Gaman v Monarch Developers Limited & 2 others (Environment & Land Case E427 of 2021) [2023] KEELC 16209 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16209 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E427 OF 2021

JO MBOYA, J

FEBRUARY 23, 2023

BETWEEN

DR.GAMAN ALI MOHAMED GAMAN ..... APPLICANT

AND

MONARCH DEVELOPERS LIMITED ..... 1ST DEFENDANT

BANK OF BARODA (KENYA) LIMITED ..... 2ND DEFENDANT

MOHAMED MADHANI & COMPANY ADVOCATES ..... 3RD DEFENDANT

RULING

Introduction And Background

1. Vide Notice of Motion Application dated the January 27, 2023, the Plaintiff/Applicant has approached the Honourable court seeking for the following reliefs;

    i. That this Application be certified urgent and service thereof be dispensed with in the first instance.

    ii. That this Honourable Court be pleased to stay the hearing of the main suit scheduled for February 1, 2023

    iii. That the Honourable Court be pleased to lift the corporate veil of the 1ST Defendant and Order that the Directors of the 1ST Defendant be enjoined in the suit in their personal capacities.

    iv. That following the issuance of prayer 3 above as an Order of this Honourable Court, the amended Plaint dated January 27, 2023 be deemed as duly filed and a part of the Court record.

    v. That in the alternative to prayers 3 & 4 above, this Honourable Court be pleased to grant the amendment in terms of prayer (g) of the amended Plaint dated January 27, 2023.

vi. That the Honourable Court be pleased to refer this instant suit back for pre-trial compliance.

vii. That the costs of this Application be in the course.

2. The instant application is premised and anchored on the various grounds that have been alluded to and contained at the foot of the Application. Besides, the Application herein is supported by the affidavit of the Plaintiff/Applicant sworn on the January 28, 2023 and in respect of which the deponent has attached assorted documents/annexures.

3. It is imperative to note that upon being served with the application herein, the 1st Defendant/ Respondent responded thereto vide a Replying Affidavit sworn on the February 27, 2023 and in respect of which, the deponent of the said affidavit has averred inter-alia, that the Plaintiff has neither met nor satisfied the requisite threshold to warrant the lifting of the veil, either in the manner sought or at all.

4. Other than the 1st Defendant/Respondent, the instant application has also been responded to by the 3rd Defendant/Respondent who has filed grounds of opposition dated the January 31, 2023.

5. For completeness, the 2nd Defendant/Respondent neither filed any grounds of opposition nor Replying affidavit. Furthermore, learned counsel for the 2nd Defendant/Respondent intimated that same would not be opposed to the instant application.

6. Be that as it may, the instant application came up for hearing on the February 9, 2023, whereupon the advocates for the respective Parties agreed to canvass and dispose of the application by way of oral submissions.

Submissions By The Parties

Applicant's Submissions

7. Learned counsel for the Applicant herein raised, highlighted and amplified four salient and pertinent issues for consideration by the Honourable court.

8. Firstly, learned counsel for the Applicant submitted that though the Applicant had hitherto sought for and been granted leave to amend the Plaint beforehand, the leave to amend which was so granted was neither appropriated nor utilized by the Applicant. Furthermore, learned counsel for the Applicant has submitted that the failure to utilize and/or appropriate the leave that had hitherto been granted, was neither intentional nor deliberate.

9. To the contrary, learned counsel contended that the failure to utilize and/or appropriate the leave that had hitherto been granted, was as a result of the fact that the Advocate who had been assigned the task of crafting the amended Plaint and complying with the directions of the Honourable court left the employment of the law firm acting for the Plaintiff/Applicant.

10. In addition, it was also submitted that by the time the tasked Advocate left the employment, same did not intimate to the Principal Partner in the law firm acting for the Plaintiff/Applicant that he had not complied with the directions of the court and in particular, as pertains to the amendments of the Plaint.

