



Tanui v Green Systems Africa Limited (Environment and Land Case E136 of 2020) [2024] KEELC 867 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E136 OF 2020
OA ANGOTE, J
FEBRUARY 15, 2024**

BETWEEN

DANIEL KIPSANG TANUI PLAINTIFF

AND

GREEN SYSTEMS AFRICA LIMITED DEFENDANT

RULING

1. The Plaintiff's application for determination is dated 21st December, 2021, and seeks the following reliefs:
 - a. That the Plaintiff be granted leave to enjoin Naomi Wambui Ndiangui and Solomon Njuguna Chege as Defendants in this suit.
 - b. That the Plaintiff be granted leave of the court to amend the Complaint dated 16th September, 2020.
 - c. That costs of this Application be in the cause.
2. The application is supported by the Affidavit of Daniel Kipsang Tanui, the Plaintiff, sworn on 21st December, 2021, in which he deponed that vide a Ruling delivered on 7th October, 2021 by Okong'o J, the Defendant was ordered to vacate the suit premises and in default eviction orders to issue and that the Defendant refused to vacate and was evicted by his Auctioneers on 14th December, 2021.
3. The Plaintiff deponed that upon taking possession, he established from the Auctioneers and the Management of Royal Apartments where the suit premises is situated that the premises were occupied by Naomi Wangui Ndiangui and Solomon Njuguna Chege; that the two had severely damaged the suit premises and had not been paying service charge, water bills and electricity bills; and that the two should be joined in the suit as Defendants for compensation for losses he has incurred.
4. The Defendant filed a Relying Affidavit sworn on 24th January, 2023 by Naomi Wambui Ndiangui, one of its Directors, in which she deponed that the premises known as Apartment No. 2, Block B



on Title No. IR. 146380 L.R. No. 209/20672 (suit premises) was formerly the registered property of the Defendant and that the Defendant vacated the premises following the Ruling delivered by Justice O’kongo.

5. It was deponed that the suit premises was never used as residential premises by the Defendant or its directors, Naomi Wambui Ndiangui and Solomon Njuguna Chege, as alleged by the Plaintiff; that the two directors were and still are residents of Kitengela Town in Kajiado County since the year 2008 and that the Directors cannot be enjoined in this suit as they are not personally liable for the alleged damage of the suit property.
6. It was deponed that the suit property was wholly and solely owned by the Defendant before being bought by the Plaintiff; that the Plaintiff’s claim that he incurred financial loss and expenses to the tune of Kshs. 725,000 is untrue and the Plaintiff is misleading the court for his selfish gains and that the Applicant has not shown how the Directors of the Defendant are personally liable for the alleged damage and loss of the suit property.
7. In response, the Plaintiff swore a Supplementary Affidavit insisting that he was entitled to compensation from the intended Defendants in their personal capacities as they were using the property as their residence; that the Defendant expressly admitted to this in its Replying Affidavit sworn on 11th November, 2020 which was annexed to the Supplementary Affidavit and that he has a lawful claim against the intended Defendants.
8. The Plaintiff submitted that amendments of pleadings sought before the hearing should be freely allowed if made without prejudice to the other side, and that there is no injustice if the other party can be compensated by way of costs.
9. On whether the directors of the Defendant Company could be joined to the suit, Counsel for the Plaintiff cited Order 1 Rule 3 and Rule 10(2) of the Civil Procedure Rules which allows joinder of parties to suits.
10. He further submitted that the Defendants were evicted from the suit premises upon which he discovered severe damage to it, and arrears in utility bills and service charge; that since they had admitted that they were in occupation of the suit premises and the alleged damage emanated from their residency on the suit premises, then he should claim damages from them.
11. The Defendants submitted that the word enjoin is distinguishable from the word join and since parties are bound by their pleadings, and thus in the absence of amendment on the wording of the pleadings, the same is defective.
12. Counsel, submitted on the general power to amend under Section 100 of the Civil Procedure Act and Order 8 of the Civil Procedure Rules. It was submitted that the Defendant being a company, it is a basic principle of company law that a company has a distinct and separate legal personality from its shareholders, directors and its members as laid down in Salomon v Salomon & Co. Ltd [1897] A.C 22.
13. It was submitted that courts have upheld the doctrine of corporate veil and limited liability of a company; that nothing has been shown in this matter to suggest that the Plaintiff has complied with the provisions of the law to have the directors of the Defendant held personally liable and that it is clear that the suit property was owned by the Defendant and the intended Defendants were only directors of the Defendant.
14. According to the Defendants, the application is brought in bad faith and that allowing the proposed amendments will be prejudicial and cause injustice to the Defendant and its directors who according to



the law are not supposed to be held personally liable unless the veil of incorporation of the Defendant is lifted.

