REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 28 OF 2016

KEMUSALT PACKERS PRODUCTION LIMITED.....APPLICANT/PLAINTIFF

-VERSUS –

DUBAI BANK KENYA LIMITED (IN LIQUIDATION)....1ST RESPONDENT/DEFENDANT

PETER KAHI.....2ND RESPONDENT/DEFENDANT

ANTONY MUTHUSI.....3RD RESPONDENT/DEFENDANT

COUNTER-CLAIM

BETWEEN

DUBAI BANK KENYA LIMITED (In liquidation).....PLAINTIFF

-VERSUS-

KEMUSALT PACKERS PRODUCTION LIMITED.....1ST DEFENDANT

HASSAN ZUBEIDI.....2ND DEFENDANT

CORAM: Hon. Justice Reuben Nyakundi

Rachier & Amollo Advocates LLP for the Applicant

Oraro & Company Advocates for the Respondents

RULING

Introduction

The applicant in this instance is **KemuSalt Packers Production Limited (KemuSalt).** They brought the application dated 1st July 2020 under a certificate of urgency and in the terms of Sections 1A, 1B and 80 of the Civil Procedure Act, Order 6 and 40 of the Civil Procedure Rules 2010, Sections 593, 594 and 595 of the Insolvency Act 2015 for orders that:

> **a. Pending the hearing and determination of this application interpartes, the Honourable court be pleased to issue a mandatory injunction directing the respondents either by themselves, their agents, servants or employees to forthwith cease and desist from running, managing, occupying or in any other way interfering with the applicant's asset LR NO 22138 (GRANT 28851/1) NORTH OF MALINDI, KILIFI COUNTY;**
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> **b. Pending the hearing and determination of this application and the suit, the Honourable court be pleased to issue a mandatory injunction directing the respondents either by themselves, their agents, servants or employees to forthwith cease and desist from running, managing, occupying or in any other way interfering with the applicant's asset LR NO 22138(GRANT 28851/1) NORTH OF MALINDI, KILIFI COUNTY;**

c. The Honourable court be pleased to disqualify the firm of Messrs Oraro and Company Advocates from further acting for any party in this matter;

d. The honourable court be pleased to order that the 1st respondent produces the Original Deed of Assignment of Debenture dated 5th March 2009 for court's inspection;

e. The Honourable court be pleased to direct that the O.C.S. MARERENI POLICE STATION to help enforce these orders;

f. The honourable court be pleased to strikeout and/or stay the Defendants' Counterclaim dated 11th April 2018 as against the applicant;

g. Costs of this application be borne by the Respondents.

The application was supported by the sworn affidavit of **Hussein Saleh Muhamed** Ismail dated 1st July 2020.

When the application came up before the Court on 2nd July 2020, the Court upon perusal issued orders that the matter's pleadings and Pre-Trial Conference had been closed; that there be no more interlocutory matters with respect to the dispute as the case had been scheduled for hearing on the 31st March 2020; that the application be served upon the respondents but the applicant bear in mind the foregoing observations; and that the application to proceed via Digital platform on 9th July 2020.

The respondents filed grounds of opposition dated 8th July 2020 on even date. Additionally, following directions issued by the Court on 16th July 2020, in opposition to the application, a sworn affidavit of **John Masega Ombasa** dated 24th July 2020 was put in by the respondents. The applicant thereafter filed a supplementary affidavit sworn by **Hussein Saleh Muhamed Ismail** dated 5th August 2020.

In further compliance with the Court orders of 16th July 2020, the applicant filed submissions dated 6th August 2020. The respondents in return filed submissions dated 12th August 2020 which the applicant responded to through its submissions dated 27th August 2020.

Procedural History

As a segue into the issues appurtenant to this application, first, a brief reminder of the chequered history of the matter. From the record, it appears that its genesis is a Plaint filed on the 8th November 2016 wherein KemuSalt sought to challenge its placement under receivership by the **1st respondent (Dubai Bank)** on the 6th September 2016. Contemporaneous with filing the Plaint, KemuSalt applied for, and was granted an ex-parte order which, inter alia, barred the respondents from dealing or interfering with any undertaking, goodwill, property or its assets. At the time of the issuance of the said ex-parte order the 2nd and 3rd respondents had already taken over KemuSalt and they had to vacate its premises in obedience of the order.

