REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCOMM/E456 OF 2020

WOOLWICH PROPERTIES (K) LIMITED.....…….PLAINTIFF

VERSUS

THE NEW KENYA PLANTERS

CO-OPERATIVE UNION COMPANY LIMITED……DEFENDANT

RULING

INTRODUCTION

1. In order to put the applicant's application dated **5th** November 2020 into a proper perspective, it is important to bring into view, albeit briefly, the factual matrix. In this regard, a summary of the applicant's case as enumerated in the Plaint is necessary.

2. Woolwich Properties (K) Limited, (herein after referred to as the applicant) claims that vide a lease agreement dated **1st** October 2015, the Respondent leased to it office space measuring approximately **120,000** square feet located in the building erected on **LR No. 209/8658**, which lease was registered at the land's registry at Nairobi ion **22nd** July 2016.

3. The applicant claims that it was an implied term of the said lease and its legitimate expectation that the Respondent would formalize the lease but to date it has neglected or refused to do so. It states that the initial lease for a period of **15** years contemplated renovation, reconstruction and refurbishing of the premises into a commercial property comprising of a modern shopping centre and a market. It states that it had secured a financier for the project, but owing to the ensuing uncertainty attributed to the Respondent, the financier is unable to commit further funds.

4. The applicant states that following further negotiations culminating in a letter dated **27th** August 2018, the Respondent approved a variation of the lease and extended it for a period of 25 years; that it granted the applicant a grace period of **2** years to undertake re-construction; and added an additional **20,000** square feet which was later revised to **67,000** square feet subject to availability of space. The applicant avers that in the said letter, the Respondent demanded a deposit equivalent to **6** months' rent by **5th** October 2018.

5. The applicant avers that its management subsequently changed and it invited its new management to take over the premises and commence the construction. It also states that the Respondent assured it that it would grant it additional space and it asked it to clear the outstanding balances. It states that it paid **Kshs. 13,000,000/=** being **6** months' rent and it under took to pay outstanding rates of **Kshs. 2,154,750/=**. Further, it states that on **18th** February 2019, it paid **Kshs, 4,300,000/=** for rates recoverable from the rent and vide a letter dated **21st** February 2019, the Respondent requested it to pay the above sum of **Kshs. 2,154,750/=** which it did.

6. The applicant avers that relying on the said lease, it engaged consultants and professionals to refurbish the premises as shown by the agreement dated **3rd** June 2020 between itself and Structural Construction International Limited, and, that, it incurred costs obtaining the necessary approvals, clearances, construction permit(s), approvals from the Nairobi City County Government, and the National Environment and Management. Additionally, it claims that it contracted engineers and paid them **Kshs. 50,000/=**, it incurred legal costs and staff salaries, and that, third-party stake holders have invested **Kshs. 250,000,000/=** expecting to get value for their investments. As a result of the foregoing, it states that it risks being sued for breach of contract. It also states that despite paying a total sum of **Kshs. 38,037,000/=** to the Respondent, the Respondent has refused to formalize its lease. Further, the applicant states that the total estimated cost of the project is **Kshs. 646,000,0000/=** while the estimated gross income for the term of the lease is **Kshs. 372,448,800/=.** It avers that the Respondent breached the agreement and committed acts of fraud against it.

7. As a consequence, the applicant prays for judgment against the Respondent for: -

a. An order of specific performance of the lease dated 1st October 2015 compelling the defendant to hand over to the Plaintiff the suit premises measuring approximately 187,000 square feet erected on all that parcel of land known as LR No. 209/8658 situated in Nairobi.

b. A permanent order of injunction restraining the defendant whether by themselves, assigns, servants and or agents or any person claiming under them from selling, disposing, leasing other than to the applicant, charging and or mortgaging, transferring or dealing with the suit premises measuring approximately 187,000 square feet and erected on all that parcel of land known as LR No. 209/8658 in any manner whatsoever prejudicial and or detrimental to the applicant's legitimate expectations or interest as embodied in the agreement to lease.

