Simba Drilling Company Limited & another v Farah (Civil Appeal E015 of 2025) [2026] KEHC 3814 (KLR) (18 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3814 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E015 OF 2025

JN ONYIEGO, J

MARCH 18, 2026

BETWEEN

SIMBA DRILLING COMPANY LIMITED .... 1ST APPELLANT

ABDUL HAJI .... 2ND APPELLANT

AND

MOHAMUD AHMED FARAH .... RESPONDENT

(Being an appeal against the ruling of Hon. T.M Mwangi (CM) and delivered on 22.08.2025 in Civil Suit No. E070 of 2024 at Garissa)

JUDGMENT

1. The respondent herein moved the trial court via an undated amended plaint seeking the following orders:

   i. A declaration that the defendants (appellants) were in breach of contract through their failure to perform the drilling works as per the agreement.

   ii. General damages for breach of contract.

   iii. An order directing the defendants to refund the total sum of Kes. 3,000,000/- being amounts paid for the drilling works and interest accrued over the 12-month period.

   iv. Interest on the amounts claimed at court rates from the date of filing of this suit.

   v. Costs of the suit.

   vi. Any other relief that this Honourable Court may deem fit and just to grant.

2. The 1st and 2nd defendants filed their amended statement of defence dated 17.12.2024 in which they denied that the 2nd defendant was acting as an agent of the 1st defendant and that the 2nd defendant

had been wrongfully sued. The defendants stated that their failure to meet their time frame obligation was due to terror attacks which are rampant in the region and therefore beyond the 1st defendant's reasonable control. That the drilling works was hindered by the said terror attacks a fact that was brought to the attention of the respondent. That pursuant to clause 8.0 of the agreement dated 30.04.2023, the defendants cannot thus be held liable for the delay in performance of its obligations. It was thus prayed that the suit be dismissed for want of merit.

3. The crux of the suit is that the 1st appellant, a limited liability company incorporated in Kenya and engaged in borehole drilling, together with the 2nd appellant, its director and agent, entered into a contract with the respondent for drilling of a borehole within 14 days after execution of the contract. The appellants were said to have quoted a total cost of Kes. 2,204,000/-, payable in two equal installments of Kes. 1,102,000.00/-

4. It was further stated that the respondent took out a loan facility in anticipation of returns from the borehole project but the appellants failed to perform their obligations, leaving the respondent without the expected benefits.

5. The court upon considering the said application 31-10-2024 dismissed the same via a ruling dated 22.08.2025. It is the said ruling that is the subject of this appeal.

6. The appellants filed a memorandum of appeal dated 09.09.2025 on the following grounds:

    i. That the learned trial magistrate erred in fact and law by dismissing the 2nd appellant's application dated 31.10.2024 without considering in totality the grounds of the application and the supporting affidavit thereof.

    ii. That the trial magistrate erred in fact and law by failing to consider and analyze the appellant's submissions and authorities thereby arriving at a wrong decision.

    iii. That the learned trial magistrate erred in fact and law by delivering a ruling on 22.08.2025 without considering the appellant's application on merit thus arriving at a wrong decision.

    iv. That the learned trial magistrate erred both in fact and law by failing to consider and apply the provisions of section 6 of the *Companies Act*, 2015 together with the Fourth Schedule of the Companies (General) Regulations, 2015, and thereby erroneously finding that the 2nd appellant was properly joined in the suit.

    v. That the learned trial magistrate erred in fact and law by rewriting the contract between the parties and implicating a party that was not privy to the contract.

    vi. That the learned trial magistrate erred in fact and law by failing to appreciate that the 2nd appellant was and still is a stranger to the subject contract hence not privy to the contract.

    vii. That the learned trial magistrate erred in fact and law by failing to find that there was no privity of contract between the 2nd appellant and respondent thus wrongfully dismissed the appellant's application.

    viii. That the learned trial magistrate erred in fact and law in dismissing the 2nd appellant's application notwithstanding that the respondent neither pleaded nor particularized any allegation of fraud in the undated amended plaint, the replying affidavit sworn on 31.01.2025, or in the submissions filed and authorities relied thereon thereby arriving at an erroneous decision.

7. This court was therefore urged to allow the appeal and set aside the finding by the trial court and come up with its own finding.

8. The appeal was canvassed by way of written submissions.

9. The appellants in their submissions dated 02.12.2025 distilled the following issues for determination namely:

    i. Whether the appeal dated 09.12.2025 should be allowed and the ruling delivered on 22.08.2025 set aside.

    ii. Who should bear costs of the appeal.

