



REPUBLIC OF KENYA



**Lery Enterprises Company Limited v Ngugi (Environment & Land
Case E352 of 2022) [2024] KEELC 5800 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5800 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E352 OF 2022**

**JO MBOYA, J
JULY 29, 2024**

BETWEEN

LERY ENTERPRISES COMPANY LIMITED PLAINTIFF

AND

MARGARET WAMBUI NGUGI DEFENDANT

RULING

1. The Defendant/Applicant, who is also the decree holder has approached the court vide Notice of Motion Application dated the 19th February 2024; brought pursuant to Sections 3 and 3A of the [Civil Procedure Act](#) and Order 22 Rule 35 of the [Civil Procedure Rules 2010](#) and wherein the Applicant has sought for the following reliefs;
 - i. That Paul W. Gichu and Priscila Njige the Judgement-Debtor's/Plaintiff's Directors and any other company officer of the plaintiff do personally appear before this Honourable Court to be orally examined as to whether the Judgement-Debtor/Plaintiff has any property or means of satisfying the costs ordered vide the Certificate of Taxation dated 3rd October 2023.
 - ii. That Paul W. Gichu and Priscila Njige the Judgement-Debtor's/Plaintiff's directors and any other officer of the company be compelled to attend and appear before the Honourable Court and produce such all and any book of accounts, bank statements, Kenya Revenue Authority tax returns/records, Audited Accounts and other documents relating to operations, business and management of the Judgement-Debtor/Plaintiff from 1st January 2022 to date.
 - iii. That Paul W. Gichu and Priscila Njige being directors of the Judgement-Debtor's/Plaintiff's do produce before this Court their personal bank statements as the court may deem fit.
 - iv. That in default of appearance and or failure to produce any or all documents above, or failure to such reasonable circumstances as may be deemed fit, Paul W. Ndichu and Priscila Njige



be deemed personally liable to settle the claim and or taxed costs herein and warrants of attachments do issue against them personally and or in their individual capacity.

- v. That costs of this Application be provided for.
2. The subject application is premised on the various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of Margaret Wambui Ngugi [deponent] sworn on even date and to which the deponent has attached a total of 9 documents thereto.
3. Upon being served with the subject application, the Plaintiff/Respondent filed Grounds of opposition dated the 2nd March 2024 as well as a Replying affidavit sworn on the 21st May 2024 by Paul Gishu and Pricila Njige, respectively.
4. Suffice it to point out that the Application beforehand came up for hearing on the 16th May 2024, whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
5. Pursuant to and in line with the directions of the court, the Defendant/Applicant proceeded to and filed written submissions dated the 31st May 2024; whereas the Plaintiff/Respondent filed written submissions dated the 11th June 2024. For coherence, the two [2] sets of written submissions are on record.

Parties' submissions:

a. Applicant's Submissions:

6. The Applicant herein filed written submissions dated the 31st May 2024 and wherein the Applicant has adopted the grounds contained at the foot of the application; as well as the averments in the body of the supporting affidavit.
7. Furthermore, the Applicant herein has thereafter raised, highlighted and canvassed two [2] salient grounds for consideration and determination by the court.
8. Firstly, learned counsel for the Applicant has submitted that the directors of the Plaintiff/Respondent herein have conducted the affairs and management of the Plaintiff/Respondent company in a fraudulent and opaque manner geared towards defrauding the public and in particular the Defendant/Applicant, who is also the decree holder herein.
9. Additionally, learned counsel for the Applicant has submitted that the lack of transparency in the conduct and management of the affairs of the Plaintiff/Respondent company is discernible in the manner in which the Plaintiff/Respondent deployed violence in blocking and/or resisting the execution of the lawful court process by the auctioneer.
10. Based on the contention that the directors of the Plaintiff/Respondent company have conducted the affairs of the said company in a fraudulent and dishonest manner, learned counsel for the Applicant has contended that a basis has therefore been laid to warrant the summoning of the directors of the Plaintiff company to attend court in person for purposes of examination pertaining to the assets of the company.
11. Further and in addition, learned counsel for the Applicant has submitted that the Applicant herein has demonstrated that the fraudulent and improper conduct of the affairs of the company by the directors thereof is geared towards evading the payments of the costs which were awarded to and in favour of



the Applicant. To this end, learned counsel has referenced the contents of the supporting affidavit by Pricila Njige as forming a basis for the dishonesty and underhand dealing by the company herein.