11. Be that as it may, learned counsel submitted that the impugned mistake or failure, was a mistake of counsel and therefore same ought not to be visited upon the Plaintiff/Applicant. In any event, counsel added that the impugned mistake was honest, inadvertent and thus excusable.

12. Secondly, learned counsel submitted that Leave to amend Pleadings, ought to be granted freely and more particularly, where the Leave to amend has been sought prior to and before the commencement

of the hearing. Consequently and in this regard, learned counsel invited the Honourable court to take cognizance of and to apply the provisions of Order 8 Rule 5 of the *Civil Procedure Rules*.

13. Additionally, learned counsel contended that the intended amendments will enable the Honourable Court to deal with and to determine all the issues in controversy, once and for all and therefore avert a multiplicity/plethora of suits relating to incidental issues.

14. On the other hand, it was also submitted that the grant of leave to amend and the consequential amendment in terms of the draft amended Plaint, shall not prejudice or inconvenience the Defendant/ Respondents, in any manner whatsoever.

15. Furthermore, counsel added that subject to amendment, the Defendants and any such impleaded party, shall be at liberty to amend his/her pleadings and to file consequential documents, in answer to the amendments and the issues in Dispute.

16. Thirdly, learned counsel for the Applicant submitted that the Directors of the 1st Defendants/ Respondents used the 1st Defendant/Respondent as a vehicle for obtaining money from the Plaintiff/ Applicant, even though the 1st Defendant/Respondent knew that same would not be in a position to pass/convey title to and in favor of the Plaintiff/Applicant in respect of the suit property, which was the subject of sale.

17. Additionally, learned counsel has contended that by the time the Directors of the 1st Defendant/ Respondent purported to collect and receive monies from the Plaintiff/Applicant, same knew and were aware of the fact that the suit property was duly charged to and in favor of the 2nd Defendant/ Respondent.

18. Notwithstanding the foregoing, counsel has added that the 1st Defendant/Respondent and her Directors proceeded to and received the monies at the foot of the impugned sale, but failed to transmit same to the 2nd Defendant, for purposes of procuring partial discharge over and in respect of the suit property.

19. Arising from the foregoing, learned counsel for the Applicant has therefore submitted that the Directors of the 1st Defendant/Respondent therefore entered into the impugned sale agreements over and in respect of the suit property, whilst knowing that same were not in a position to transfer the title.

20. In this regard, counsel added that the directors of the 1st Defendant/Respondent were therefore using the company as a vehicle to commit fraud and other activities as against Members of the Public and particular, the Applicant herein.

21. In any event, learned counsel added that the fact that the 1st Defendant has not been able to pay the monies at the foot of the Charge, connotes that the Directors of the 1st Defendant/Respondent were using the monies collected from the Plaintiff/Applicant, for other purposes, which therefore amounts comingling of funds.

22. In view of the foregoing, learned counsel for the Applicant has therefore invited the Honourable Court to find and hold that sufficient basis has been pleaded and established to warrant piercing/lifting of the veil of the 1st Defendant/Respondent, with a view to impleading the Directors thereof personally.

23. In support of the submissions that sufficient basis has been established to warrant the lifting/ piercing of the veil, learned counsel cited and quoted the decision in the case of *Ukwala Supermarket versus Jadeep Shah (2016)eKLR*.

24. In view of the foregoing, learned counsel for the Applicant has therefore submitted that the Applicant has established and demonstrated a basis to warrant the grant of the subject application.

25. Furthermore, it has been added that the grant of the subject application, will go a long way in facilitating the determination of all the issues in controversy, effectively and effectually.

1St Respondent's Submissions

26. Learned counsel for the 1st Defendant/Respondent adopted and relied on the contents of the Replying affidavit sworn on the February 7, 2023, by one Arul Servaraj Mudalia, (hereinafter referred to as the Deponent), and thereafter amplified two issues for consideration by the Honourable court.

