



Ndege v Diamond Property Merchants Ltd & 5 others (Environment & Land Case E282 of 2023) [2024] KEELC 7257 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E282 OF 2023
AA OMOLLO, J
OCTOBER 24, 2024**

BETWEEN

LILIAN WAMBUI NDEGE PLAINTIFF

AND

DIAMOND PROPERTY MERCHANTS LTD 1ST DEFENDANT

MILKAH WANJIKU WANGUI 2ND DEFENDANT

PHYLIS WAHU NDUNGU 3RD DEFENDANT

**HANNAH WANJIRU HAIYAE (2 TO 4 DEFENDANT SUED
AS ADMINISTRATORS OF THE ESTATE OF JOHN NDUNG’U
HAIYAE) 4TH DEFENDANT**

ROBERT NG’ANG’A WARANGU 5TH DEFENDANT

JOSEPHAT GICHUNGE MWIRABUA 6TH DEFENDANT

JUDGMENT

1. The Plaintiff has sued the 6th Defendants listed and described in paragraphs 1 – 5 of the plaint dated 8th August, 2022. She pleaded that the registered owner of L.R No. Ruiru East/Juja Block 2/2485 was Raphael Wahogo Karori. That the 1st 5th and 6th Defendants presented themselves as the registered and or beneficial owners of the said land and which representation caused the plaintiff to enter into a sale agreement with them for purchasing a portion thereof.
2. The plaintiff impleads that on the behest and demand of the 1st Defendant’s directors, shareholders and agents, she paid to the 1st Defendant the agreed full purchase price of Kshs.630,000 on 27th February, 2018 plus another Kshs.20,000 as processing fee. However, despite receipt of the full purchase price, the Defendants have failed to deliver to the plaintiff her rightful interest comprised in a plot measuring 50 x 100 feet that was to be curved from the suit title Ruiru East/ Juja block 2/2485.



3. She averred that she had entered the agreement for sale in good faith and was/is still willing to complete the sale. She further pleaded that under clause 9.2 of the sale agreement the 1st defendant ought to refund the plaintiff all sums of monies expended towards the purchase being Kshs.650,000/= plus interest at 10% from the date of the sale agreement.
4. The plaintiff puts liability on the 5th and 6th Defendants as agents of the 1st Defendant for misrepresentation and fraud. She listed the particulars of the misrepresentation as below;
 - a. Knowingly duping the plaintiff in both writing and in conduct that they were selling land which they had no capacity to sell;
 - b. Making a representation to the plaintiff and other un-knowing members of public of non-existent rights to the suit land. The Defendants, employees, servants and/or agents' misinforming the plaintiff despite their knowledge to be false at the time of executing the sale agreement;
 - c. Defendants acting in false pretence as the plaintiff entered into the agreement in good faith whereas the Defendants themselves, employees, servants and/or agents had ulterior motives to obtain fraudulently from the plaintiff.
 - d. Making a false and fraudulent misrepresentation to the plaintiff with the sole purpose and intention to defraud the plaintiff and on which the plaintiff acted upon at the time of executing the sale agreement.
 - e. The plaintiff has incurred loss and damages as a result of relying on the false misrepresentation by the Defendants by themselves, employees, servants and/or agents.
5. Reasons wherefore the plaintiff prays for judgment against the Defendants jointly and severally for;
 - a. Refund of Kenya Shillings of Kenya Shillings Six Hundred and Fifty Thousands (Kshs.650,000/=) only together with at (10%) interest from 27th February, 2018 to date. Damages, costs and interest at court rates.
 - b. Any other relief this Honourable Court deems just and fit to grant.
6. The 1st – 5th Defendants entered appearance on 21st February, 2023 and filed a statement of defence dated 2nd November, 2023. They pleaded that the sale agreement was entered between the plaintiff and the 1st defendant. That there exists no contractual relationship between her and the other Defendants. They aver, that the plaintiff is arbitrarily trying to lift the veil of the 1st Defendant without leave of the court.
7. The 2nd, 3rd and 4th Defendants who were sued as legal administrator of estate of John Ndungu pleaded that they have wrongly been included in this suit. They denied being served with any demand notice to sue. They urged that the plaintiff's suit be dismissed with costs.
8. The 6th Defendant did not defend the suit.
9. Once the pleadings closed, it is only the plaintiff who gave evidence. The plaintiff adopted contents of her written statement dated 2nd June, 2022 filed together with the plaint as her evidence in chief. She stated that the property was selling at a cost of Kenya Shillings Seven Hundred Thousand Shillings only however, since she was a cash buyer she received a minimal discount. That she embarked on the process of buying the suit parcel of land known as Plot No. 7 Phase 28 on L.R No. Ruiru East/Juja East Block 2/2485 measuring 50 feet by 100 feet for a sum of Kenya Shillings Six Hundred and Thirty