12. Secondly, learned counsel for the Applicant has submitted that owing to the fraudulent manner in the conduct of the affairs of the company, there exist sufficient basis and grounds upon which the court should venture forward and lift the veil of the Plaintiff company so as to enable the court to go behind the company and deal with the persons/shareholders of the company, who are responsible for controlling the activities of the company.
13. To vindicate the submissions that basis has been laid to warrant the lifting/ piercing of the veil, learned counsel for the Applicant has cited and referenced inter-alia the decision in the case of *Aster Holdings Ltd v City Council of Nairobi & 2 others* [2019]eKLR, *Jayden Ltd v Bradley Ltd* [2021] KEHC 127 [KLR] and *Mugenyi & Company Advocates v Attorney General* [1992] 2EA 199, respectively.
14. Premised on the foregoing submissions, learned counsel for the Applicant has thereafter implored the court to find and hold that the application beforehand is meritorious and thus ought to be allowed.

b. Plaintiff/respondent's Submissions:

15. The Plaintiff/Respondent filed written submissions dated the 11th June 2024; and in respect of which same [Plaintiff] has reiterated the contents of the Grounds of opposition dated the 2nd March 2024 as well as the Replying affidavit sworn on the 21st May 2024.
16. Additionally, the Plaintiff/Respondent has ventured forward and canvassed four [4] pertinent issues for consideration by the court.
17. First and foremost, learned counsel for the Respondent has submitted that the firm of M/s Kinyanjui Kirimi & Co Advocates are properly on record, same having duly executed and filed a consent dated the 22nd May 2024 between the said law firm and the law firm of M/s Ahamed Mberere & Co Advocates. Besides, learned counsel for the Respondent has also posited that subsequent to the filing of the consent, same also proceeded to and filed a notice of appointment dated the 16th May 2024 to act for and on behalf of the directors of the Plaintiff/Respondent.
18. Secondly, learned counsel for the Respondent has submitted that even though the Applicant has contended that the directors of the Respondent company have fraudulently managed the affairs of the company, same [Applicant] has neither tendered nor produced any evidence to demonstrate the allegations touching on fraudulent and improper conduct of the affairs of the Respondent company.
19. In this regard, learned counsel for the Respondent has posited that it was not enough for counsel to highlight allegations pertaining to fraud and improper management but same was obligated to venture forward and proved the allegations to the requisite standard.
20. For good measure, learned counsel for the Respondent has submitted that proof of fraud and improper management of the affairs of the Respondent company required much more than the report filed by Samuel M M Muthangia, who is an auctioneer and not a criminal investigation officer.
21. Other than the foregoing, counsel ventured forward and submitted that it was incumbent upon the Applicant herein to tender before the court a report from the Registrar of the company, if any; to demonstrate that the affairs of the company have been fraudulently and improperly managed. Instructively, learned counsel pointed out that in the absence of any credible evidence by the Applicant, the allegations touching on fraud by the Applicant on the affairs of the company remain unproven.



22. Thirdly, learned counsel for the Respondent submitted that the Applicant herein has neither tendered nor placed before the court any evidence to warrant the lifting/ piercing of the veil of the Respondent company or at all.
23. In any event, it has been contended that prior to and before lifting the veil, the court must be treated to credible evidence to demonstrate that the company is either sham or was incorporated for purposes of fraudulent and illegal activities.
24. On the other hand, learned counsel has pointed out that the fact that the company is unable to meet and/or settle her debts or better still, the fact that a company is insolvent, does not by itself provide a basis for the lifting of the veil.
25. In support of the foregoing submissions, learned counsel for the Respondent has referenced and relied on inter-alia the case of *Cary Ngini v Denis O Ogola & another* [2010]eKLR and *Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd & another* Nairobi HCC 125 of [2002] [UR], respectively.
26. Finally, learned counsel for the Respondent has submitted that the Applicant herein has not established and demonstrated a basis to warrant the directors of the Plaintiff/Respondent company being held personally liable for the debts and liabilities of the Respondent company.
27. Consequently and in this respect, learned counsel has reiterated the previous submissions that no evidence has been placed before the court to underpin the contention of fraudulent and improper management of the affairs of the Respondent at all.
28. Based on the foregoing, learned counsel for the Respondent has therefore submitted that the Applicant before the court has neither met nor satisfied the threshold to warrant the lifting of the veil and by extension, holding the directors of the Respondent company personally liable for the debt of the company.
29. Simply put, learned counsel for the Respondent has contended that the application beforehand is devoid of merits and thus same [application] ought to be dismissed with costs.