27. First and foremost, learned counsel for the 1st Defendant/Respondent submitted that the Plaintiff/ Applicant herein had hitherto sought to be granted leave to amend the Plaint. However, counsel added that despite being granted leave to amend, the Applicant failed to utilize and appropriate the Leave granted.

28. Having failed to utilize and appropriate the leave granted, learned counsel for the 1st Respondent therefore contended that the Applicant herein is not entitled to the exercise of discretion, either in the manner sought or at all.

29. Additionally, learned counsel has also submitted that even though the failure to appropriate the leave granted has been attributed to an advocate who left the employment of the law firm acting for the Plaintiff/Applicant, no evidence has been placed before the Honourable court that the said advocate has ever left the employment in the manner alluded to.

30. In the premises, learned counsel has therefore submitted that even though the Plaintiff/Applicant is seeking exercise of discretion, same has however failed to place before the Honourable court sufficient material to warrant the exercise of such discretion.

31. Based on the foregoing, learned counsel for the 1st Defendant/Respondent has therefore submitted that the Honourable court ought not to grant leave for purposes of amendment of the Plaint insofar as no basis has been laid and/ or established.

32. Secondly, learned counsel for the 1st Defendant/Respondent has submitted that the Plaintiff/ Applicant has neither established nor met the threshold to warrant the lifting of the corporate veil of the 1st Defendant/Respondent. In this regard, it has been contended that it has not been shown that the Directors of the 1st Defendant have used the 1st Defendant for purposes of committing a fraud and criminal activities.

33. Furthermore, counsel has added that it has also not been shown and established that the 1st Defendant/ Respondent is devoid of adequate capitalization, either in the manner impleaded or at all. For clarity, counsel pointed out that it was not enough for the Applicant to throw allegations on the head of the Honourable court and thereafter imagine that by throwing such allegation, same has proved the issues at hand.

34. In addition, counsel for the 1st Defendant/Respondent has also contended that the Applicant has also not established the claim pertaining to comingling of funds by the Directors of the 1st Defendant/ Respondent. Consequently, the allegations pertaining to comingling of funds has similarly not been proved.

35. In support of the foregoing submissions, learned counsel for the 1st Defendant has cited and quoted the case of *Mogeni & Company Advocates versus The Attorney general (1999) 2 EA 199* and Ukwala Supermarket Ltd versus Jadeep Shah (2016)eKLR, to vindicate the submissions pertaining to the issue of piercing/lifting of veil.

36. In a nutshell, learned counsel for the 1st Defendant/Respondent has contended and submitted that the instant application is not only premature and misconceived, but same is Legally untenable.

3Rd Defendant's/respondent's Submissions

37. Learned counsel for the 3rd Defendant/Respondent adopted and reiterated the Grounds of opposition dated the January 31, 2023; and thereafter highlighted two issues before the Honourable court.

38. Firstly, learned counsel submitted that the Plaintiff/Applicant herein has proceeded to and filed an amended Plaint albeit, without leave of the Honourable court and is thereafter seeking the permission of the court to validate the amended plaint, albeit ex-post-facto.

39. Nevertheless, counsel has submitted that any document and/or pleading that is filed before the Honourable court albeit without leave, is a nullity and cannot be validated, either in the manner sought or at all.

40. In this respect, Learned Counsel has cited and quoted the holding of the Supreme Court of Kenya in the case of *County Executive Committee, Kisumu County versus The County Government of Kisumu (2017)eKL*R.

41. Secondly, learned counsel for the 3rd Defendant/Respondent has submitted that the Plaintiff/ Applicant has neither satisfied nor met the threshold to warrant the piercing/lifting of the Corperate veil of the First Defendant, either in the manner sought or at all.

42. In addition, counsel has contended that the issues alluded to and contended at the foot of the current application and which inform the intended piercing of the veil, are issues that can be dealt with and addressed during cross examination of the 1st Defendant's/Respondent's witnesses.

43. Furthermore, learned counsel also contended that the issues alluded to by the Applicant herein are well provided for and capable of being taken care of by invocation of the provisions of Order 22 Rule 35 of The Civil Procedure Rules.