On 16th November 2016 the respondents approached the court seeking to set aside the orders of 8th November 2016 the thrust of their argument being that orders had been issued by **Angote, J** in **Malindi ELC No. 265 of 2016 (O.S.)** barring the 2nd and 3rd Respondents from selling KemuSalt's land and assets pending the hearing and determination of that particular matter thereby rendering the orders issued on 8th November 2016 otiose.

Subsequently, on 21st November 2016, **Chitembwe, J** varied the orders he had issued on 8th November 2016 allowing the 2nd and 3rd respondents back onto the suit premises subject to compliance with the orders issued by **Angote J**. in the **ELC case No. 265 of 2016 (O.S.).**

Thereafter, the respondents filed another application on 23rd January 2017 seeking to hold identified directors of the applicant in contempt of court for failure to obey the orders of the court issued on 21st November 2017. The Court rendered its Ruling on this application on the 28th of September 2017, allowing the application and finding the Respondent's named directors to be in contempt. On 14th December 2017, the Court sentenced one **Hussein Saleh Muhamed Ismail** to a fine of Ksh.100,000 in default of which he was to serve two months imprisonment. The Court further discharged one **Khajan Nurddin** and directed that summons do issue to **Hassan Zubeidi, Ahmed Hassan** and **Hassan Ahmed Abdullahi** for mitigation and sentencing on the 12th March 2018.

Going by the Court Record, when the 12th of March 2018 came around, **Mr. Gicharu**, the then advocate for the applicant and **Mr. Muchiri** representing the Respondents agreed by consent inter alia that:

a. the pending warrants against Hassan Zubeidi, Ahmed Hassan and Hassan Ahmed Abdullahi be lifted;

b. an application for the amendment of the joint statement of Defence be allowed;

c. the respondents be allowed to file their amended Defence and Counterclaim;

d. the matter be set down for hearing on its merits; and

e. status quo be maintained, meaning that the 2nd and 3rd respondents in the main suit continue their operations as receiver managers pending the hearing and determination of the suit.

On 20th July 2018, the applicant herein filed an application seeking an order summoning the 1st respondent by itself, or through its Liquidation Agent, **Mr. Adam Boru** to appear in Court at the interpartes hearing of that application and produce the original Deed of Assignment of Debenture dated 5th March 2009 that purportedly gave the 1st respondent the power to appoint the 2nd and 3rd respondents as Receiver Managers of the applicant.

Additionally, that application sought for the setting aside of the order by **Chitembwe J** issued on 21st November 2016 and a mandatory injunction removing the 2nd and 3rd respondents as Receiver Managers of the applicant pending the hearing and determination of this suit. This application came up for hearing on the 20th September 2018 wherein after hearing Counsel for the respective parties, the Court expressed its firm view that the matter be set down for a hearing of the main suit as opposed to dwelling on interlocutory applications. Counsel acceded to this view and the Court ordered that the application dated 20th July 2018 be suspended and the matter proceed to hearing of the main suit. Parties were directed to appear before the Deputy Registrar on 14th November 2018 for pre-trial and fixing a hearing date.

The matter thereafter came up before Court a number of times before of relevance to the instant Ruling, an application dated 25th October 2019 was filed by the 2nd defendant in the Counterclaim. This application sought to strike out the counterclaim by the plaintiff in the Counterclaim as against the 2nd Defendant in the Counterclaim. This Court gave its Ruling on this application on the 3rd of February 2020 partially allowing the application by striking out the counterclaim by the plaintiff against the 2nd defendant.

On 3rd February 2020, the Court further directed that the matter be set for hearing on the 31st of March 2020. As **Mr. Muchiri** for the respondents was the only Counsel present, the Court set 12th March 2020 for a final conference so as not to occasion any uncertainty on the trial date fixed in the absence of the other Parties. On the 12th of March 2020, the hearing date of 31st March 2020 was confirmed. However, with the advent of the Covid-19 pandemic, the hearing could not proceed on the given date. It was not until 2nd July 2020 that the matter came up wherein the instant application to which this Ruling relates was brought before the Court.