Issues For Determination:

30. Having reviewed the application together with the response thereto and upon consideration of the written submissions filed by and on behalf of the respective parties, the following issues do crystalize and are thus worthy of determination.
 - i. Whether the application beforehand relates to and or concerns the question of the lifting of the veil of the company or otherwise.
 - ii. Whether the court is seized of the jurisdiction to grant the orders sought at the foot of the application beforehand.

Analysis And Determination:

Issue Number 1 Whether the application beforehand relates to and or concerns the question of the lifting of the veil of the company or otherwise.

31. Learned counsel for the Applicant herein filed written submission dated the 31st May 2024 and in respect of which same [Applicant] highlighted two [2] issues for consideration. For coherence, the



- salient and pertinent issue which has been canvassed by learned counsel for the Applicant relates to and concerns the lifting of the veil of the Plaintiff/Respondent company.
32. Furthermore, after highlighting the issue concerning the lifting of the veil, learned counsel for the Applicant has ventured forward and ventilated various issues to underpin the contention that the veil of the company ought to be lifted/pierced so as to enable the court to go behind the veil and to deal with the persons who are actually directing and controlling the activities of the Respondent company.
 33. At any rate, learned counsel for the Applicant has cited and referenced various decisions highlighting the circumstances under which a court of law can proceed to lift the veil of a company.
 34. On the other hand, learned counsel for the Respondent has also made extensive submissions on the question as to whether or not the Applicant has demonstrated a basis to warrant the lifting of the veil of the company and thereafter to hold the directors thereof personally liable for the debts/liabilities of the Respondent company.
 35. Similarly, there is no gainsaying that learned counsel for the Respondent has also cited and referenced various decisions in his endeavour to underscore the fact that the corporate veil of the company ought not to be lifted for the mere asking by an Applicant.
 36. To the contrary, learned counsel for the Respondent has posited that prior to and before a court of law can venture forward and list the veil, the court must be satisfied that the company in question is either sham or was incorporated for purposes of propagating fraudulent and illegal activities. In any event, learned counsel has asserted that the Applicant bears the burden and/or responsibility of proving the allegations underpinning the application for lifting of the veil.
 37. Despite the elaborate and extensive submissions, which have been highlighted in the preceding paragraphs, the question that the court must grapple with touches on and concerns whether the issue pertaining to the lifting of the veil of the Plaintiff company has been duly pleaded and placed before the court for interrogation and appropriate adjudication.
 38. To start with, the court has reproduced the various reliefs which have been sought for by and on behalf of the Applicant/Decree Holder. Nevertheless, it suffices to underscore that nowhere has the Applicant herein adverted to and/or referenced a prayer/relief seeking to lift the veil of the Plaintiff/Respondent company.
 39. To my mind, if the Applicant was keen and desirous to propagate a case for the lifting/piercing of the veil of the Plaintiff company, then it behooves the Applicant to plead the relief for lifting of the veil with necessary particularity and specificity, in the manner required under the law.
 40. Additionally, once the Applicant herein has pleaded the relief for lifting of the veil, same [Applicant] would thereafter be called upon to highlight and canvass the requisite grounds upon which the application for lifting of the veil is premised and/or predicated.
 41. Other than the foregoing, there is no gainsaying that the Applicant would also be obligated to tender and produce cogent and plausible evidence, towards proving the application for lifting of the veil. Suffice it to say, that only then would the court be called upon to interrogate the application for lifting the veil and engage with the applicable law, in an endeavour to ascertain whether the threshold for lifting the veil has been met or otherwise.
 42. Be that as it may, the application that was placed before the court and which the court must engage with has nothing to do with lifting piercing of the veil. In this regard, the court is lost as to how the question and issues of lifting of the veil have found their way into the submissions by the parties, yet same is not part of the application before the court.



43. It is imperative to state and underscore that parties, the Applicant not excepted, who seeks to approach the court should appreciate the nature of their cases and or application, frame same with the requisite particularity and thereafter endeavour to prove the case as pleaded and/or framed. [See Order 2 Rule 6 of the Civil Procedure Rules, 2010].
44. Furthermore, it is not lost on this court that it is the parties who set the agenda for the hearing and determination of matters, including applications and once the agenda is set; then both the parties and the court are bound. Instructively, a party who has set the agenda for the court vide his/her pleadings cannot be allowed to veer outside the four corners of the pleadings and/or application.
45. To this end, it is imperative to cite and reference the decision of the Court of Appeal in *Nairobi City Council v Thabiti Insurance Brokers Ltd* [1997]eKLR, where the court stated and held thus;

After considering the case of *Odd Jobs v Mubia* [1970] EA 476, this Court then went on to say in Sande, that:

"In the MUBIA case, the unpleaded issue upon which the judge had based his decision was whether one of the parties to the agreement had failed to comply with a condition in the contract between them.