44. In short, learned counsel for the 3rd Defendant/Respondent has invited the Honourable court to find and hold that the impugned application is devoid of merits and same ought to be dismissed with costs.

Issues For Determination

45. Having reviewed and evaluated the Application dated the January 27, 2023, together with the Supporting affidavit thereto and having taken into account the Responses filed on behalf of the adverse Parties; and having similarly, considered the oral submissions made on behalf of the Parties, the following issues are pertinent and thus worthy of determination;

    i. Whether the Honourable court can deem the amended Plaint dated the January 27, 2023 as duly and validly filed, either in the manner sought or otherwise.

    ii. Whether the Plaintiff/Applicant has established a sufficient basis to warrant the grant of Leave to amend the Plaint in the manner sought.

    iii. Whether the Plaintiff/Applicant has established and met the threshold for Lifting/Piercing corporate veil of the 1st Defendant/Respondent.

Analysis And Determination

Issue Number 1 Whether the Honourable Court can deem the amended Plaint dated the January 27, 2023 as duly and validly filed, either in the manner sought or otherwise.

46. The Plaintiff/Applicant herein had hitherto sought for and obtained Leave to amend the Plaint before the Honourable court. However, despite procuring and obtaining leave to file an amended Plaint, the Plaintiff/Applicant failed to utilize and appropriate the leave that was granted.

47. To this end, learned counsel for the Plaintiff/Applicant submitted and contended that the failure to utilize and appropriate the leave that was granted arose inter-alia, because the advocate who had been assigned and tasked to comply with the directions of the Honourable Court left employment of the law firm acting for the Plaintiff/Applicant.

48. Consequently and in this regard, it was therefore contended that the failure to amend Plaint was informed by an inadvertent, but honest error and mistake on the part of the Applicant's advocate.

49. Notwithstanding the foregoing, learned counsel for the Applicant proceeded to and contended that upon discovering that the amended Plaint had not been filed pursuant to the direction of the Honourable court, same proceeded to and filed an amended Plaint dated the January 27, 2023. In this regard, it is the said amended Plaint that the Plaintiff is seeking to be deemed as duly filed and to be forming part of the record of the Honourable Court.

50. In response to the Applicant's prayer that the impugned amended Plaint be deemed as duly filed, learned counsel for the 3rd Defendant/Respondent submitted that the impugned amended Plaint, having been filed without Leave of the Honourable court is therefore a nullity and hence incapable of being validated ex-post-facto.

51. In the circumstances, the question that does arise for determination; is whether the Plaintiff/Applicant herein can file a pleading or such other document, albeit without leave of the Honourable court and thereafter approach the court to validate/deem the impugned pleadings as duly filed.

52. It is imperative to note and observe that the Rules of procedure envisage a situation where a Party, who is keen and desirous to file any pleading or document, albeit out of time, seeks for and obtains, Leave of the Honourable court beforehand.

53. In the alternative, where a timeline had hitherto been granted for the filing of any pleading or better still, the doing of any act, which time has since expired, the concerned litigant is at liberty to file an application for extension of time, irrespective of whether the time hitherto granted has expired and/or lapsed.

54. In my humble view, the import and tenor of the relevant rule is that the application for leave to do a particular act or better still for the extension of time, which has since lapsed, must be mounted beforehand.

55. Consequently and in this regard, it behooves every Applicant to file the requisite application and thereafter procure the intended Leave before filing the impugned pleading or undertaking the intended act.

56. Put differently, an Applicant like the one before the Honourable court, cannot take it upon himself and file the impugned pleadings, without leave of the court and in utter disregard of the Rules of procedure and thereafter, approach the Honourable court and be heard to say; I have filed it without leave, but I want you to validate it and make it right.

57. Such an approach is contrary to and in contravention of the established and hackneyed position of the law. In any event, it is inimical to the Rule of law; and if allowed, would invited chaos and anarchy in the general administration of Justice, insofar as Parties and their advocates would be at liberty to do as they please.

