample opportunity, had earlier declined or neglected to comply with the requirements of Order 11 of the Civil Procedure Rules.

Issues for Determination

8. Having examined the application, the supporting affidavit in support together with replying affidavit in response and the relevant authorities, the following issues emerge for determination:

Whether this Court has the jurisdiction to determine this matter

Whether the 3rd 4th and 5th Defendants/Applicants may be sued in their personal capacities.

Analysis and Determination

10. Before any other matter can be approached, the Court must confront the issue of jurisdiction. It is the wellspring of judicial power, and without it the law commands absolute restraint.
11. As the Court of Appeal pronounced in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR:**

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

12. Moreover, the Supreme Court of Kenya in **Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)** underscores, a court's jurisdiction flows solely from the Constitution or other written law: it cannot be assumed or extended by judicial creativity.

13. Thus, a Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

14. Turning to the facts of the present matter. A careful examination of the Reservation Letter reveals that the Applicants have, with some imprecision, anchored their argument on clause 13. That clause, however, deals solely with the timing of completion and makes no provision whatsoever for the resolution of disputes by arbitration.

15. Clause 13 provides:

*“**Completion Date** The date falling fifteen (15) Working Days after the date on which a Certificate of Practical Completion of the Apartment has been achieved.”*

16. It is therefore evident that reliance on this clause to challenge the jurisdiction of this Court is misplaced.

17. The Court must look instead to the subsequent provisions of the Letter to determine whether any clause genuinely contemplates arbitration and whether, if so, it has the effect of divesting this Court of its jurisdiction.

18. I take note that there is mention of arbitration under Clause 14 of the Reservation Letter which sets out the condition for “Plans and Elevations” as follows:

“...Notwithstanding the provisions for arbitration contained in the Sale Agreement, any dispute arising in connection with any matter referred to in this condition shall be submitted to arbitration to the Vendor’s Architects whose decision shall be final and binding.”

19. A careful reading of Clause 14 demonstrates that its arbitration provision is circumscribed and specific. It applies only to disputes arising in connection with the 'Plans and Elevations' and not to all matters contemplated under the Reservation Letter.
20. The reference to arbitration before the Vendor's Architects, whose decision is declared final and binding, cannot be taken as an all-encompassing ouster of this Court's jurisdiction.
21. In other words, while Clause 14 contemplates a specialized mechanism for resolving technical disputes relating to architectural plans, it does not purport to displace the Court's authority to entertain claims outside that narrow ambit.
22. The Applicants' broad reliance on an arbitration clause to challenge this Court's jurisdiction must therefore be seen as overextended and lacking in foundation.
23. A close reading of Clause 14 lays bare the limited compass of its arbitration provision. It speaks only to disputes concerning the *Plans and Elevations*, and cannot be stretched to divest this Court of its jurisdiction over the broader claims before it.
24. While the Applicants may seek arbitration for matters squarely within that narrow domain, the law does not permit a party to cloak a general challenge to jurisdiction in the guise of a specialized clause.

25. The Court, as guardian of its own authority, therefore affirms that it has full jurisdiction to hear and determine the matter in its entirety.
26. Having resolved the threshold question of jurisdiction, the Court must now turn to the second issue: whether the 3rd, 4th and 5th Defendants/ Applicants may properly be sued in their personal capacities or whether they remain insulated by the separate legal personality.
27. The leading principle, long established since ***Salomon v Salomon & Co. Ltd [1897] A.C. 22***, is that a registered company is a juristic person distinct from its directors, shareholders or agents and ordinarily must sue or be sued in its own name.
28. This principle has been firmly incorporated into Kenyan law. Courts have repeatedly affirmed that a company possesses a separate legal personality distinct from its directors and shareholders, and that, absent exceptional circumstances, it alone is the proper party to sue or be sued.
29. In ***Samuel Ojwang Juma v Sapphire Collections Limited [2021] KEELRC 1729***, the Court observed that:

*“Since the decision of the English case of **Salomon & Salomon & Co. Ltd v Salomon [1897] A.C. 22 H.L.**, it is trite law that a company is a separate and distinct person from its shareholders and directors. However, over the time courts have developed principle or legal thresholds for disregarding or lifting the corporate veil so that the*

persons who control the company may be held personally liable to pay the company's debts."

30. The Court went on to enunciate on when the corporate veil can be lifted as follows:

*"The circumstances under which the corporate veil may be pierced were discussed in paragraph 90 of **Halsbury's Laws of England 4th Edition Volume 7 (1)** as follows:*

"Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the 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."

31. This exposition underscores that piercing the corporate veil is an exceptional measure, reserved for circumstances where the company is used as a mere façade or instrumentality to perpetrate

fraud or improper conduct. See ***Ukwala Supermarket v Jaideep Shah & another [2022] eKLR.***

32. In the instant application, a look at the plaint filed by the Plaintiffs/Respondents establishes that they have pleaded specific acts of fraud and breach of fiduciary duty against the 3rd, 4th and 5th Defendants/ Applicants.
33. Although the separate legal personality of the company stands as the bedrock principle of corporate law, the pleadings in this matter raise a triable question as to whether the company may have been employed as an instrumentality for improper conduct.
34. As emphasised in ***Multichoice Kenya Limited v Mainkam Limited & Another [2013] eKLR***, determination of whether directors may be personally liable is fact-dependent and cannot be resolved solely on a preliminary application. The separate legal personality of the company does not confer automatic immunity where allegations raise the prospect that the company was used as an instrument for improper conduct.
35. Accordingly, the 3rd, 4th and 5th Defendants/Applicants remain properly joined in their personal capacities, and the suit may proceed against them. Their statement of Defence dated 25.9.25 is deemed as duly filed.
36. Save as aforesaid, the application dated 29th September 2025 lacks merit and is accordingly dismissed with costs.

**Dated, Signed and Delivered, at Thika this 8th day of December
2025**

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J. M. ONYANGO
JUDGE

In the presence of:

1. Miss Kibii for Mr Munyithya for the Plaintiff
2. Miss Mwendwa for Mr. Githinji for the Defendant

Court Assistant: Hinga