



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Wangwe v Bamoja Construction Limited & 2 others (Environment & Land Case 104 of 2020) [2024] KEELC 7531 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7531 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 104 OF 2020  
AA OMOLLO, J  
OCTOBER 31, 2024**

**BETWEEN**

**EMMANUEL WANGWE ..... PLAINTIFF**

**AND**

**BAMOJA CONSTRUCTION LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. For determination in the application dated 10<sup>th</sup> July, 2024 brought by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The applicants seek to be granted orders;
  1. That this Honourable Court be pleased to strike out the names of the 4<sup>th</sup> and 5<sup>th</sup> Defendants from the Amended Complaint of 10<sup>th</sup> June, 2024 and as parties to this suit.
  2. That this Honourable Court be pleased to grant any further orders as it deems just in the circumstances.
  3. That costs of this Application be awarded to the Applicants.
2. It is premised on five grounds listed on its face repealed in the affidavit in support of thus;
  - a. That the Amended Complaint discloses no reasonable cause of action in law against the 4<sup>th</sup> and 5<sup>th</sup> Defendants.
  - b. That the 1<sup>st</sup> Defendant/Applicant herein is a body corporate capable of suing and being sued in line with the principle of corporate personality established in *Solomon v Salomon* (1897) AC 78.



- c. That the Honourable Court has not lifted the corporate veil to allow any cause of action against the 4<sup>th</sup> and 5<sup>th</sup> Defendants and they cannot therefore be properly sued in their individual capacities.
  - d. That proceeding with the Suit as is may prejudice, embarrass or delay the fair trial of the same.
  - e. That the Amended Plaint as is therefore frivolous, vexatious, vexatious, scandalous, and grossly redundant and an abuse of the court process as it discloses no reasonable cause of action against the 4<sup>th</sup> and 5<sup>th</sup> Defendants.
3. The application is opposed by the grounds of opposition filed by the Emanuel Wangure (1<sup>st</sup> Plaintiff/ Respondent) dated 25<sup>th</sup> July, 2024. He states that;
- a. That the Application is incompetent for offending the provisions of Order 1 Rule 10 (2) as the grounds raised in the application seeking to be struck out the 4<sup>th</sup> and 5<sup>th</sup> Defendants amounts in substance to a defence on a point of law, namely the directors' non-liability for actions committed by the 1<sup>st</sup> Defendant company.
  - b. That although it is indisputed principle of law since *Salomon v Salomon*, that a company is an independent and legal personality distinct from the individuals who are its members, it has also been firmly established that the corporate veil may be lifted where there are allegations that directors have committed fraud, or improper conduct.
  - c. That the 4<sup>th</sup> and 5<sup>th</sup> Defendant being directors of the 1<sup>st</sup> Defendant/Applicant are necessary parties in these proceedings as the Plaintiff has made serious allegations that the said directors used the 1<sup>st</sup> Defendant company as a vessel for the sole purpose for committing fraudulent acts, that is, that is, selling tainted property to the plaintiff.
  - d. That the instant application is misguided and is purposefully calculated at exonerating the 4<sup>th</sup> and 5<sup>th</sup> Defendants of wrongdoing at this preliminary stage without considering the evidence to be produced by the Plaintiff at trial thereby undermining the plaintiff's right to fair hearing as contemplated under Article 50 of *the Constitution* of Kenya, 2010.
  - e. That the application is premature since the issues raised therein can only be canvassed upon evaluation of evidence at full trial.
  - f. That the 4<sup>th</sup> and 5<sup>th</sup> Defendants shall suffer no prejudice being enjoined in the suit as they will have an opportunity at the trial to demonstrate that as directors, they were not personally liable for the acts and omissions of the 1<sup>st</sup> Defendant company.
4. Bernard Masaka Shinali, the Plaintiff in ELC E380 of 2022 also opposed the application vide his grounds of opposition dated 24<sup>th</sup> July, 2024 pleading inter alia;
- i. The Applicants are necessary parties.
  - ii. The crux of the Plaintiff's case is a fraud committed on the Plaintiff by natural persons who are the applicants
  - iii. The Applicants vide their joint statement of defence recognize their individual proprietary rights in the suit land.



5. The 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants filed written submissions dated 26<sup>th</sup> September, 2024. They submit that order 1 Rule 10(2) speaks of misjoinder and non-joinder of both plaintiffs. That the Rule does not speak to joinder on a point of law or fact. Order 1 rule 10(2) provides;

“(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.”