58. In this respect, I beg to take cognizance of the provisions of Order 50 Rule 6 of the Civil Procedure Rules,2010, which underlines and underscores the process which a Party seeking to file a pleading or do an act, for which time has lapsed, has to comply with.

59. For coherence, the provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010, provides as hereunder;

> 'Power to enlarge time [Order 50, rule 6.]
>
> Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.'

60. My understanding of the foregoing rule, drives me to the conclusion that the application for leave to file the impugned pleading or to do a particular act, which was not done within timeline, must precede the filing of the impugned pleading.

61. Additionally, it is also incumbent upon the Party filing of the requisite application to pursue and obtain the requisite order (Leave) of the Honourable court, before doing the impugned act or filing the intended pleading.

62. Clearly, the converse has not been legislated.

63. Furthermore, I wish to add that the issue as to whether a litigant/party can file a pleading or document out of time and thereafter seek to invite the Honourable court to validate same, has since received Judicial pronouncement and effective determination by the apex court.

64. In the case of *Nicolas Kiptoo Arap Salat versus IEBC & 6 Others, Civil Application No 16 of 2014 (2014)eKLR*, the Supreme Court of Kenya stated and observed as hereunder;

> ' What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.
>
> By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.
>
> To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling

renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it.

65. Need I say more. In my humble view, the answer to the invitation by the Applicant to deem the amended Plaint dated January 27, 2023, as duly filed is well provided for and articulated in the decision (supra).

66. Clearly, the impugned amended Plaint which was filed albeit, without Leave and presumptively on the basis that the Honourable court, will no doubt, t validate same is a nullity in law.

67. In the premises, the impugned document, namely, the amended Plaint dated the January 27, 2023, be and is hereby struck out and expunged from the record of the Honourable court.

Issue Number 2- Whether the Plaintiff/Applicant has established a sufficient basis to warrant the grant of Leave to amend the Plaint in the manner sought.

68. It is common ground that the Plaintiff/Applicant herein had hitherto sought for and obtained leave to file an amended Plaint. However, it is also not denied that the amended Plaint was never filed in line with the directions of the Honourable court.

69. Notwithstanding the foregoing, the Applicant has returned before the Honourable court vide the current application wherein same has, inter-alia, sought for Leave to amend the Plaint and introduce additional Parties and further reliefs.

70. Furthermore, the Applicant herein has endeavored to and explained the reasons why the amended Plaint was never filed in line with the Leave which was hitherto granted.

71. In addition, learned counsel for the Applicant has submitted that the intended amendment, which is sought, will bring forth all the Parties affected by the subject matter and also implead all the issues in controversy and thus enable the Honourable court to reach an effective determination once and for all.

72. In any event, learned counsel for the Applicant has also submitted that unless the leave sought is granted and the Plaintiff/Applicant is allowed to file the requisite amended Plaint, the Applicant would be unduly prejudiced and deprived of an opportunity to canvass and ventilate all his claims before the Honourable court.

73. Conversely, learned counsel for the Applicant has further submitted that the Defendants/Respondents herein shall not be prejudiced and/or affected, if the Leave to amend is granted. In any event, counsel has added that the Respondents shall be at liberty to file and serve amended pleadings and further documents, if any.

74. Other than the foregoing, it was also pointed out that it is trite and established law that Leave to amend, ought to be granted freely, particularly, in situations/circumstances where same is sought prior to and before the commencement of the hearing.

75. In any event, I must point out that in the course of their response to the subject application, none of the Respondents alluded or adverted to any prejudice that may arise or accrue, if Leave to amend the Plaint is granted to the Plaintiff/Applicant.

76. Be that as it may, I am also alive to the fact that the Plaintiff/Applicant had hitherto been granted leave to amend which was neither utilized nor appropriated. However, the question that does arise is whether the none utilization of the previous leave should act as bar to further granting latitude or opportunity to the Plaintiff to amend.

