



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.70 OF 2014**

**KENITA COMPANY LIMITED.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**1. BOSCO FAVIO**

**2. TAMBAGNA ROBERTO**

**3. BOSCO FARM LIMITED**

**4. BOSCO PAOLO**

**5. BOSCO ROBERTO.....DEFENDANTS/APPLICANTS**

**R U L I N G**

1. The Application by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants is dated 16<sup>th</sup> December 2014. In the Application, the Defendants are seeking for the following orders:
  - (a) **That the Plaint filed herein by the Plaintiff/Respondent (“the Respondent”) be struck out as against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.**
  - (b) **That in the result the suit as against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants be dismissed with costs to them.**
  - (c) **That the costs of this Application be awarded to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.**
2. The Application is premised on the grounds that the Plaintiff does not disclose a reasonable cause of action as against the Defendants; that the Plaintiff is a total stranger to the Defendants and that the Plaintiff has no claim as against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants as there is no privity of contract between them.
3. The Plaintiff filed both Grounds of Opposition and a Replying Affidavit.
4. According to the Plaintiff's director, the Plaintiff has disclosed and particularized causes of action against all the Defendants; that the cause of action as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is

- fraud and unjust enrichment and that at the time the 1<sup>st</sup> and 2<sup>nd</sup> Defendants made the fraudulent representations, they purported to be the registered proprietors of the land.
5. The Plaintiff's director deponed that the cause of action as against the 4<sup>th</sup> and 5<sup>th</sup> Defendants is that they jointly with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants abused the 3<sup>rd</sup> Defendant's corporate veil to defraud the Plaintiff.
  6. According to the Plaintiff, the cause of action is not for breach of contract but fraud, deceit and unjust enrichment.
  7. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' counsel submitted that the suit is based on a transfer of 3<sup>rd</sup> April 2013; that the Plaintiff has sought for a refund of the purchase price and that the Defendants were not parties to the agreement.
  8. Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not directors of the 3<sup>rd</sup> Defendant and that the 3<sup>rd</sup> Defendant is a legal person separate from its members.
  9. On the other hand, the Plaintiff's counsel submitted that the Plaintiff has accused the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of making fraudulent representations, deceit and unjust enrichment; that the 4<sup>th</sup> and 5<sup>th</sup> Defendants are directors of the 3<sup>rd</sup> Defendant and that the Plaintiff is seeking for the lifting of the corporate veil.
  10. Counsel submitted that in any event, the option to strike out a pleading is very restricted because it is draconian and is to be exercised only when the pleading is so hopeless that no amount of amendments can breathe life in it.

### **Analysis and findings:**

11. The Plaintiff has pleaded in the Plaintiff that sometimes in the months of January, 2013, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants made the following representation to the Plaintiff: that there existed land known as L.R. NO.6835; that the said land was a bona fide private property and that they were in a position to sell and transfer a good title to the Plaintiff.
12. According to the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants made those representations knowing that the representations were false.
13. In the Plaintiff, it has been averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants thereafter registered a transfer of the suit property from themselves to the 3<sup>rd</sup> Defendant and that the 4<sup>th</sup> and 5<sup>th</sup> Defendants are directors of the 3<sup>rd</sup> Defendant company and sons of the 1<sup>st</sup> Defendant.
14. According to the Plaintiff, the court should pierce the 3<sup>rd</sup> Defendant and reach the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants who have used the 3<sup>rd</sup> Defendant to defraud the Plaintiff of Kshs.12,000,000 in the misguided belief that they will escape liability for their fraud.
15. The particulars of fraud and misrepresentations have been stated in the Plaintiff.
16. According to the Plaintiff, a substantial part of L.R.6835 fell within another parcel of land being L.R.6802; the residual segments of L.R.6835 fell into the 40 meter wide road reserve and that the deed plan was a false document made by a person unknown to the surveyor, Mr. E.M. Kiguru.
17. The Plaintiff is seeking for a refund of Kshs.12,000,000 being the purchase price and Kshs.1,428,000 in stamp duty.
18. The question of the validity of the title in respect of the land that was sold to the Plaintiff can only be addressed conclusively after trial.
19. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not denied that they were initially the registered owners of the suit property before they sold it to Verriello Meriangela by an agreement of 31<sup>st</sup> January, 2013.
20. However, according to the Plaintiff, before the suit property could be transferred to the Plaintiff, but after the agreement of 31<sup>st</sup> January, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants transferred the suit property to the 3<sup>rd</sup> Defendant, a limited liability company. It has been averred that one of the Directors of the 3<sup>rd</sup> Defendant is a son of the 1<sup>st</sup> Defendant.
21. Considering that the Plaintiff has alleged that on the ground, the 3<sup>rd</sup> Defendant had no land to sell, then the question that the court shall have to establish is whether the transfer of the land by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> Defendant before the same was transferred to the Plaintiff was fraudulent.

- 22.Indeed, if it is shown that the suit property was transferred to the Plaintiff when the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants knew or ought to have known that the 3<sup>rd</sup> Defendant had no title to pass, then this court can pierce the corporate veil of the 3<sup>rd</sup> Defendant and have either all, or some of the Defendants held liable.
- 23.According to the Halsbury's Laws of England, 4<sup>th</sup> Edition, volume 7 (1) paragraph 90, the court will pierce the corporate veil of a company 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 cases, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders and will consider the person as shareholders or even agents, controlling the activities of the company.
- 24.The facts as pleaded in the Plaint will therefore require the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to explain why they had to transfer the suit property to the 3<sup>rd</sup> Defendant first even after entering into an agreement with one of the Plaintiff's director. The 4<sup>th</sup> and 5<sup>th</sup> Defendants on the other hand will explain the circumstances under which the 3<sup>rd</sup> Defendant bought the suit property before selling it to the Plaintiff.
- 25.Considering that the Plaint has alleged fraud and improper design by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, the Plaintiff has shown that it has a reasonable cause of action as against the Defendants.
- 26.For those reasons, I dismiss the Defendants' Application dated 16<sup>th</sup> December 2014 with costs.

**Dated and delivered in Malindi this 11<sup>th</sup> day of September 2015.**

**O. A. Angote**

**Judge**