6. The Applicants also cited the holding in the case of *Salmon & Company Ltd. Vs Salomon (1897) AC 22* and *Multi Choice Kenya Ltd. Vs. Mainkam Ltd & Another (2013) eKLR*. The latter case held thus;

“To my mind, there is no doubt that ever since the famous case of *Solomon versus Salmon*, courts have applied the principles of corporate personality strictly, but exceptions to the principles have also been made where it is too flagrantly opposed to justice. Other instances include when a fraudulent and improper decision by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as an entity.”

7. It is uncontroverted that *Bamoja Construction Limited*, the 1<sup>st</sup> Defendant herein (hereinafter referred to as “the Company”), is a private limited company incorporated within the laws of Kenya. It is a body corporate capable of suing and being sued in the line with the principle of corporate personality established in *Salomon v Salomon* above. The Plaintiff discloses no reasonable cause of action in law against the directors of the Company, the 4<sup>th</sup> and 5<sup>th</sup> Defendant herein. It is only until the corporate veil is lifted that the directors of the Company can be sued in their individual capacities.

8. The Applicants submit that the plaintiff contends that the main ground to be relied upon is fraud. In *Pamba Ong’weno Amila vs. John Juma Kutolo (2015) eKLR* the court held;

“Fraud is a conclusion of law. The facts alleged to be fraudulent must be set out and evidence led thereon to prove fraudulent intent..... We also bear in mind that allegations of fraud must be proved to a standard above balance of probabilities but below beyond reasonable doubt.”

9. The 1<sup>st</sup> Plaintiff/Respondent filed written submissions dated 2<sup>nd</sup> October 2024 which cited the provisions of order 1 rule 10(2) of the Civil Procedure Rules. The Plaintiff also cited the case of *Marwaha vs. Pandit Dwarka Nath Nairobi HCCC No. 599 of 1952 [1952] 25 LRK 45*, which has been referenced in several authorities. The Court expressed itself as follows:

“This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27...The point was premature because upon the plaint alone it was not unequivocally clear that he is being sued in tort at all...”

10. The Respondent submits that the principle of separate personality is not indefeasible and that Courts have held that the corporate veil can be pierced in certain instances in order to reveal the facade behind the company. He cited the decision in *Kenroid Limited v Aureum Limited & 8 others [2019] eKLR*.



That in this case, the Applicants are accused of conniving in the fraud and the particulars of the alleged fraud have been set out in paragraph 18 of the Amended Plaintiff notably.

11. It is the Respondent's submission that there are serious allegations of fraud and deceitful conduct committed by the 4<sup>th</sup> and 5<sup>th</sup> Defendant and it would be premature at this point to examine the evidence tendered without full trial. He associated himself with the position held in *Multichoice Kenya Limited v Mainkam Limited & Another* (2013)eKLR where the Honourable Judge held:

“I think that to ascertain this at this juncture the court would be required to go into the rigorous exercise of trying to determine whether the Plaintiff has a proper case against the Applicant by assessing the evidence in place. This in my view is premature as evidence can only be tendered at the trial. I am of the view that the merits and demerits of the claims against the Applicant cannot be summarily decided through this application.

....I am of the opinion that the whether or not the Applicant is liable for the purported actions that he is being accused of, namely fraud, the same should essentially be controverted by way of a Defence.”