77. Better still, the ancillary question to be answered is whether the blunder, culminating into the non-filing of the amended Plaint, in terms of the leave hitherto granted ought to deprive the Applicant of a Constitutional right to ventilate the entirety of his claim before the Honourable court.

78. My answer to the questions alluded to in the preceding paragraphs emanates and flows from the holding in the case of *Philip Keipto Chemwolo & another versus Augustine Kubende [1986] eKLR*, where the Honourable Court stated and observed as hereunder;

> ' Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.'

79. Furthermore as pertains amendments of pleadings, there is no gainsaying that the applicable legal and Jurisprudential position has been established and spoken to. In this regard, one aspect that is common and omnipresent, is that amendments ought to be freely allowed particularly, if same, has been sought for prior to and before the commencement of formal hearing.

80. Clearly and in respect of the instant matter, the formal hearing is yet to begin. Consequently, it is worthy to state that the disputants/parties to the subject matter can very well remedy their respective situation(s) by filing further/additional pleadings and documents.

81. To underscore the legal principle applicable to amendments of pleadings, it is appropriate to reiterate the holding of the Court of Appeal in the case of *Central Bank of Kenya versus Trust Bank Ltd (in liquidation) (2000)eKLR*, where the Court of Appeal stated and observed as hereunder;

> ' The settled rule with regard to amendment of pleadings has been concisely stated in Vol 2, 6th Ed at P 2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:
>
> 'That a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.
>
> And at page 2248, they continue to say that an amendment merely clarifying the position put forward in the plaint or written statement of defence must be allowed.'

82. First forward, the foregoing position pertaining to amendment of pleadings and the relevant circumstances/ ingredients to be taken into account, was re-visited by the Court of Appeal in the case

of *Elijah Kipng'eno Arap Bii versus Kenya Commercial Bank (2013)eKLR*, where the Court stated and held as hereunder;

> ' The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs First National Bank of Chicago, Civil Appeal No 149 of 1991 as follows:-
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> 'The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.'

83. In my humble view, the issues that are intended to be captured in the intended amended Plaint, inter-alia, the joinder of additional Parties and reliefs, premise and provide a sufficient basis to warrant the grant of leave to amend.

84. Furthermore, it is not lost on this Honourable court that if the leave sought is declined, then there is a likelihood of the Plaintiff/Applicant generating and filing a multiplicity and a plethora of suits, (sic) to ventilate the aspects, which will have been precluded on the basis of the refusal of leave to amend.

85. In this regard, the resultant situation would culminate into the Honourable court being flooded with separate and distinct suits, which could very well have formed segments of one particular/composite suit, to be heard and determined at one go, subject to amendments.

86. Finally, it is also worthy to reiterate that none of the Respondents alluded to or pointed out any prejudice or detriment, that may be suffered and in any event, which cannot be atoned for or compensated by way of payment of costs.

87. In a nutshell, I am persuaded that sufficient basis has been laid out to warrant the exercise of discretion to and in favor of the Plaintiff/Applicant, to facilitate the filing of the intended amended Plaint, for purposes of impleading the additional claims/reliefs, as envisaged.

Issue Number 3 Whether the Plaintiff/Applicant has established and met the threshold for Lifting/ Piercing of the Corporate veil of the 1st Defendant/Respondent.

88. Other than the issue of Leave to amend the Plaint by and on behalf of the Plaintiff/Applicant, there is also the limb of the application that pertains to and concerns the lifting or piercing of the veil of the 1st Defendant/Respondent herein.

89. In this respect, the Applicant has contended that the Directors of the 1st Defendant/Respondent dealt with him (Plaintiff/Applicant), in such a manner that connotes that same (read the directors of the

1st Defendant/Respondent) were using the 1st Defendant/Respondent as a vehicle for purposes of committing or perpetuating fraud and other criminal activities.