Armed with the foregoing history, we now turn to the Applicant's gravamen in the instant application.

The Applicant's Case

The plaintiff/applicant advanced its case through the grounds set out on the face of the application and further extrapolated in the affidavit of **Hussein Saleh Muhamed Ismael.**

It is averred that on 21st September 2019 the applicant entered into a loan agreement (hereinafter "loan Agreement") with East African Development (hereinafter called "EADB") for various foreign currencies amounting to Special Drawing Rights (SDR) 1,123,000 which was equivalent to USD 1,500,000/- on the terms and conditions set out in the said Loan Agreement.

According to the applicant, to secure the said loan, interest and charges thereon, the applicant agreed in terms of clause 3.04 (a) (i) of the Loan Agreement to create inter alia a first floating Debenture on all assets, both present and future. By a debenture dated 18th October 1999 the applicant covenanted with EADB to repay the loan as prescribed in the loan agreement and to pay all other monies due and owing to EADB under the provisions of the Loan Agreement and the said debenture.

It is averred that it was an express term of the Debenture that the monies secured thereunder shall immediately become due and payable and the security enforceable if EADB shall declare the principal of and all accrued interest on the loan immediately due and payable under the provisions of clause 7.01 of the Loan Agreement. Further, under clause 7.01 of the loan agreement, EADB had a contractual obligation to serve written notice on the applicant and declare the principal of and all accrued interest on the loan to be and payable upon the happening of any events of default as set out therein. The debenture had an express term that at any time after the security shall become enforceable; EADB may appoint any person or persons to be a receiver of all or any part of the assets of the applicant.

The applicant deposed that despite the foregoing unequivocal provisions, the 1st respondent purportedly signed a Deed of Assignment in its favour and for a consideration. It was the applicant's assertion that there was no valid deed of assignment that was executed between EADB and Dubai Bank Limited (in liquidation) nor was there a transfer of charge or registration in their favour thereof. As such, the 1st respondent had no contractual right to appoint any receivers over any or all of the applicant's assets.

According to the applicant, the foregoing notwithstanding, the 1st respondent purported to appoint the 2nd and 3rd respondents as receivers by way of Deed of Appointment dated 6th September 2016 on the basis and in exercise of its alleged rights under the debenture dated 5th March 2009. That this appointment was illegal for the reasons that: there was no valid deed of assignment that was executed by EADB in favour of Dubai Bank(in liquidation) over any or all of the applicant's assets; It was only EADB that could lawfully appoint receivers if at all; EADB did not and has never appointed any receivers over any or all of the applicant's assets; under Section 593 of the Insolvency Act of 2015, the tenure of the receivers was to expire automatically at the lapse of 12 months from the date of appointment and their term could only be extended under Section 594 by applying to the Court before the expiry of the said term; no such extension has ever been applied for by the respondents despite their term having ended on 5th September 2017; the 2nd and 3rd respondents are in blatant breach of their duties as receivers/administrators of the plaintiff by retaining the same advocates that have sued the same company that they are administering under receivership hence are in direct conflict of interest and thereby unable to independently and diligently discharge their mandate as receivers under the prevailing circumstances and are bound to irredeemably run down the company.

It was also averred that from 6th September 2016, the 2nd and 3rd respondents purportedly took over possession of the assets and the conduct of the applicant/plaintiff's business, affairs and operations. The respondents' acts of taking over the asset of the respondents have wasted the applicant's assets, plants, machinery and equipment and are at the verge of crumbling the business.

In addition, it was contended that the 2nd and 3rd respondents mismanaged the salt works by terminating the contracts of the applicant's employees thereby leaving them destitute and with no source of livelihood; drawing huge sums in form of salaries and allowances; by an Agreement entered into on 7th June 2017, leasing the assets of the applicant to the applicant's rival Kensalt Limited to sell the applicants salt at a gross undervalue particularly at 94% below the market value; leaving the machinery, equipment and the entire salt production plant to deteriorate due to neglect, plunder and exposure to vagaries of nature by the respondents.

