

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. E349 OF 2023

ANTHONY TOM

OLUOCH.....PLAINTIFF

VERSUS

RIVER POINT DEVELOPMENT LIMITED.....1ST
DEFENDANT

CARLING WOOD INVESTMENT
COMPANY LIMITED.....2ND
DEFENDANT

PETER ALIOSHI IDENYA.....3RD
DEFENDANT

PRISCA AGWANDA IDENYA.....4TH
DEFENDANT

ABDELKARIM MOHAMED TAGELDIN
HASSAN SHALABI.....5TH
DEFENDANT

HASSAN MOHAMED.....6TH
DEFENDANT

ADIL ASLAN.....7TH
DEFENDANT

RULING

1. The Court is called upon to determine the Notice of Motion dated 21st November 2023 by the 5th, 6th and 7th Defendants seeking to be struck out from the suit pursuant to Order 1

Rule 10(2) and Order 2 Rule 15(1)(a), (b), (c) and (d) of the Civil Procedure Rules.

2. The application is premised on the grounds of the face of the record and supported by the affidavit of the 5th Defendant with the authority of the 6th and 7th Defendants. He contends the sale agreement subject of this suit is between the Plaintiff and the 1st Defendant, a limited liability company duly incorporated under the Companies Act. The 1st Defendant has a separate legal entity different from its shareholders and or directors. He avers that no cause has been shown why the plaintiff has elected to lift the veil of incorporation and the 5th, 6th and 7th Defendants herein.
3. The application is opposed by the Plaintiff through Grounds of Opposition dated 20th March 2025 and submissions dated 1st April 2025. It was submitted that the 5th, 6th and 7th Defendants were properly joined in the suit, being directors and shareholders of the 1st Defendant. They participated in fraudulent dealings with the company and thus cannot be allowed to hide behind the corporate veil to escape liability. The corporate structure is being used as a vehicle for improper conduct. Their presence is necessary for the complete adjudication of the dispute. That the suit raises triable issues against the 5th, 6th and 7th Defendants.

Analysis and determination

4. I have considered the application, the grounds of opposition and the rival submissions. The issues for all for determination are:

- i. Whether the Plaintiff discloses a reasonable cause of action against the 5th, 6th, and 7th Defendants.
- ii. Whether their joinder offends the doctrine of separate legal personality.

Whether the Plaintiff discloses a reasonable cause of action against the 5th, 6th, and 7th Defendant

5. The power to strike out a defendant from proceedings is anchored in **Order 1 Rule 10(2)**, which provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

6. The jurisdiction to strike out is discretionary and must be exercised judiciously. The applicable test is whether the pleading discloses a *bona fide* triable issue deserving of ventilation at trial. An applicant seeking to be struck out must demonstrate that the pleadings are scandalous, frivolous or vexatious, that they disclose no reasonable cause of action in law, or that they are otherwise an abuse of

the process of the Court and likely to prejudice, embarrass or delay the fair trial of the suit.

7. In the present case, the Plaintiff's claim against the 5th, 6th, and 7th Defendants is not founded merely on privity of contract. The Plaintiff alleges that he paid Kshs 58,895,000/= towards the purchase of six apartments in a development project said to arise from a joint venture involving the 2nd, 3rd, and 4th Defendants, with the 3rd and 4th Defendants providing the land known as L.R. No. 330/716 Nairobi. It is further alleged that the 5th, 6th, and 7th Defendants, as directors and shareholders of the 1st Defendant, were the controlling minds behind the transaction, failed to ensure completion of the project, became evasive after receiving substantial payments, and engaged in conduct allegedly intended to defeat the Plaintiff's interest, including attempts to charge the suit property.
8. On the other hand, the applicants argue that they were not parties to the sale agreements and rely on privity of contract principles. Indeed, the doctrine of privity is well settled. In **Agricultural Finance Corporation v Lengetia Ltd & Another [1985] eKLR**, the Court of Appeal held:

“As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a party...”
9. That principle is settled. However, the Plaintiff's claim is not framed purely in contract but also in tort and equity, particularly on allegations of fraud, misrepresentation and

improper use of corporate personality. The Plaintiff alleges operative facts implicating the 5th, 6th, and 7th Defendants personally. Whether those facts will ultimately be proved is immaterial at this stage. The test is not whether the Plaintiff will succeed, but whether he is entitled to be heard. I thus find that the 5th, 6th, and 7th Defendant are proper parties.

Whether their joinder offends the doctrine of separate legal personality

10. The Applicants correctly invoke the principle in **Salomon v Salomon & Co. Ltd [1897] AC 22**, which established that a company is a separate and distinct legal entity from its shareholders and directors. That principle has been consistently upheld in our jurisdiction. However, it is not absolute. In **H. Ajay Shah & Another v Deposit Protection Fund Board & Another [2016] eKLR**, the Court of Appeal held:

“Directors and shareholders can be held personally liable if the corporate entity is used as a vehicle for fraud.”

11. Similarly, in **Riccatti Business College of East Africa Ltd v Kyanzavi Farmers Company Ltd [2010] eKLR**, the Court observed:

“The court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness... where the corporate structure is being used to shield fraud or improper conduct.”

12. The Supreme Court in **Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Another [2014] eKLR**

reaffirmed that separate legal personality may be disregarded where the company is used as a vehicle for fraud or improper purpose.

13. The Applicants contend that fraud has not been strictly pleaded. That argument implicates Order 2 Rule 10 of the Civil Procedure Rules, which requires particulars of fraud to be specifically pleaded. Whether the pleadings ultimately satisfy the evidentiary threshold for fraud is a matter for trial. At this interlocutory stage, the Court is not called upon to make definitive findings on the existence of fraud, but only to determine whether the pleadings disclose a sustainable cause of action.

14. The test is not whether the Plaintiff will succeed, but whether he is entitled to be heard. On the face of the Plaintiff, there are operative facts alleged against the 5th, 6th and 7th Defendants personally. If proved, such facts could justify the lifting of the corporate veil.

15. **Order 1 Rule 3** of the **Civil Procedure Rules** provides that:

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

16. The Plaintiff's grievance arises from one development project and a series of related transactions. The allegations against the 5th, 6th, and 7th Defendants stem from the same factual matrix. Their joinder cannot, at this stage, be said to be wholly extraneous or frivolous.
17. The power under Order 1 Rule 10(2) to strike out a party must be exercised judiciously and only where it is clear that the party has been improperly joined and that no relief can possibly lie against them. That threshold has not been met.
18. In my considered view, the Plaint discloses triable issues touching on alleged fraud, improper conduct and possible misuse of corporate personality. These are matters best determined upon full hearing where evidence can be tested through cross-examination.
19. To strike out the 5th, 6th and 7th Defendants at this stage would amount to prematurely shutting out the Plaintiff from ventilating his grievance.
20. Accordingly, I find as follows:
 - i. The Notice of Motion dated 21st November 2023 is bereft of merit, and the same is hereby dismissed.*
 - ii. The 5th, 6th, and 7th Defendants shall remain parties to the suit.*
 - iii. Costs of the application shall be in the cause.*

It is so ordered.

RULING delivered virtually, dated and signed at **NAIROBI**

This **12th** day of **February** 2026.

P.M. MULWA
JUDGE

In the presence of:

Ms. Kwamboka h/b for Mr. Peter Wanyama for Plaintiff

Ms. Okomo h/b for Mr. Owino for Defendants

Court Assistant: *Carlos*