90. Furthermore, learned counsel for the Applicant also submitted that at the time that the 1st Defendant/ Respondent entered into the sale agreement and pretended to be capable of transferring the rights and interests attendant to the suit property, the suit property was indeed charged to and in favor of the 2nd Defendant/Respondent.

91. In addition, counsel for the Applicant has further submitted that despite knowing and being privy to the fact that the suit property was charged to and in favor of the 2nd Defendant/Respondent, the Directors of the 1st Defendant/Respondent, who collected the purchase price/consideration, did not transmit the purchase price to the 2nd Defendant to facilitate partial discharge of the suit property.

92. Other than the foregoing, counsel for the Applicant also invited the Honourable court to take into account that the reason why the 1st Defendant/Respondent has not been able to effectively comply with her obligations pertaining to the charge with the 2nd Defendant/Respondent is because of her Directors were comingling the funds which were collected from the sale of the suit property.

93. In this regard, Learned Counsel pointed out that comingling of funds provides a legitimate basis upon which the veil of a company can be pierced and/ or lifted.

94. On her part, counsel for the 1st Defendant/Respondent submitted and contended that the Applicant herein has neither established nor demonstrated the requisite exceptions to warrant the lifting of the veil.

95. Furthermore, learned counsel for the 1st Defendant/Respondent has also submitted that it is not enough for the Plaintiff/Applicant to make allegation pertaining to fraud and commissions of criminal activities, including comingling of funds, without tendering cogent evidence before the Honourable court.

96. In any event, learned counsel also contended that the lifting of veil is an exceptional situation that can only be adverted to, if cogent evidence has been pleaded and placed before the Honourable court. However, counsel reiterated that in respect of the instant matter, no evidence or at all has been placed before the Honourable court.

97. Before making a determination as pertains to lifting or piercing of the veil of the 1st Defendant/ Respondent, it is appropriate to consider previous decisions, wherein the issue beforehand has been adverted to, calibrated upon and addressed.

98. In this respect, I wish to advert to and take cognizance of the holding in the case of *Multi-Choice Kenya Ltd versus Mainkam Ltd & Another (2013)eKLR*, where the Hon Judge expressed himself as hereunder;

> ' 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) AC 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose 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.'

99. In the case of In *Kolaba Enterprise Ltd versus Shamsudin Hussein Varvani & Anor(2014) eKLR*, the Honourable Judge whilst addressing and indeed dealing circumstances where the veil of a company can be pierced/lifted stated and observed as hereunder;

> ' It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of Salomon & Co Ltd V Salomon [1897] AC 22 HL that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved.
>
> Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.'

100. Furthermore, the issue of lifting/ piercing of the veil of a company or body corporate was also elaborated upon by the Court in the case of In *China Wu Yi Company Ltd versus Ederman Property Ltd & 2 Others (2013) eKLR*, where it was stated as follows:

> ' Further, the 2nd and 3rd Defendants maintained that in accordance with the principles expounded in the well-known case of Saloman v Saloman & Co Ltd (1897) A C 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff.To this end, the Court's attention was drawn to the finding of Ringera J; (as he then was) in Corporate Insurance Co Ltd versus Savemax Insurance Brokers Ltd & Anor HCCC No 125 of 2002 (unreported) when he stated:
>
> > 'The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company,'

101. From the decisions cited and alluded to in the preceding paragraphs, the golden thread that emerges and runs therefrom is as hereunder;

   i. The separate corporate personality of a company ought to be duly protected and vindicated by all and sundry.

   ii. However, the lifting and piercing of the corporate veil ought to be undertaken with necessary caution and circumspection.

   iii. That before the veil of a company can be pierced and lifted, the Applicant seeking for such an order must demonstrate exceptional circumstances to warrant the piercing of the veil.

iv. In any event, it is incumbent upon the Applicant to inter-alia exhibit that the company was constituted and used as a vehicle for committing fraud and other activities.

v. That the inability of a company to pay her debts and by extension insolvency is not a basis for lifting of the veil.