It is further averred that by their own admission, the respondents were unable to account for highly valued machinery including the crystallizer, the tractors and the refinery itself thereby exposing their negligence. That the salt field themselves together with the dykes and canals which took millions of shillings to dig and construct had been left unattended with the consequence that if the respondents were allowed to continue in operation of the applicant, it would suffer irreparable harm and ultimate closure of the otherwise thriving salt plant; and that the applicant normally extracts Thirty Thousand (30,000) tones of salt every month which is a large amount of salt going to waste due to the adverse weather conditions caused by rain.

According to the applicant, the 1st respondent had indulged in an abuse of court process by introducing a counterclaim against the applicant dated 11th April 2018. This counterclaim is res sub judice **HCCC Number 467 of 2015 Kenya Deposit Insurance Corporation as the Liquidator of Dubai Kenya Limited (IL) VS Kemusalt Packers Production Limited and Others**, since the subject matter in this suit was a replica of the subject matter in **HCCC NO 467 OF 2015.**

This averment was pursued by stating that there was a similarity in the instant suit and **HCCC NO 467 OF 2015** given that in the latter suit, the orders sought were that:

> **a. an order of injunction to restrain the defendants by themselves, their collective or Individual agents or servants from interfering with selling, charging, transferring or in any manner whatsoever dealing with the lands including LR 28851(MALINDI), LR. 22138(MALINDI) and LR MN/V/1514;**
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> **b. An order of injunction freezing and preventing the defendants from transferring, withdrawing or pledging monies from their collective or individual bank accounts to any third party and any money due and owing to the defendants jointly and severally be deposited in an account to the credit of the plaintiff;**
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> **c. A mandatory order of injunction to compel the defendants to surrender to the plaintiff all property registered in their separate or joint names, bank accounts, monies in their separate or joint accounts, documents relating to Dubai bank of Kenya limited (IL) and to reveal the whereabouts of any property or money the defendants may have in their individual or collective possession or may have disposed to third parties.**

In the instant suit, that is **Civil Suit Number 28 of 2016**, the primary prayer against the applicant was for the sum of Ksh.271,909,664.34 plus interest at commercial rates from the 1st defendant in the counterclaim, being KemuSalt from 6th September 2016 until repayment in full. That the foregoing claim was predicated on alleged fraud the applicant. It was attested that the 1st respondent in the counterclaim in Civil Suit Number 28 Of 2016 had particularized the alleged fraud by the KemuSalt as follows:

> **a. Obtaining the sum of Kshs 82,999,528 from the Bank Account 81026629 of Kamp Engineering a customer of Dubai bank of Kenya limited (IL) so as to amongst others utilize the said sums to purchase salt refinery machines for use by the applicant;**
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> **b. Falsifying the details and status of Bank Account 81026629 in the name of Kamp Engineering so as to hide the overdrawing of the bank Account by the 2nd Defendant; and**
>
> **c. Obtaining the sum of Kshs 82,999,528 from the Bank Account 81026629 of Kamp Engineering a customer of Dubai bank of Kenya limited (IL) with no intention of repaying the said sum**.

The applicant thus contended that from the foregoing, it was apparent that the 1st respondent was calling upon the court to decide over the same issues it raised in **Civil Suit Number 467 of 2015**. That this was intended to embarrass two courts of equal jurisdiction as **Honourable Grace Nzioka** issued orders preserving the assets of the Applicant in **Civil Suit Number 467 of 2015.**

The applicant charged that Section 6 of the Civil Procedure Act Cap 21, provided that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

In yet another averment by the applicant, it was deposed that the firm of **Oraro and Company Advocates** on record for the 2nd and 3rd Respondents had been retained by the plaintiff in the counterclaim, that is Dubai Bank, to sue the company under receivership, KemuSalt. This, it was contended, put the firm in a conflict of interest as they could not effectively prosecute and defend KemuSalt. Their continued process was only meant to cripple and run down the company to oblivion.

It was also averred that although the matter had been scheduled for hearing on 31st March 2020, the same could not proceed due to the outbreak of Covid 19 Pandemic which paralyzed most operations including the court processes. That despite the applicant continuing to suffer irreparable harm from the unlawful acts of the 1st and 2nd respondents, there was no clear sight when the matter would be concluded. That the matter involved large volumes of documents and lengthy cross examination of witnesses during presentation of viva voce evidence.