10. Counsel submitted that the 1st appellant, Simba Drilling Company, being a duly incorporated limited liability company under Kenyan law, had the requisite locus standi to institute or defend proceedings in its own name. Reference was made to the cases inter alia; Salomon vs Salomon & Co Ltd [1897] AC 22 affirming the principle of separate corporate personality. Additionally, the case of James Ndugi & 4 others vs Jamleck Waithaka Kinyua & 7 Others [2022] KEELC 730 (KLR), J.O. Mboya J. at paragraph 53, while citing Alfred Njau & 5 Others vs City Council of Nairobi [1983] eKLR, stated as follows:

    > ‘The term locus standi means a right to appear and, conversely, as is stated in Jowitts's dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding”.

11. It was further contended that the contract dated 03.04.2023 was unequivocally between the 1st appellant and the respondent, and that the 2nd appellant was not a party to the agreement. That by attaching liability to the 2nd appellant, the trial court was said to have erred both in law and fact, effectively rewriting the contract and violating the doctrine of privity of contract.

12. It was submitted that contractual obligations cannot be imposed on a stranger to an agreement, and that the 2nd appellant's proximity to or involvement in the dealings did not confer contractual liability. To that end, reliance was placed on the case of Agricultural Finance Corporation vs Lengetia Ltd [1985] KLR 765 to reinforce the principle that contracts bind only parties who assent to them. The appellants therefore maintained that the trial magistrate misdirected himself by extending liability to the 2nd appellant contrary to the established principles of company law and contract law.

13. On the issue of costs, it was argued that costs follow the event and are awarded at the discretion of the court to the successful party. In support of the foregoing, reliance was placed on the case of Mwasungia & Another vs Kimbo (Environment and Land Appeal E005 of 2023) [2024] KEELC 5960 (KLR), where the court stated that costs are a discretion of the court and in any event to a party who is successful.

14. Finally, counsel submitted that the appeal should be allowed in its entirety, the ruling set aside, and the 2nd appellant held to have been improperly joined to the proceedings, with costs awarded to the appellants.

15. The respondent opposed the appeal vide submissions dated 16.12.2025 citing the following issues for determination:

    i. Whether the learned trial magistrate erred in law and fact in dismissing the 2nd appellant's application and retaining him as a party to the suit.

ii. Whether the appellants have demonstrated any basis for this Honourable Court to interfere with the trial court's exercise of discretion.

iii. Whether the appeal is competent or whether it is premature and intended to delay justice and frustrate the expeditious disposal of the suit.

16. It was submitted that the appellants' nine grounds of appeal were without merit as the trial magistrate correctly applied the law in retaining the 2nd appellant as a party to the suit. The court was said to have properly relied on Order 1 Rule 10(2) of the Civil Procedure Rules, which allows joinder of parties necessary for complete adjudication. Reliance was placed on the case of Joseph Njau Kingori vs Robert Maina Chege [2002] eKLR and Zephir Holdings Ltd vs Mimosa Plantations Ltd [2014] eKLR, where the respective courts emphasized on the importance of including parties whose presence is essential to resolve disputes fully. It was further averred that the magistrate rightly considered the 2nd appellant's role as director, guarantor and beneficiary thus making him an indispensable party to the proceedings.

17. The respondent urged that in as much as the appellants relied on the doctrine of privity under the *Companies Act*, 2015, the court was correct to recognize exceptions where justice requires lifting the corporate veil, particularly in cases involving fraud or misuse. In buttressing the foregoing, reliance was placed on the case of Multichoice Kenya Ltd vs Mainkam Ltd [2013] eKLR and Victor Mabachi vs Nurturn Bates Ltd [2013] eKLR where the High Court affirmed veil lifting where the company shields injustice. It was also stated that the magistrate did not prematurely lift the veil but prudently retained the 2nd appellant pending trial, with the possibility of amendment to plead fraud and misrepresentation.

18. On the issue of privity of contract, it was argued that although contracts generally bind only parties, exceptions exist in cases of agency, personal guarantees and collateral contracts. The 2nd appellant's verbal assurances and personal guarantees were said to have induced the respondent to secure a loan and enter into the contract, thereby creating potential personal liability. The respondent relied on the case of Savings & Loan (K) Ltd vs Kanyenje Karangaita Gakombe [2015] eKLR to illustrate enforceability of collateral contracts arising from third-party representations.