Thousand (Kshs.630,000) and paid a further sum of Kenya Shillings Twenty Thousand (Kshs.20,000/=) described as title processing fees.

10. It is also her evidence that the sale agreement was entered into with the 1st Defendant, her shareholders, directors and employees and paid the agreed purchase price. That her woes began after making the payment when the Defendants went totally mute. She continued that in further search for answers, while visiting the offices of the 1st Defendant, she met the 6th Defendant who introduced himself as the Chairman of the 1st Defendant at the time of the transaction. That the 6th Defendant gave her several promises that the property would be transferred to her name but that did not materialise.
11. She states that clause 4 of the sale agreement expressly stated that the date of completion would be six (6) months from the date of signing the agreement. However, the Defendants have failed to honour the said clause by declining, failing and neglecting to deliver to the Plaintiff the interest in the suit of land known as plot No. 7 Phase 28 on L.R No. Ruiru East/Juja East Block 2/2485 measuring 50 feet by 100 feet.
12. She reiterated that she entered the agreement in good faith and her attempts over the years to reach the defendants bore no fruit. It is her claim that this has resulted to her suffering great financial losses, psychological and emotional distress. She urged the court to order the Defendants to refund her the money (Kshs.650,000/=) together with interest at 10% from dates of agreement and costs of the suit. The plaintiff produced documents in her list to support her claim.
13. During cross-examination by Mr. Njonjo Counsel for the 1st and 5th Defendants, the plaintiff said she signed the agreement with the 1st Defendant. That she was purchasing plot 7 to be curved out of the suit property. The purchase price was paid by cheque in favour of the 1st Defendant and was issued with a receipt dated 28th February, 2018.
14. The witness continued that she has approached the 1st Defendant to give her the sold plot several times but they failed. That in one of her visits, she was told one of the directors had passed on hence the company was unable to access funds to refund her. The plaintiff said she used to meet the 5th Defendant at the offices of the 1st Defendant and he kept saying she would be refunded. She admitted that she has not produced any transfer form signed by the 6th Defendant.
15. In re-examination, the witness said that according to CR – 12 of the 1st Defendant the persons listed as directors of the 1st Defendant are; Robert Nganga, Estate of Ndungu Hayae and Ferdinard Muchoma. That the undated transfer form bears the name of the 6th Defendant. This marked the close of the Plaintiff's case.
16. The Defendant closed their case without calling any witness. Thereafter, the advocates filed their written submissions. The plaintiff in her submissions reiterated the facts as pleaded and stated by the witness. She argues that the 2nd to 6th Defendants as directors of 1st Defendant had reached out to the plaintiff in their individual capacities to refund the money. That courts have lifted the corporate veil in instances where there was fraud or improper conduct.
17. In support of submissions on lifting the corporate veil, the plaintiff cited Halsbury's Laws of England 4th Edition paragraph 90 which states thus;

“Notwithstanding the effect of a Company's incorporation, in some cases the court will 'piece 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 or even as agents, directing and controlling the activities of the company.”

18. Further, the plaintiff cited the case of Machakos Misc. App. E202 of 2021; Essential Drugs Ltd Vs. Oss Chemie (K) Ltd. (2022) KEHC (KLR) where M. W. Muigai held thus;

“In the case of Jiang Nan Xiang v Cok Fas-St. Company Limited; Miscellaneous Application (2018) eKLR, the court stated that; “I find that the law on lifting the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are inter alia where there is no formal legal separation between the Company and its shareholders’ personal financial affairs and/or that the Company is just a sham or the Company’s actions were wrongful or fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the Company and/or design a scheme, to perpetrate financial fraud, and/or if the Company’s creditors suffer unjust cost, that is, they did business with the Company and they are left with unpaid bills or unpaid court judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or the directors personally liable.”