In the alternative

c. A declaration that having failed to yield the suit premises to the Plaintiff as embodied in the agreement of lease, the defendant is in breach of the implied and or express conditions of the lease.

d. A declaration that the defendant is liable to pay to the Plaintiff all damages and or losses arising and or incidental to the defendant's breach of the implied and or express conditions of the agreement to lease.

e. An order directing the defendant to pay the following sums to the Plaintiff: -

i. Expenses incurred by the Plaintiff in furtherance of the lease together with interests at the applicable commercial rates.

ii. Loss of the projected profit together with interests.

f. Costs of the suit and such other and further relief as the honourable court may deem just and fit to grant.

The application

8. Contemporaneous with the plaint, the applicant filed a Notice of Motion seeking: -

a. Spent.

b. Pending inter partes hearing and determination of this application a temporary injunction do issue restraining the Respondent whether by themselves, assigns, servants and or agents or any person claiming under them from selling, disposing, leasing other than to the applicant, charging and or mortgaging , transferring or dealing with the suit premises measuring approximately 187,000 square feet and erected on all that parcel of land known as LR No. 209/8658 in any manner whatsoever prejudicial and or detrimental to the applicant's legitimate expectations or interest as embodied in the agreement to lease.

c. Pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the Respondent whether by themselves, assigns, servants and or agents or any person claiming under them from selling, disposing, leasing other than to the applicant, charging and or mortgaging , transferring or dealing with the suit premises measuring approximately 187,000 square feet and erected on all that parcel of land known as LR No. 209/8658 in any manner whatsoever prejudicial and or detrimental to the applicant's legitimate expectations or interest as embodied in the agreement to lease.

d. Pending inter partes hearing and determination of this application and suit, the Respondent be restrained from terminating and or in any way whatsoever from frustrating and or interfering with the lease to the applicant over the suit premises measuring approximately 187,000 square feet and erected on all that parcel of land known as LR No. 209/8658 situate in Nairobi dated 1st October 2015 and registered at the Nairobi Central Lands Registry on 22nd July 2016.

e. Costs of this application be borne by the Respondent.

9. The application is founded on the grounds enumerated on the face of the application and the annexed affidavit of Arale Hassan Ahmed, a director of the applicant. A reading of the grounds on the face of the application and the said affidavit show that they are substantially if not wholly a replica of the averments in the plaint, hence it will serve no utilitarian value to rehash them here. It will suffice to state that the applicant states that it will suffer an imminent loss, that it has a *prima facie* case with a probability of success, and it risks suffering irreparable loss which cannot be compensated by way of damages.

Respondent's Replying affidavit

10. Angeline Ndambuki, the Respondent's acting Manager swore the Replying affidavit dated **19th** November 2020 in opposition to the application. She averred that the Plaintiff's suit is incompetent, defective, bad in law and it does not disclose a case against the Respondent.

11. She averred that the applicant's case stands on an agreement between itself and the defunct Kenya Planters Co-operative Union Limited (KPCU Ltd) and not the Respondent, hence the Respondent is not privy to the said contract. She deposed that the Respondent was not in existence in 2018 when the alleged contract was signed, and that the defunct KPCU Ltd mismanaged it affairs as a result of which the

Commissioner for Co-operative Development appointed liquidators under the provisions of the Co-operative Societies Act [1] who took over the affairs of the defunct union.

12. She deposed that the applicant was not paying rent despite having leased and rented the premises to other persons, and that from the schedule of creditors, the applicant is shown as having an outstanding debt of **Kshs. 90,000,000/=** which amount the liquidators are yet to recover; hence, it has no moral authority to seek an equitable relief. She deposed that the applicant's alleged sum of **Kshs. 38,037,000/=** was cooked up to hoodwink the court, while the claim that the applicant paid **Kshs. 17,000,000/=** as goodwill is incredible and the allegation that it paid **Kshs. 646,000,000/=** is unrealistic.