19. It was further submitted that the appeal was premature and intended to delay justice as no final determination of liability had been made despite the fact that the respondent had already suffered financial prejudice. The magistrate's ruling was described as pragmatic, grounded in substantive justice under Article 159 of *the Constitution*. To buttress this position, the court was referred to the case of Civicon Limited vs Kivuwatt Limited & 2 Others [2015] eKLR where the High Court emphasized on the principle of joinder to avoid multiplicity of suits. In the end, this court was urged to dismiss the appeal as the same was simply a delaying tactic.

20. I have considered the grounds of appeal and submissions by both parties. The only issue for determination is whether the name of the 2nd appellant should be struck out for misjoinder.

21. The appeal challenged the trial magistrate's ruling retaining the 2nd appellant, a director of the 1st appellant company, as a party to the suit.

22. Order 1 Rule 10 of the Civil Procedure Rules 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."

23. In the instant case, the respondent alleged that the 2nd appellant being the director of the 1st appellant acted as an agent and equally as a representative of the 1st appellant. That the presence of the 2nd appellant is necessary in the proceedings herein for the reason, from his alleged representations, the respondent has suffered untold losses as a result of the 1st appellant's breach of contract.

24. The indisputable fact is that the 2nd appellant on behalf of the 1st appellant on 03.04.2023 signed a contract with the respondent. But even that being the case, based on the doctrine of privity of contract, it is trite that the rights and obligations under that contract would only be conferred upon the parties therein. It would be contrary to this doctrine, to impose any obligation on the 2nd appellant simply because he signed the contract on behalf of the 1st appellant.

25. In the case of City Council of Nairobi vs Wilfred Kamau Githua T/A Githua Associates & Another (2016) eKLR Pg. 10 the court observed at Halsbury's Laws of England, 4th Edition, Volume 9 (1) Paragraph 478 stated that:

> " The general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits; contracts made on the basis of memorandum and articles of a company, collective agreements, contracts with unincorporated association; and mortgage surveys and valuations".
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> AFC VS Lengetia, 1982 – 88 I KAR 722 which states:
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>> "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, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he maybe considered a party to the consideration does not entitle him to sue upon the contract".

26. As already mentioned, the parties to the contract herein are listed as Simba Drilling Company Limited and Mohamed Ahmed Farah. Indeed, Simba Drilling Company Limited is a limited liability company with a known director as shown in the search document annexed thereon. As such, the 1st appellant is a distinct person from the 2nd appellant. [See section 19 of the *Companies Act*, 2015]. As a consequence, liability cannot attach to a person who is not a party to the contract, even if they derive some benefit from it. Privity of contract dictates that only parties to a contract can sue or be sued on it.

27. Likewise, in this case, I do not find there to be any cause of action against the 2nd appellant because the issue in dispute is the breach of the contract by the 1st appellant. Having perused the pleadings by the respondent, and notwithstanding the fact that, while this court is alive to the fact that exceptions exist (fraud, agency, collateral contracts), the respondent's pleadings lacked particularized fraud or misrepresentation against the 2nd appellant.

28. There is no doubt that in law a director can be held liable for actions or omissions of a company to which he is a director if there is proof of fraud. This can only be done after applying for lifting of the vail. This is also applicable after finding the company liable and therefore seek execution to apply against it or where it is impossible to institute or prosecute a suit against the company owing to the conduct or actions of the director/s of the company hence the need to seek for the lifting of the corporate veil. In the instant case, there is no claim of fraud particularized against the second appellant to justify lifting of the veil at this early stage.

29. On costs, I seek to rely on the finding by the Supreme Court wherein the court set forth guiding principles applicable in the exercise of a court's discretion in the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

30. In the end, I find that the 1st and 2nd appellants demonstrated that the 2nd appellant is not a necessary party to the suit and I say so for the reason that retaining him at this stage would amount to rewriting the contract. Consequently, the name of the 2nd appellant is struck from the suit for misjoinder with no orders as to cost.

31. In view of the above finding, it is my finding that the appeal herein is merited and the same is allowed with orders that;

    a. The trial court's order dated 22-08-2025 dismissing the appellants' application dated 31-10-2024 be and is hereby set aside and instead substituted thereof with the order that the appellants' aforesaid application be and is hereby allowed with the order that the name of the second appellant /defendant be and is hereby struck out from the pleadings/proceedings as he was prematurely and wrongly joined at this stage.

    b. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MARCH 2026

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J. N. ONYIEGO

JUDGE