It was attested that the 1st respondent was indulging in the abuse of court process by filing multiple claims which involve the same parties and the same subject matter.

On the basis of the foregoing, it was intimated to the Court that it was only just that it intervenes and grants the orders sought.

Defendants'/respondents' Response to the Application

In opposition to the Motion by the Original applicant/plaintiff in the main suit dated 1st July 2020, the respondents' filed grounds of opposition detailed below:

a. THAT the orders sought by the plaintiff/applicant in its Notice of Motion dated 1st July 2020 are res judicata having previously been determined in this case as well as in Misc.2 of 2019 wherein Your Lordship dismissed their application seeking to oust the 2nd and 3rd defendants as receivers by a Ruling delivered on 20th September 2019.

b. THAT this application is also res judicata having been the subject of a Ruling on 3rd February 2020 in respect of an application which the Original plaintiff participated in the hearing on 10th December 2019 wherein Mr. Ezekiel Munyua addressed the Court on a similar application seeking the stay and/or striking out of the Counter-Claim against amongst others the Original Plaintiff and which was the subject of a Ruling on 3rd February 2020.

c. THAT the applicants seek by this application to reopen a case which has been certified as ready for hearing at a Case Conference and set down for hearing on 31st March 2020 in clear breach of the Civil Procedure Rules.

d. THAT this application is an abuse of process as it seeks to file and have determined in this Cause the fifth such similar application, in particular the first having been the one dated 8th November 2016 filed in HCCC 28 of 2016; the second one dated 20th July 2018 filed in HCCC 28 of 2016; the third one dated 22nd October 2018 filed in HC.Misc 266 of 2018 (Mombasa) later Misc.2 of 2019 (Malindi); the fourth being 4th February 2019 filed in ELC.90 of 2018 (Malindi) and which was determined on 13th March 2020; and the fifth application being the present one dated 1st July 2020 filed in HCCC 28 of 2016.

e. THAT the matters which the Original plaintiff seeks to have determined at an interlocutory stage and through mandatory orders can only be determined after a hearing on merit and in any event the Plaintiff has failed to establish grounds entitling it to the Mandatory Orders.

f. THAT the applicants are asking Your Lordship to sit on Appeal of your own decision dated 20th September 2019 given in Misc.2 of 2019 as well as the decision of this Court dated 3rd February 2020 given in this matter, and Orders issued by Hon. Mr. Justice Weldon Korir on 20th September 2018 wherein His Lordship directed that no further interlocutory applications would be filed in Court in respect of this matter and that matter do proceed to hearing on merit; and Hon. Mr. Justice Olola's decision of 13th March 2020 in ELC.90 of 2018 (Malindi) wherein he declined to grant orders that sought the ouster of Messrs. Oraro & Company from representing the Kemusalt (In Receivership).

g. THAT the application dated 1st July 2020 seeks to set aside the Consent Orders recorded by the Parties on 12th March 2018 wherein the Parties agreed inter alia that the applications for Injunctive Relief and Setting Aside of Injunctive Relief dated November 8, 2016 and November 15, 2016 be disposed off by way of an order of Status Quo (i.e the Receivers remain in full control and possession of KemuSalt pending the hearing and disposal of the suit).

h. THAT the application contravenes the Orders issued on 20th September 2018 wherein the Court directed that the matter would be heard on merit and no further interlocutory applications would be filed in the matter.

i. THAT the application dated 1st July 2020 is an Appeal couched as an Injunction application and/or Stay Application

j. THAT this application dated 1st July 2020 is an abuse of the Court process.

k. THAT the application is res judicata insofar as it seeks to also bar Messrs. Oraro & Company from acting in these proceedings as similar orders were sought and denied by Hon. Mr. Justice Olola of the Environment and Land Court in ELC.90 of 2018- Suleiman Enterprises v Kensalt Ltd and Kemusalt on 13th March 2020.

l. THAT orders of the Court are not enforced with the assistance of the Police.