Analysis and Determination

15. To understand what gave rise to the instant application, it is important to outline the background of this suit. This court delivered its ruling on 7th October, 2021 where summary judgment was entered in favour of the Plaintiff.
16. In the said ruling, the Defendant was ordered to vacate the property and in default eviction orders to issue. It is the Plaintiff's case that the Defendant refused to vacate the suit property and had to be evicted therefrom.
17. Upon eviction, it is the Plaintiff's position that he realised that the suit premises were severely damaged. It is at this point that the Plaintiff brought this Application seeking to join the two directors of the Defendant Company as Defendants in this suit in their personal/individual capacity, on the grounds that they used the suit premises as their residence.
18. This court notes that the Respondent has raised the issue of the distinction between the words "join" and "enjoin,". The Plaintiff seeks to "enjoin" the two directors named in the Notice of Motion as parties to this suit. The argument by the Defendant is that the words "join" and "enjoin" do not mean one and the same thing.
19. The Defendant has aptly submitted that the *Black's Law Dictionary*, 11th Edition defines the word enjoin as follows: "to legally prohibit or restrain by injunction; to prescribe, mandate or strongly encourage". The Defendant has distinguished it from the word join, which is defined in the same dictionary as the uniting of parties or claims in a single suit.
20. The Defendant's submissions are correct. However, that argument alone cannot be a ground for dismissal of the application. There are many instances where parties as well as advocates have used the term enjoin in place of join. Considering that the intention of the Plaintiff is clear, it is the finding of this court that the Plaintiff intends to "join" the new parties in the suit.
21. Moreover, the meaning of the word "enjoin" in the circumstances was not lost on the Defendant who went ahead to respond to the application in a manner that lets this court know that she understood its substratum.
22. It is trite that a company is a legal person, distinct from its members, shareholders or directors. This principle is what has come to be widely known as the veil of incorporation, which enables its shareholders and directors to escape personal liability from the actions and/or dealings of the company.
23. The principle of separate legal personality is affirmed in the now famous case of *Salomon v Salomon & Co* [1897] AC 22 where Lord MacNaghten stated that:-

"The company is at law a different person altogether from its subscribers...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."
24. In some instances, however, there may arise a situation when the veil of incorporation may as of necessity be disregarded to enable courts to look into the individual shareholders and/or directors who are the real beneficial owners of the company, and attach responsibility to them individually.



25. Para. 90 of *Halsbury's Laws of England* 4th Edition Volume 7 (1) addresses the issue of piercing the veil of incorporation as follows:

“90. Piercing the corporate veil.

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.” [Emphasis added]

26. The corporate veil will be disregarded in cases such as where a company is clearly being used as a creature by the controlling director(s), which they wield in an attempt to avoid recognition by the eyes of the law. This is explained clearly in *H. L. Bolton Engineering Co. Ltd v T. J. Graham & Sons Ltd* [1956] 3 ALL ER where it was held as follows:

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such.”

27. Evidently, and from the above cited case law, the veil of incorporation can only be pierced in exceptional cases. This position is buttressed in the recent case of *Ukwala Supermarket v Jaideep Shah & Another* [2022] eKLR, where the court gave two broad scenarios when a court may pierce the veil of incorporation as follows:-

“19. In general, therefore, Courts in Kenya will only allow for the piercing of the corporate veil when two requirements are met:

- (a) First, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and
- (b) Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.”

28. In the present application, the proposed amendments and joinder of the two directors of the Defendant company arose from the Plaintiff's allegation that the two, who are man and wife, used the premises as their family's residence. Naomi Wambui Ndiangu in her Replying Affidavit denies using the suit premises as their residence, stating instead and under oath for that matter at paragraph 7 of the aforementioned Affidavit that “the two mentioned directors were and still are residents of Kitengela Town, Kajiado County since the year 2008.”