13. She deposed that the liquidators who assumed office in 2019 have not approved or given authority to the applicant to engage in such a project or investment and that the agreement is alleged to have been executed at a time when the defunct KPCU Ltd was in a financial and management crisis and it is doubtful whether there was a proper meeting of directors from 2015 up to the time KPCU Ltd was put under liquidation. She deposed that with the appointment of the liquidator, all engagements, undertakings and dealings with the assets of the KPCU Ltd in liquidation stopped unless with the express consent and permission of the liquidator. She also deposed that the alleged agreement with consultants does not alter the said legal position nor does it better its claim.

14. M/s Ndambuki deposed that the applicant has not demonstrated a case with chances of success to warrant the orders sought, and that, the alleged undertaking with a financier will only serve to complicate the position. Also, she deposed that the lease agreement has a termination clause subject to a **6** months' prior notice; that the document granting the lease is clear on the intended use of the premises, and its terms do not envisage such drastic alterations of the building and the structures contemplated in the amended draft lease.

15. She deposed that the applicant's original shareholders only paid **Kshs. 12,280,000/=,** equivalent to **6** months' rent, hence, they did not comply with terms of the lease, which renders the purported transfer of the lease a nullity.

16. Additionally, she deposed that the applicant is among the creditors of the defunct Union having paid only **Ksh. 12,280,000/=** as deposit for the period **1st** October 2015 and thereafter no other payment was made save for the unauthenticated sum of **Kshs. 6,300,000/=** in respect of rates and legal fees allegedly paid on behalf of the Union. She deposed that the alleged goodwill and transfer of shares amounting to **Kshs. 17,00,000/=** cannot be associated with rent payment and that the applicant is in rent arrears in excess of **Kshs. 90,000,000/=.** She deposed that if the applicant is unable to pay the said sum, it's not clear how it will pay for the additional **67,000** square feet.

17. M/s Ndambuki also averred that no consent was granted to the applicant to construct the alleged ultra-modern city, and in any event, the Permanent Secretary, Ministry of Finance wrote prohibiting any developments near the railway line after which the Nairobi City County prohibited any developments within the said area which includes the alleged **67,000** square feet. Lastly, she deposed that there are no board minutes to support the alleged lease agreement.

Applicant's further affidavit

18. Mr. Arale Hassan Ahmed swore the further affidavit dated **1st** December 2020 essentially disputing the contents of the defendant's Replying affidavit. He averred that the defendant deliberately refused to sign the agreement. Also, he deposed that the defendant took over the affairs of its successor, and that, no liquidation procedure or insolvency ensued rather it was a restructuring and rebranding to make the entity viable and no assets of the defunct union were disposed.

19. He deposed that the property was leased with the approval of the Kenya Commercial Bank Ltd. On the alleged rent arrears, he deposed that the applicant was given a grace period of **2** years.

The applicant's advocates submissions

20. Mr. Olaha, the applicant's counsel adopted the applicant's affidavit in support of the application and the supplementary affidavit. He argued that relying on the lease, the applicant undertook the following steps, namely; it paid **6** months' rent deposit; it paid rates which were to be off set from the rent; it entered into agreements for the design and refurbishment of the project with third parties; it incurred costs as particularized in the affidavit and in the Plaint; it obtained the necessary approvals, clearances and consents from the relevant authorities; and it received rent deposits from sub-tenants.

21. He urged the court to stop the defendant from denying the existence of the lease which was properly signed by the KPCU Ltd. He argued that the defendant cannot absorb itself from the obligations under the lease because it's a body with perpetual succession. He argued that no liquidation took place under the Insolvency Act,[2] but what happened was mere restructuring of the old board by converting it into a public company.

22. Mr. Olaha submitted that if at all there was liquidation, the assets of KPCU Ltd could have been sold, but nothing of that sort happened. He argued that the government injected money to revive the defunct KPCU Ltd, which cannot release the Respondent from their obligations under the lease. He argued that the applicant paid a loan to Kenya Commercial Bank Ltd in furtherance of its obligations under the lease hence the Respondent cannot distance itself from the lease.