These preceding grounds were fleshed out in the affidavit of **John Masega Ombasa**, the duly appointed Resolution Officer of the 1st Respondent and employee of the Kenya Deposit and Insurance Corporation, a statutory body charged with the responsibility of protecting depositors against loss of all their deposits in case of a bank failure, by providing payment of insured deposits thereby ensuring depositors remain confident enough to continue keeping their savings within the banking and payments system.

Mr. Ombasa averred that Dubai Bank was owned by **Hassan Zubeidi**, one of the shareholders of KemuSalt as evinced by a search from the Company's registry which was annexed.

It was contended that in the course of the discharge of his duties as Resolution Officer of Dubai Bank, he came across documentation establishing that KemuSalt entered into a Loan Agreement with EADB on 21st September 1999. The Loan Agreement in the Recital provided that EADB was an expression which would include its successor in title and assigns. According to **Mr. Ombasa**, KemuSalt had created security in favour of EADB over all the KemuSalt's undertaking, goodwill, assets, book, debts and property whatsoever and wheresoever both present and future including the uncalled capital for the time being of the Kemu-Salt (hereinafter collectively "Assets") by way of a Debenture dated 18th October 1999 to secure the obligations of KemuSalt to the EADB. That the said Debenture as well as Charges executed in favour of EADB were to secure the repayment of a sum of Special Drawing Rights(SDR) 1,123,000 equivalent of US$1,500,000 which were to cater for the proposed expansion and modernization programme of KemuSalt through the procurement of Salt Plant Development and Building Works set out in Section 2.02(c) of the Loan Agreement. The averment was made that KemuSalt had charged its properties to EADB.

It was further averred that EADB entered into a Deed of Assignment of the Debenture with Dubai Bank on 5th March 2009 for valuable consideration in the sum of US$1,000,000, which Deed was duly registered at the Companies Registry on 8th April 2009.

The case was made that KemuSalt and Suleiman Enterprises Limited had executed a Charge in favour of EADB so as to stand as security for the aforementioned advances as set out in Section 3.04 (a) of the Loan Agreement. That on 16th November 2009 EADB executed a Transfer of the Charge to Dubai Bank.

According to the Respondents, in February 2010 Objection proceedings had been instituted by Dubai Bank when KemuSalt assets had been proclaimed by one **Paul Charo Mukoka** in **Senior Resident Magistrates Court at Mombasa** in **SRMCC.4102 of 2004**. Dubai Bank was represented by **Messrs. Kiplangat Associates Advocates** and, in their letter addressed to Dubai Bank enclosing their submissions which letter was copied to KemuSalt and **Mr. Hassan Zubeidi of Kemu-Salt** confirmed the existence of the Debenture and the Deed of Assignment.

According to the deponent, on the 3rd September 2015 the 1st respondent sent the applicant demand letters notifying it that it was in default in the sum of Ksh. 205,860,433.13 which should be repaid within a 14 day period. That following continued default of the applicant, on 6th September 2016 the 1st respondent placed the applicant under Receivership and appointed the 2nd and 3rd respondent's as Receivers over the plaintiff.

It is contended that upon the 2nd and 3rd respondent's gaining access to the plaintiff's premises they found that the employees of the plaintiff/applicant had not been paid their salaries for many months and the salt plant was in a state of disrepair and electricity bills had not been paid.

The contention by the respondent's is that on 8th November 2016 the applicant herein filed this suit and an application wherein they sought injunctive reliefs against the defendants and orders to that effect were issued by the Court. On 16th November 2016 the 1st respondent filed an application seeking the setting aside of the injunctive relief obtaining in favour of the applicant. That following this, on 21st November 2016 in the presence of Counsel for all the parties, namely, **Mr. Kimani Gicharu** holding brief for **Mr. Bernard Koyokko** for the plaintiff and **Mr. Muchiri** for all the defendants, **Hon. Justice S.J. Chitembwe** made Orders, inter alia, varying the order issued on 8th November, 2016 and allowing the "official" receiver to be back on the ground subject to compliance with the orders issued by **Hon. Justice Angote** in **ELC No. 265 of 2016 (Malindi).**

It is contended that the Orders by **Chitembwe J** were disregarded by the applicant to the extent of barring the respondents and their agents and/or servants from accessing the premises of KemuSalt using armed Borana militia; disposing of assets belonging to KemuSalt in particular salt harvested and refined during the period of November and December 2016 as well as machinery belonging to Kemusalt in a bid to destroy evidence and directing the employees of Kemusalt to ignore the lawful orders issued by respondents.