102. Be that as it may, what is also evident is that despite a company forming or constituting a separate corporate personality, such personality can be pierced, where sufficient cause or basis is established and duly demonstrated.

103. Notwithstanding the foregoing, the lifting and piercing of the Corporate veil of the Company, must be undertaken upon a delicate balance of the conflicting circumstances and situations and in any event, on a case by case basis.

104. Taking into account the foregoing observations and being duly nourished by the holdings and pronouncements hitherto made on the question of lifting of the veil, I come to the conclusion that the totality of the issues beforehand, warrant the lifting of the veil of the 1st Defendant/Respondent.

105. In my humble view, the fact that the directors of the 1st Defendant/Respondent engaged in the dealings with the Plaintiff/Applicant herein and personally collected the purchase price, but failed to transmit same to the 2nd Defendant/Respondent, with a view to procuring partial discharge, connotes commission of fraud against the Plaintiff/Applicant.

106. Furthermore, at the point in time when the 1st Defendant/Respondent, through her directors, dealt with the Plaintiff/Applicant, same knew that the suit property was charged to the 2nd Defendant/Respondent, but nevertheless, did not deem it appropriate to procure the requisite consent in terms of Section 88 of the *Land Act*, 2012.

107. In my humble view, the manner in which the directors of the 1st Defendant/Respondent dealt with the Plaintiff/Applicant herein, demonstrated that same were merely intent on extracting and by extension extorting, the money from the Plaintiff/Applicant, whilst knowing that the suit property was not available for sale or alienation, in the manner purported.

108. To surmise, I come to the conclusion that sufficient basis has been established, laid out and demonstrated to warrant the lifting of the veil of the 1st Defendant/Respondent and thereby allowing the named Directors thereof to be joined and impleaded in the subject suit.

Final Disposition

109. Having dealt with and addressed the itemized issues, which were highlighted in the body of the Ruling herein, I come to the conclusion that the Application beforehand is substantially meritorious.

110. In any event, I bear in mind that the leave sought herein, for purposes of amendment, would no doubt, allow all the issues in dispute to be pleaded and brought under one roof, with a view to facilitating ventilation thereof in an orderly manner, and to mitigate wastage of precious court time.

111. Additionally, the granting of the instant application accords with the overriding objectives of the Honourable Court as enshrined vide the provisions of Section 1A and 1B of The *Civil Procedure Act*, Chapter 21 Laws of Kenya.

112. Consequently and in the premises, the Application dated the January 27, 2023 be and is hereby allowed on the following terms;

i. The Amended Plaint dated the January 27, 2023 and which was filed in court, albeit without Leave, be and is hereby struck out and expunged from the court record.

ii. Nevertheless, the Plaintiff/Applicant be and is hereby granted Leave to file and serve an amended Plaint and same to be filed and served within 14 days from the date herein.

iii. The Defendants/Respondents shall be at liberty to file and serve amended Statement of Defense, if any, and same to be filed and served within 14 days from the date of service of the amended Plaint.

iv. The Plaintiff/Applicant shall be at liberty to file and serve a Reply to the amended Statement of Defense and same to be filed with 14 days from the date of service by the Defendants/ Respondents.

v. The corporate veil of the 1st Defendant/Respondent be and is hereby lifted and/or pierced and the names of the Directors thereof shall be joined and impleaded as additional/co-Defendants in the matter.

vi. The said Directors, who have been joined and impleaded as co-Defendants shall be at liberty to enter appearance and file the requisite pleadings, albeit within 14 days from the date of service.

vii. The Parties herein shall be at liberty to file and exchange further/additional bundle of documents and witness statements, if any and same shall be filed and exchanged within 30 days from the close of pleadings.

viii. Costs of the application shall abide the cause.

113. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Miller for the Plaintiff/Applicant

Mr. Busaidi for the 1st Defendant/Respondent

Mr. Gathaiya for the 2nd Defendant/Respondent

Mr. Antony Mbugua for the 3rd Defendant/Respondent