23. Mr. Olaha submitted that the applicant has a legitimate expectation that the Respondent will honour their part of the agreement; that the applicant has demonstrated a *prima facie* case with a likelihood of success; and that, its case is not frivolous. He maintained that the applicant had taken steps in furtherance of the lease and that its rights have been violated. He urged the court to protect the applicant's rights and submitted that the applicant risks suffering irreparable loss which cannot be compensated by way of damages. He cited binding legal agreements entered with third parties and the colossal resources deployed in the project and argued that the said expenditure cannot be remedied.

24. He urged the court, in the event of doubt to find that the balance of convenience lies in favour of granting the injunction because of the greater harm the applicant is likely to suffer if the injunction is refused. He urged the court to maintain the *status quo*. He argued that even though the agreement has a termination clause, from the Respondent's conduct, it can be implied that it wants to terminate the lease. He urged the court to find that the applicant has satisfied the tests in *Giella v Cassman Brown* and allow the application with costs.

Respondent' advocates submissions

25. Mr. Muriuki, the defendant's counsel adopted the defendant's Replying affidavit dated **19th** November 2020 and submitted that there is a liquidation in force under the Cooperative Societies Act.[3] He submitted that under sections **62** to **68** of the Act the liquidators are necessary parties to this case. He referred to the Gazette Notice appointing the liquidators and argued that the effect of the Gazette Notice is that the society stands dissolved.

26. Responding to Mr. Olaha's submission that no liquidation has taken place under the Insolvency Act,[4] Mr. Muriuki submitted that the provisions of the Insolvency Act[5] cannot override the provisions of the Co-operative Societies Act.[6] He argued that liquidation under the Co-operative Societies Act[7] entails gathering assets and liabilities after which the liquidators prepare a report and scheme of distribution and the assets are offered for sale. Mr. Muriuki submitted that the defendant is a State Cooperation and that the applicant wants to entangle the defendant in a mess created by the Board of the defunct KPCU Ltd.

27. Mr. Muriuki submitted that the new Board is not privy to the contract made by the defunct KPCU Ltd, and that the applicant ought to enjoin the liquidator to this case. He submitted that there is a disconnect between the lease signed in 2015 and the agreement the Respondent is being asked to sign. He argued that the 2015 agreement provided for refurbishing and using as opposed to a total overhaul provided in the new agreement.

28. He argued that the applicant admits that it is not in possession, that it has not paid rent from 2015 but only paid a refundable 6 months' rent deposit. As such, he submitted that the applicant is in breach of the said lease, hence it is not entitled to the orders sought. He described the **2** years grace period as suspect and questioned the applicant's documents covering the period 2018 to 2020 arguing that in 2018, KPCU Ltd was under the receivership of the Kenya Commercial Bank Ltd, and the directors had no role to play at all. He questioned the absence of Board minutes granting the lease. He argued that the applicant relied on letters from a person alleging to be the Managing Director, yet such actions led to the removal of the management and placing the KPCU Ltd under liquidation.

29. Mr. Muriuki argued that after the approval of the liquidation report by the Commissioner and the Cabinet Secretary, it will be submitted to the government which desires to revive the coffee industry and any claims will be settled through the liquidation process. He submitted that the applicant has not presented a credible case to warrant the orders sought and in any event the Gazette Notice annexed to the Replying affidavit shows that the intended developments are prohibited. He submitted that to obtain the orders sought the said Gazette Notice must be quashed. He also submitted that the applicant has not come to court with clean hands and that they are listed as creditors to the KPCU Ltd. Lastly, counsel submitted that no notice to terminate the lease has been served, hence, the instant application is pre-mature.