It was contended that when the 2nd and 3rd respondents did gain control of the premises of KemuSalt on the week of 25th January 2017 they noted that some of the machines that had been presented in September, October and November 2016 had been carted away by the Kemusalt through its Directors. In particular it was noted that missing from the plant were:

a. The 3 generators (1000kw) (each valued at between Kshs. 2.0 million to Kshs.3.0 million);

b. 4 packing machines (each valued at Kshs.5.0 million);

c. Mechanical weighing scale; and

d. Horizontal thermic boiler.

As a direct result of these actions by the applicant, it was deposed that **Hon. Justice Korir** in a Ruling delivered on 28th September 2017 found the Directors of Kemusalt guilty of contempt of Court.

It was also contended that due to the applicant's indebtedness to its employees, utility providers as well as the taxman, its operations were unsustainable. This predicament forced the respondents to give Kensalt Limited a Licence over the Salt Plant and land owned by Kemusalt as a strategic investor to run the Salt Plant and ensure that the assets and properties of Kemusalt do not go to waste.

The contention by the **Mr. Ombasa** was that on 12th March 2018, **Mr. Geoffrey Muchiri** for the respondents and **Mr. Kimani Gicharu** plantiff's Counsel recorded a Consent before **Hon. Mr. Justice Korir** to the following effect:

a. THAT the warrants of arrest against Hassan Zubeidi, Ahmed Hassan and Hassan Ahmed Abdullahi be lifted;

b. THAT the Application by Dubai Bank Kenya Ltd (in Liquidation) dated September 27, 2017 seeking leave to Amend the Joint Statement of Defence be allowed as prayed;

c. THAT the Applications for Injunctive Relief and Setting Aside of Injunctive Relief dated November 8, 2016 and November 15, 2016 be disposed off by way of an order of Status Quo (i.e. the Receivers remain in full control and possession of Kemusalt Packers Production Limited pending the hearing and disposal of the suit);

d. THAT the Defendants do have 30 days to file an Amended Statement of Defense and Counter-Claim and Witness Statements within 30 days of today's date;

e. THAT the Plaintiff do have 30 days from the date of service of the Amended Defense and Counter-Claim) to file and serve any Pleadings and/or Further Witness Statements as it deems fit; and

f. THAT the matter do come up for Pretrial Conference on May 17 2018 when a hearing date will be given

By the by, the averment was made that the instant application was res judicata for various reasons. First, it sought the very orders which were sought in amongst others the applicant's application of 8th November 2016 which was compromised by of the Consent Order of 12th March 2018. Second, it sought the striking out and/or stay of the 1st respondent /defendant's Counter-Claim which was allowed by the Consent of the Parties on 12th March 2018. Finally, it sought to interfere and oust the 2nd and 3rd respondents/defendants from their office as Receivers over the applicant which prayers had been previously determined in this suit as well as in **Misc.2 of 2019** wherein the Court had dismissed their application by a Ruling delivered on 20th September 2019.

It was further contended that the order seeking to stay and/or striking out of the Counter-Claim was also res judicata as this Court had delivered a Ruling on a similar application on the 3rd of February 2020.

According to the respondents, the plaintiff/applicant was in clear breach of the Civil Procedure Rules as the application sought to reopen a case which been certified as ready for hearing on 12th March 2020 at a Case Conference and set down for hearing on 31st March 2020 and would have come up for hearing were it not for the Covid 19 pandemic.

The respondents dismissed the need for an application seeking to compel them to produce the original copy of the Deed of Assignment of Debenture deposing that the same would be produced at the hearing and a Notice to Produce would have sufficed without the necessity of a formal application.