19. The 1st – 5th Defendants also filed written submissions dated 3rd September, 2024. They argued that at the time of contract, neither the 2nd – 4th Defendants were associated with the company as directors. These defendants (2nd – 4th Defendants) came into the Company to hold the shares of John Ndungu – who died and was one of the Directors of the 1st Defendant. The 1st – 5th Defendants cited the case of Salomon Vs Salomon & Company Ltd (1896) uKHL which created the principle that a company is a legal distinct person from its directors.

20. The Defendants also cited inter alia the case of Multi Choice Kenya Ltd vs. Mainkan Ltd & another (2013) EKLR where Mabeya J. held thus;

“I agree that Directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of Salomon v. Salomon (1897) A. C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design 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 one entity.”

21. Further, the 1st – 5th Defendants cited the case of Mugenyi & Co. Advocates vs. The Attorney General (1999) & EA 199 which held instances of lifting the veil. The judge state inter alia thus;

1. Where companies are in the relationship of holding and subsidiary companies’
2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder.
3. In abuse of law in certain circumstances;
4. Whether the device of incorporation is used for some illegal or improper purpose and



5. Where the private company is founded on personal relationship between the members.”

Analysis & Determination:

22. The plaintiff has presented evidence of an offer she executed with the 1st Defendant on 27th February, 2018. The document was executed on behalf of the 1st Defendant by Timothy Nturibi described as the Relationship Manager and Aldrina Sheila Gelenywa described as the legal assistant/company representative. At clause 7 of the offer letter, it stated thus;
- “Sale agreements: The Vendors lawyer, Ms K. Mberia & Partners Advocates, will prepare the transactional documents which shall be executed by both parties at the appropriate time”
23. The plaintiff produced a copy of the sale agreement drawn by K. Mberia & Partners Advocates which was undated and not executed by both the vendor (1st Defendant) or the purchaser (plaintiff). On the execution page, an ID and PIN numbers of persons defined as Director and Secretary is entered. The plaintiff did not provide evidence to state which of the Defendants owned the ID and PIN numbers typed in the undated sale agreement she produced. Whether the names were provided, it would not make a difference because the document was not executed. Thus the only binding contract between the two parties is the offer letter.
24. There is no dispute that the plaintiff paid to the 1st Defendant Kshs.650,000/= as presented by a receipt confirming the payment exhibited. The 1st defendant did not present any evidence to the contrary. She also presented a certificate of ownership issued to her by the 1st Defendant. In her evidence, the plaintiff said that she did a search for the suit property and found it was not registered in the name of the 1st Defendant but still proceeded to pay money to purchase a plot to be curved out of land that was not owned by the 1st Defendant.
25. To justify her decision, the plaintiff said that she asked the 1st Defendant for authority from the registered owner to sell and was shown some transfer between the company and the said Raphael. The witness did not produce a copy of the said transfer or who among the Defendants showed it to her. Further, her evidence does not state at what point in time she dealt with each of the said directions (2nd – 5th Defendants). Was it before making the payment or after? Who amongst these directors misrepresented facts to her?
26. It is trite law that courts lift the veil to hold directors of companies personally liable for actions undertaken using the company to defraud. In this instance, for the lifting of the veil to take place, a hearing must take place where directors of the company are summoned for cross-examination. It is my understanding that such process would be independent of the instant claim. For now, I will not lift the veil but the Plaintiff is at liberty to apply in the proper forum for such an order.
27. Since the impugned transaction was done with the 1st Defendant, it is the 1st defendant who has the legal personality in law (Salomon vs Salmon and Co. Ltd) that is liable for the breach of contract. The upshot of the foregoing is that as of now, this court can only give judgment for refund of the monies expended by the plaintiff as against the 1st Defendant and 6th Defendant who did not defend the claim.
28. On the basis that proof of payment of Kshs.650,000 was made, I enter judgment against the 1st and 6th Defendants jointly and severally for refund of the said money with interest at 10% per annum from the 27th February, 2018 until payment is received in full. Costs of the suit is also awarded.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024

A. OMOLLO



JUDGE