Applicant's Advocates submissions in reply

30. Mr. Olaha submitted that the defendant has not yet handed over the property to the applicant, hence, no rent is payable. He argued that the original directors sold the company, but the same directors remained, which does not relief the Respondent from its obligations. Lastly, he submitted that there is nothing to show that the applicant is a creditor of the defunct company.

Determination

31. A convenient starting point is to state that the purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the *status quo* pending the determination of the parties' rights. In granting such an injunction, the court is concerned both with: (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

32. The jurisdiction to grant injunctions is discretionary and very wide, but it does not confer the court with an unlimited power to grant injunctive relief. Regard must be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights. The decision of *American Cyanamid Co. v Ethicon Limited* [8] established the test in the English courts in deciding if an injunction should be granted. The test has three elements: (a) there must be a serious/fair issue to be tried, (b) damages are not an adequate remedy, and (c) the balance of convenience lies in favour of granting or refusing the application.

33. The onus is on the applicant to satisfy the court that it should grant an injunction. The jurisdiction to grant an injunction may be exercised "if it is just and convenient to do so." In *Giella v Cassman Brown and Co. Ltd,*[9] the court set out the principles for Interlocutory Injunctions. The Canadian case of *R. J. R. Macdonald v Canada (Attorney General)*[10] enumerated a three-part test for granting injunction. These are: - (a) *Is there a serious issue to be tried? (b) Will the applicant suffer irreparable harm if the injunction is not granted? (c) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").*

34. Platt JA in *Mbuthia v Jimba Credit Corporation Ltd*[11] echoed the "serious question to be tried" test enunciated by Lord Diplock in *American Cyanamid*[12] and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The seriousness of the question, like the strength of the probability, depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks.

35. In *Films Rover International Ltd v Cannon Film Sales Ltd,*[13] Lord Hoffman stated that in determining whether to grant an interlocutory injunction, a court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong," in the sense of granting an injunction to a party who fails to establish his or her right at trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds or would succeed at trial. In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant.

36. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a "sufficient likelihood of success." The plaintiff's prospects of succeeding at trial will always be relevant "as a necessary part of deciding whether there is a serious question to be tried" and as an almost invariable factor in evaluating the balance of convenience. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms – carries the lower risk of injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.

37. The *prima facie* case test represents the law in relation to the grant of interlocutory injunctions. A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending the trial rather than demonstrating that it was more probable than not that the plaintiff would succeed at trial. In *Mbuthia v Jimba Credit Corporation Ltd* (supra) Platt JA stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only *needs to weigh the relative strength of the party's cases.*

38. The following excerpt from *Interlocutory Injunctions: Practical Considerations"*[14]is relevant: -

> *"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald v Canada (Attorney General)*[15]*"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."*[16] *It is usually a brief examination of the facts and law.*
>
> *In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a stronger prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."*

39. I will first address the question whether the applicant has demonstrated a *prima facie* case with a likelihood of success. The applicant's case is anchored on a lease agreement signed between itself and the defunct KPCU Ltd. As Plat JA stated (supra), the court is not required to make final findings of contested facts and law but only *needs to weigh the relative strength of the party's cases.*

40. The Respondent states that it is not privy to the lease agreement. It states that the agreement was signed by the defunct KPCU Ltd. Whether or not the Respondent is bound by the said agreement will be an issue for determination at the trial. Additionally, the Respondent states that there are no Board Minutes to support the alleged agreement. This is a pertinent issue that will require a serious interrogation at the main hearing.

41. Annexed to the Respondent's Replying Affidavit is a Gazette Notice appointing liquidators of KPCU Ltd. This calls for an examination of the relevant provisions of the Co-operative Societies Act.[17] Section **65** of the Act provides for the appointment of a liquidator as follows: -

> *Where the registration of a co-operative society is cancelled under section 61 or 62, the Commissioner may appoint one or more persons to be liquidator or liquidators of that society (hereinafter referred to as the liquidator) and all the property of such society shall vest in the liquidator from the date upon which the order of cancellation takes effect.*

42. Section **61** of the Act provides the procedure for dissolution of a Co-operative Society while section **62** provides for cancellation of registration of a Co-operative Society. Section **63** of the Act provides that "where the registration of a Co-operative Society is cancelled, the society shall cease to exist as a corporate body from the date the order takes effect."