The unpleaded issue was not a claim for special damages which, as we have repeatedly stated, the law requires to be specifically pleaded before it can be proved...We would endorse the well-established view that a Judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallise the issues which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are

46. Other than the foregoing decision; the requirement that parties must plead and thereafter canvass the pleaded case and not otherwise, was also elaborated by the Court of Appeal in the case of *Dakianga Distributors Ltd v Kenya Seed Company Ltd* [2015]eKLR, where the court stated and held thus;

A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

47. Guided by the decisions [supra] I am minded to and do hereby hold that the Applicant herein cannot purport to canvass a case for the lifting of the veil of the Plaintiff/Respondent company vide the written submissions, yet such a case has not been pleaded and/or placed before the court.



48. Furthermore, it is my humble view that there is a serious disconnect between the application that was filed by and on behalf of the Applicant and the written submissions which have been placed and highlighted before the court on behalf of the Applicant.
49. To my mind, the disconnect is fundamental and vitiates the entire application, insofar as the application as filed has substantially not been canvassed.
50. Put differently, the Applicant herein has endeavoured to canvass issues which have not been captured and/or sought for at the foot of the application. In this regard, I find and hold that the submissions cannot supplant the application and/or expand the scope of the application filed. [See *Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi* [2014]eKLR and *Commissioner of Customs & Excise v Kaaya Enterprises Limited & 3 others* (Civil Appeal 204 of 2020) [2024] KECA 502 (KLR) (26 April 2024) (Judgment) - Civil Appeal 204 of 2020].
51. Arising from the foregoing, my answer to issue number one[1] is to the effect that the application before the court has neither pleaded nor propagated a case for the lifting of the corporate veil of the Respondent company.
52. Consequently, this court, which is bound by the rules of procedure cannot thus engage with issues that have not been properly impleaded. [See the holding of the Court of Appeal in the case of *Nairobi City Council v Thabiti Company Limited* [1997] eKLR]

Issue Number 2: Whether the court is seized of the jurisdiction to grant the orders sought at the foot of the application beforehand.

53. Notwithstanding the fact that the Applicant herein has neither impleaded nor sought the lifting of the veil of the Plaintiff company, the Applicant has nevertheless sought for reliefs pertaining to summoning of the directors of the Plaintiff company and/or such other officers thereof with a view to same being examined as to the assets, properties and/or means of the Judgment/Debtor towards satisfying the debt and or liability beforehand.
54. In my humble view, the nature of reliefs that have been highlighted at the foot of the application are such that same required the court to go behind the veil of the company and summon the directors. However, as pointed out whilst discussing issue number one [1], the court can only go behind the veil once the veil is lifted and/or pierced.
55. Pertinently, for as long as the corporate veil has neither been pierced and/or lifting in accordance of the law, the court is obligated to respect the corporate veil of the company in the manner underscored vide the decision in the case of *Salmond v Salmond* [1987] AC 22.
56. At any rate, the significance of respecting the corporate veil has been reiterated in a plethora of decisions inter-alia *Aster Holdings Limited v City Council of Nairobi & 4 others* [2019] eKLR, where the court stated thus;
 7. There is no doubt that a company is at law a separate legal entity which is different from its shareholders and subscribers. However in some instances, the corporate veil of a company can be pierced. The circumstances under which the corporate veil of company may be pierced were well set out in paragraph 90 of Halsbury's Laws of England 4th Edition Vol 7 (1) which states 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.”