12. The Plaintiff in ELC E380 of 2022 filed written submissions dated 8<sup>th</sup> October, 2024 in support of the grounds of opposition. He cited the provisions of order 1 rule 3 of the Civil Procedure Rules 2010 which provides that all persons may be joined as defendants against whom any right to relief has been claimed. That their plaint sets out allegations of fact which discloses a cause of action against the Applicants and in particular, paragraph 4, 10-13 of the plaint.
13. In itemising that the Applicants were aware of the legal dispute, the Respondent herein mentions the contents of a letter dated 15<sup>th</sup> December 2016 from the Chief Officer, Urban Planning. He argues that courts have previously held that where fraudulent allegations are made against the directors/ shareholders of a company, the exception to the rule in *Salmon vs Salmon* applies. He cites the case of *Multi Choice Kenya Ltd supra*, already cited by the Respondent in 104/2020.
14. The Respondent cited the provisions of section 145 of the *Companies Act* which places a general duty on a director to exercise care in the performance of their duty to prevent losses to third parties. He also submitted on why he believed the Applicants are necessary parties to his suit as consolidated with others.
15. I have read the application; the grounds of opposition filed and analysed the facts and the law. There is no dispute that the 4<sup>th</sup> and 5<sup>th</sup> Defendants (who are sued as 1<sup>st</sup> and 2<sup>nd</sup> Defendants in E380/22) are described as directors of the 1<sup>st</sup> Defendant. The plaintiff (in 104/2020) amended his plaint dated 10<sup>th</sup> June, 2024 which introduced the Applicants (Paragraph 4B and 4C). The other paragraph which mentions the 4<sup>th</sup> and 5<sup>th</sup> Defendants name is paragraph 26 of the Plaintiff which is almost similar to paragraph (b) of the prayers.
16. Paragraph 26 of amended plaint state thus;

“In views of the above, the Plaintiff now prays that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants be ordered to jointly and severally pay him all monies spent in the purchase and acquisition of the land, costs of the construction of the incompetent house, legal and all other expenses incurred by the Plaintiff in the purchase and transfer process as well as compensation in both general special damages for the lost opportunity to own a dream home in Karen Area in Nairobi.”



17. The Respondent (in E 380) discloses his claim against the Applicants inter alia at para 4 (iii), “the 1<sup>st</sup> and 2<sup>nd</sup> Defendants misrepresented to third parties the plaintiff inclusive that they through the 3<sup>rd</sup> Defendant were the registered owner of the suit property and that they had legal right to sell it”
18. The Applicants names are also singularly mentioned in paragraphs 10, 11 and 12 of the said plaint. The prayers are also sought as against the three defendants. The Applicants argued that no cause of action has been disclosed against them. A reading of the two plaint accuses the Applicants of fraud and that they formed the 1<sup>st</sup> Defendant as a vessel for the sole purpose of selling the tainted suit property to the plaintiffs.
19. It is trite law that a company is a legal entity capable of suing and being sued on its own name. The law permits a party to lift the corporate veil (exceptions to the rule in *Salmon Vs Salmon*) and have the directions take responsibility of the company individually. The plaintiffs herein have alleged fraud as against the Applicants. Fraud is a question of fact which must be proved by way of evidence. It is not practicable to have the allegations of fraud dealt with within an interim application whether the allegations are unfounded or not.
20. The Applicants submitted on the heading of whether the Plaintiff has adduced evidence of fraud against them. They cited the case of *Ukwala Supermarkets Ltd vs Shah and Another (2023)eklr* for the proposition that fraud is one of the grounds that a company’s veil can be lifted. They go further to cite *Pamba Ong’weno vs John Juma Kutolo (2015)eklr* for the proposition that fraud is a conclusion of law. The facts alleged must be set out and evidence led thereon. These arguments put forth by the Applicants demonstrate that their application is premature as there is no way the Respondents can bring out evidence of fraud without the case proceeding to trial.
21. The parties to the current application have all referred to the decision of *Multichoice Kenya Ltd* with the applicants citing the holding that mentioned that exceptions to the *Salmon* case would occur in cases of fraudulent and or improper decisions by scheming directors. In the cited case, the invitation to strike out the names of the applicants was dismissed after *Mabeya J.* observed that;

In my view, these allegations are serious and cannot be ignored. The question that arises is whether they are plausible in law. I think that to ascertain this at this juncture the court would be required to go into the rigorous exercise of trying to determine whether the Plaintiff has a proper case against the Applicant by assessing the evidence in place. This in my view is premature as evidence can only be tendered at the trial
22. The Applicants argue that the Plaints where they are named as defendants disclose no reasonable cause of action. It is not prudent for these court to analyse the merit or otherwise of the claims before the court without evidence adduced. Although the Applicants argument is premised on the fact of corporate liability, the Plaintiff in E380 has levelled acts of misrepresentation against them independent of the company. In my mind, they are necessary parties and It would serve the interest of justice that they remain part of the suit for the just determination of all issues in dispute.
23. I am therefore not persuaded to agree with the applicants that their names ought to be struck out from these proceedings. Consequently, the application dated 10<sup>th</sup> July 2024 is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**A. OMOLLO**

**JUDGE**