43. The import of the above section is that a Co-operative Society ceases to exist once its registration certificate is cancelled. Section **65** of the Act provides for the appointment of a liquidator: -

> *Where the registration of a co-operative society is cancelled under section 61 or 62, the Commissioner may appoint one or more persons to be liquidator or liquidators of that society (hereinafter referred to as the liquidator) and all the property of such society shall vest in the liquidator from the date upon which the order of cancellation takes effect.*

44. A reading of the above section shows that the property of the society vests in the liquidator from the date upon which the order of cancellation takes effect. The Act confers broad powers to the liquidator. These powers are stipulated in section **66** of the Act. Relevant to this application is Section **66 (1) (b)** which provides its functions include: -

> *(b) to institute and defend suits and other legal proceedings by, and on behalf of, the society in his own name or office, and to appear before the Tribunal as litigant in person on behalf of the society;*

45. The applicant did not enjoin the liquidator in these proceedings. Mr. Olaha's argument is that what happened to KPCU Ltd was "restructuring" and "refurbishment." At this stage I cannot delve into merits, but as Plat JA said my duty is to weigh the strength of the respective party's case. It will suffice to state that the question whether the liquidator is a necessary party to this case is a live question just like the question whether the omission to enjoin the liquidator is fatal. Whether the Respondent has been wrongfully sued is a live issue. All these issues will be determined at the trial.

46. It has been alleged that the applicant fell into rent arrears amounting to **Kshs. 90,000,000/=.** This is a matter of evidence. However, relevant to the issue before me is the fact that the allegation that the applicant is in breach of the same agreement it is standing on to obtain an equitable relief makes it hard for the court to allow an equitable relief. Similarly, the contention that the agreement the applicant stands on is not supported by Board Minutes impinges on the validity of the agreement making hard for the court to find that the applicant has established a *prima facie* case.

47. It has been said that between 2015 to 2018, the KPCU Ltd was under a receiver manager, namely, the Kenya Commercial Bank Limited, hence there was no Board of directors. This position if true will impact the various decisions/steps relied upon by the applicant allegedly taken during the said period. This raises doubts on the existence of a *prima facie* case. Closely tied to the foregoing issue is the argument that there is a disconnect between the 2015 agreement and the 2018 agreement. Simply put, the 2018 the Respondent is being sked to honour is under attack. This makes it hard for the court to find a *prima facie* case is founded on the said contract.

48. It has been said that the applicant is not in possession of the premises. The parties did not elaborate on the import of this position. The import of the applicant not being in possession (if it's true) means that the applicant is seeking a mandatory injunction. The test whether to grant a mandatory injunction or not is stated in best explained in *Halsbury's Laws of England*,[18] as follows: -

> *"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application."*

49. In *Kenya Breweries Ltd & Another v Washington O. Okeyo*[19] the Court of Appeal quoted with approval an English decision in the case of *Locabail International Finance Ltd vs Agroexport and others*[20] where it was stated :-*"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction."*

50. In *Nation Media Group & 2 others v John Harun Mwau*[21] the Court of Appeal stated that :-*"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."*

51. From the above jurisprudence, the following principles are discernible. *One,* a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. *Two,* that the applicant has a good case with a likelihood of success. The facts before me do not satisfy the tests for granting a mandatory injunction. Similarly, the applicant has not demonstrated a *prima facie* case with a likelihood of success.