57. Furthermore, case law abound that the corporate veil of a company ought not to be lifted and/or pierced merely because the company is unable to meet and/or settle her debts or better still same [company] is insolvent. For good measure, the Applicant desirous to propagate an application for the lifting of the corporate must demonstrate inter-alia that the company is a sham or the corporate personality is being deployed for purposes of fraudulent or improper/illegal actions.
58. Simply put, the corporate veil of a company would be lifting or pierced if the company is fake; sham or a vehicle being deployed by the persons behind same [Company] for purposes of committing fraud and/or illegalities.
59. Be that as it may, there is no gainsaying that prior to and or before the lifting of the veil, there is no way a court of law can venture forward and summon the directors or shareholder of a designated company, who are themselves separate and distinct from the company for purposes of examination as to the means of the company or better still, being saddled with the debts of the company.
60. On the other hand, it is also not lost on the court that the Applicant herein also seeks to have the directors of the company to be compelled to appear before the court and to produce various documents relating to the operation[s], business and management of the Plaintiff company from the 1st January 2022.
61. Be that as it may, what I beg to underscore is that the contents of prayer 2 seems to relate to provision of information [Documentary Information] which is a matter underpinned by the provisions of Article 35 of the Constitution 2010; as read together with the provisions of Access to Information Act, 2016.
62. Nevertheless, it is important to underscore that prior to and or before a court of law can proceed to decree and direct the provision of such kind of information like the ones adverted to at the foot of the application, the Applicant must satisfy the constitutional and statutory threshold underpinning such request.
63. Before departing from this particular issue, I beg to highlight the decision of the Supreme Court of Kenya [the Apex Court] the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment), where the court held thus;
 122. The Court of Appeal in the instant matter observed that a party requesting information from a private person must place before the court a demonstrable and sufficient link between the right sought to be exercised or protected and the information requested. Once this is done, the onus is on the private person from whom information is requested to show why such information should not be disclosed. Having examined the pleadings and submissions, the appellate court held that the pleadings before the trial court did not meet the standard set for a request for information held by a private person and there was no demonstrable or sufficient connection between the requested information and the exercise or protection of the rights under articles 28, 32(2), 48 and 50 of the Constitution.



123. On our part, we are inclined to agree with the Court of Appeal that the appellants did not establish a demonstrable link between the rights they intended to exercise or protected and the information requested. We have reached that conclusion because firstly, the right to access to information is not an absolute right. Thus, section 6 of the [Access to Information Act](#) provides that: '(1) Pursuant to article 24 of the [Constitution](#), the right of access to information under article 35 of the [Constitution](#) shall be limited in respect of information whose disclosure is likely to:
- a. Undermine the national security of Kenya;
 - b. Impede the due process of law;
 - c. Endanger the safety, health, or life of any person;
 - d. Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - e. Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - f. Cause substantial harm to the ability of the Government to manage the economy of Kenya;
 - g. Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
 - h. Damage a public entity's position in any actual or contemplated legal proceedings; or
 - i. Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.'
64. Quite clearly, the nature and kind of information [documentary information] to be decreed by the court is regulated by the law and in any event, there are certain parameters that must be satisfied and/or established. In my view, the documentation being adverted to at the foot of the current application may very well fall within the exemption highlighted by dint of Section 9[2] of the [Access to Information Act](#), 2016.
65. In a nutshell, my answer to issue number two [2] is threefold. Firstly, the prayer that the court be pleased to summon the directors of the Respondent company to appear before the court for examination as pertains to the assets, properties and means of the company towards satisfying the costs herein, is premature to the extent that the corporate veil has neither been lifted, nor pierced.
66. Secondly, the aspect of the application that seeks to compel the directors of the Plaintiff/Respondent company to bring forth and avail assorted documentary information concerning the affairs, financial portfolio and business of the company, appears to be contrary to the exceptions highlighted vide Section 9[2] of the [Access to Information Act](#), 2016.
67. Thirdly, though the Applicant has sought to have the directors of the Plaintiff/Respondent company held personally liable to settle and/or liquidate the debt/liabilities of the company, it is imperative to underscore that until and unless the corporate veil is lifted, the directors/shareholders and/or subscribers of the company cannot be held personally liable.



Final Disposition:

68. From the foregoing discussion, there is no gainsaying that the Applicant herein has neither established nor espoused a case to warrant [sic] the lifting of the corporate veil, either as adverted through the written submissions or at all.
69. On the other hand, it is worthy to underscore that the reliefs/prayers seeking to hold the directors of the Plaintiff company personally liable for the debt of the company, prior to lifting of the veil, are also premature and misconceived.
70. In a nutshell, the application dated the 19th February 2024 is clearly devoid and bereft of merits. In this regard, same [application] be and is hereby dismissed.
71. Nevertheless, each party shall bear own costs of the application.
72. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2024.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson/ Brian: court Assistant.

Ms. Muluvi h/b for Eric K Mutua SC for the Defendant/Applicant

Mr. Kirimi for the Plaintiff/Respondent