29. This is a shocking turnaround from her averments, again under oath, contained in her Affidavit sworn on 11th November, 2020 in reply to the Plaintiff's Application dated 9th October, 2020 where coincidentally at paragraph 7 thereof she stated as follows:

“That I currently reside in the suit premises with my family and the court should not be used to render me homeless until the matter has been heard and determined.”

30. It is the Plaintiff's case that the Defendant's directors refused to vacate the suit premises and had to be evicted therefrom. Upon eviction, the Plaintiff realised that the suit premises were severely damaged.

31. The company is not a natural person who can inhabit or reside in a house/property, or cause harm and damage to it. The Directors/shareholders or persons working under it, however, can. The two directors were the brains behind the company and clearly bought the suit property with the intention of using it as their primary place of residence for their family.

32. Going by their own admission, they did in fact reside therein until they were evicted pursuant to the orders of this court. In *De Ruiters Roses East Africa Limited v Alora Flowers Limited* [2006] eKLR Justice Azangalala, as he then was, held as follows;-

“The veil may however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or a device for enabling the Directors to hide themselves from the eyes of equity. An example of such a mask is for instance, where the directors have dealt with the property of the company as their personal property for use for their own purposes.”

33. Such was the case in this suit where the Directors named in the instant application dealt with the suit premises, which was until purchase by the Plaintiff the property of the company, as their personal property, and used it for their own purpose as their residence.

34. It cannot be denied that under the circumstances that gave rise to this suit, the company was essentially an extension of its directors. In the circumstances, the Directors cannot attempt to hide behind the veil of incorporation. In *Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others* [2019] eKLR, the Court of Appeal held that:-

“86. In our view, Arvind was the main actor behind the veil of the 3rd and 8th respondent companies all of whom were party to the transactions which we have found were tainted by undue influence. It is evident from the record that he treated the said companies as an extension of himself or as this Court put it in *Stephen Njoroge Gikera & another v Econite Mining Company Limited & 7 others* [2018] eKLR:

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such.” [Emphasis added]



87. As such, neither Arvind or the 3rd and 8th respondents can hide behind the veil of incorporation more so, since it is apparent it was used for covering Arvind's improper conduct. Therefore, we lift the corporate veil of the said companies and deem them to be one and the same with respect to the transactions in issue."
35. For these reasons, the court will disregard the veil of incorporation and allow the prayer for joinder of parties, thereby allowing the two directors, Naomi Wambui Ndiangui and Solomon Njuguna Chege to be joined as Defendants in this suit.
36. The Plaintiff seeks leave of the court to amend the Complaint dated 16th September, 2020. It is trite law that amendments to pleadings should be freely allowed at any time before delivery of a judgment. The general power to amend pleadings is drawn from Section 100 of the Civil Procedure Act, which provides that:-
- “The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”
37. The right to amend pleadings is nevertheless not absolute. The same is dependent upon the discretion of the court, which should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the Civil Procedure Rules which provides as follows:-
- “For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
38. The overriding consideration in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy. The Plaintiff seeks leave to amend his Complaint to capture the names of the new parties and to plead for special damages which have arisen from the proposed Defendant's Directors' occupation of the suit premises.
39. There has been no claim, and neither is this court convinced that the amendments are brought in bad faith. Indeed, it is clear from the record that the Defendant herein and the proposed Defendants will not be prejudiced if the amendment is allowed. That being the case, this court is inclined to allow the application for leave to amend the Complaint.
40. In the circumstances, the Notice of Motion application dated 21st December, 2021 is hereby allowed in the following terms:-
- a. Leave be and is hereby granted to the Plaintiff to join Naomi Wambui Ndiangui and Solomon Njuguna Chege as 2nd and 3rd Defendants in this suit;
 - b. Leave be and is hereby granted to the Plaintiff to amend the Complaint dated 16th September, 2020 in terms of the draft amended Complaint filed herein within 14 days of the date of this Ruling.
 - c. The costs of this application to be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 15TH DAY OF FEBRUARY, 2024.



O. A. ANGOTE

JUDGE

In the presence of;

Ms Nduku holding brief for Munyasia for Defendants

Ms Atieno for Bundotich for Plaintiff

Court Assistant - Tracy