52. The applicant's counsel submitted that the defunct KPCU Ltd has not been liquidated under the Insolvency Act[22] or the Companies Act.[23]This argument is attractive. But it collapses not on one but on several fronts. *First,* the Co-operative Societies Act[24] has provisions relating to liquidation. *Second,* a Gazette Notice was issued appointing a liquidator. *Third,* Section **61** of the Act provides for procedure for dissolution of a Co-operative Society, Section **62** provides for cancellation of registration while Section **63** of the Act provides for the effects of cancellation. *Fourth,* section **64** provides for the application of Companies Act.[25] It provides that the sections of the Companies Act[26] specified in Part **I** of the Schedule to the Act, are modified in accordance with Part **II** of that Schedule, and shall apply *mutatis mutandis* in relation to the winding-up of a co-operative society as they apply to that of a company registered under that Act. The Co-operative Societies Act defines "winding up" to mean all proceedings subsequent to the dissolution of a cooperative society. My reading of the said definition leaves no doubt as to when the Companies Act can apply.

53. The other test is whether the applicant has demonstrated irreparable harm. The following excerpt from *Halsbury's Laws of England*[27] explains irreparable harm : -

> *"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"*

54. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[28] **Robert Sharpe**, in *"Injunctions and Specific Performance,"*[29] states that *"irreparable harm has not been given a*

definition of universal application: its meaning takes shape in the context of each particular case." In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be compensated by way of damages.

55. Here is a case where the applicant has particularized in the plaint all the costs it claims to have incurred and provided figures for each item. The applicant carefully enumerated the total cost it has incurred. This means that it is possible to assess or quantify it's a claim in monetary terms in the event of its case succeeding. It has not been shown that there is a real risk that the loss may never be recovered. Differently put, the applicant's claim can be compensated by way of damages, hence it cannot suffer irreparable harm.

56. The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.[30] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.[31]

57. The court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If an applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining where the balance on convenience lies.

58. If the court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a *prima facie* case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element. I have carefully applied the foregoing tests to this case. I find that the balance of convenience is not in favour of granting the injunction.

59. An injunction is an equitable remedy, meaning that the judge hearing the application has a discretion in making a decision on whether or not to grant the application. A judge must consider if it is fair and equitable to grant the injunction, taking all of the relevant facts into consideration. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.[32]

60. A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e. statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law. Whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of `discretion' by Lord Mansfield in *R. v Wilkes*[33] that `discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, `but legal and regular.'

Conclusion

61. In view of my analysis of the facts, the law and the conclusions herein above arrived at, it is my finding that the applicant's application dated **5th** December 2020 does not satisfy the tests for granting the orders of injunction sought. Accordingly, I dismiss the said application with costs to the Respondent.

Orders accordingly. Right of appeal

Dated, Signed and Delivered at Nairobi this **12th** of **January** 2021

John M. Mativo

Judge

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[1] Act NO. 12 OF 1997.

[2] Act No. 18 of 2015.

[3] Act NO. 12 OF 1997.

[4] Act No. 18 of 2015.

[5] Ibid

[6] Act NO. 12 OF 1997.

[7] Ibid.

[8] {1975}1 AER 504.

[9] {1973} E A 358.

[10] {1994} 1 S.C.R. 311.

[11] {1988} KLR 1

[12] {1975} AC 396 at 407.

[13] {1987} 1WLR 670 at 680-681.

[14] Steven Mason & McCathy Tetraut, available at www.mccarthy.ca.

[15] Supra

[16] *Dole Food Co. v Nabisco Ltd* {2000}, 8 C.P.R. (4^{TH}) 461, (F.C.T.D.)

[17]Act No. 12 of 1997.

[18] *Vol. 24, 4^{th} Edition, paragraph 948*

[19] {2002} e KLR

[20] {1986} 1 ALLER 901.

[21] {2014} e KLR

[22]Act No. 18 of 2018.

[23] Act No. 17 2015.

[24] Act No. 12 of 1997.

[25] Act No. 17 of 2015.

[26] Ibid.

[27]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[28] Supra note 3.

[29] Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27

[30] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[31] Ibid

[32]See Bosire J in *Njenga v Njenga* {1991} KLR 401

[33] 1770 (98) ER 327.