It was averred that on 4th February 2019 the Firm of **Messrs. Rachier Amollo** LLP filed an application in **ELC.90 of 2018 (Malindi)** seeking for the ouster of **Messrs. Oraro & Company Advocates** from representing Kemusalt. That hence by seeking once again the disqualification of **Messrs. Oraro** Company in these proceedings it was quite evident that the plaintiff's application res judicata as **Hon. Justice Olola's** had already made a Ruling on the matter on 13th March 2020 in **ELC. 90 of 2018.**

The respondents averred that once a Company is placed in Receivership the Directors had very limited powers over the Company and for that reason they could not dictate who represents the Receivers in these proceedings.

It was averred that this application was an abuse of process as it sought to file and have determined in this Cause the fifth such similar application, in particular the first having been the one dated 8th November 2016 filed in **HCCC 28 of 2016**; the second one dated 20th July 2018 filed in **HCCC 28 of 2016;** the third one dated 22nd October 2018 filed in **HC.Misc 266 of 2018 (Mombasa) later Misc.2 of 2019 (Malindi);** the fourth being 4th February 2019 filed in **ELC.90 of 2018 (Malindi)** and which was determined on 13th March 2020; and the fifth application being the present one dated 1st July 2020 filed in **HCCC 28 of 2016.**

The respondents were of the view that the matters the applicant sought to have determined at a interlocutory stage and through mandatory orders could only be determined after hearing on merit and in any event the applicant had failed to establish grounds entitling it to the Mandatory Orders.

In the respondents' estimation, these proceedings were instituted by the plaintiff/applicant against the 1st defendant/respondent impugning the existence of any Charges and/or Debenture in favour of the 1st Respondent as well as the 1st respondent's right to place the applicant in Receivership. It would, according to the respondents, be a travesty of justice to stay the 1st defendant/respondent's Counter-Claim against the plaintiff/applicant which sought to establish and have upheld the existence of the impugned securities that is, the Charges and Debenture in favour of the 1st Defendant. It was further averred that to allow the case to proceed without the Counter-Claim would be akin to having the 1st respondent not participate in these proceedings with equality of arms and at a great disadvantage as the Court would not have the benefit of hearing and adjudicating upon all the issues in dispute.

According to the respondents, despite the Receivers request for a Statement of Affairs, the Directors of KemuSalt had over three years since the request was made, failed to provide the Receiver with a Statement of Affairs.

It was also averred that the deponent of the applicant's Supporting Affidavit to the application seeking the ouster of the Receiver had sought to recover the sum of Ksh.1,039,650 being unpaid salary.

In sum, it was stated that from the foregoing, it was evident that this application was an abuse of the Court process, res judicata and ought to be dismissed with costs and the case proceed to a hearing on its merits.

Applicant's Rejoinder

In the applicant's supplementary affidavit sworn in response to the respondents reply, **Mr. Hussein Ismail** urged that the respondents response was only intended to obfuscate and confuse the issues by raising new yet irrelevant matters. The respondents' averments that **Hassan Zubeidi** was a director of the applicant were denied. The existence of the Loan Agreement and the Debenture was acknowledged but the applicant denied the existence of any valid execution of any Deed of Assignment of Debenture and stated that the respondents could not derive any rights therefrom.

In further response to the respondents, it was averred that the alleged proceedings in **Civil Suit Number 4102 of 2004** were not commenced to challenge or test the validity of either the Debenture or the Deed Of Assignment Of Debenture. The Learned Magistrate's determinations never dealt with the legal character of the said Debenture dated 18th October 1999 or the Deed Of Assignment of Debenture dated 5th March 2009. That the sheer fact that any party characterized the document as a Deed of Assignment does not make it as such. It matters not which name you give it but the actual legal character of the document itself; that the physical possession of a document does not ipso facto transfer any rights, duties and obligations therein. It was contended that in any case the instructions to object emanated from one **Nazir Madatari** and the submissions by themselves do not have any evidential or probative value.

Mr. Hussein averred that under clause 7.01 of the Loan Agreement, EADB had a contractual obligation to serve written notice on the applicant and declare the principal of and all accrued interest on the loan to be due and payable upon the happening of any events of default as set out therein. That neither EADB nor the Respondent served the Applicant with any notice of default.

It was also reiterated that the allege appointment of receivers under the Deed of Appointment dated 6th September 2016 was unlawful and that per Section 593 of the Insolvency Act, their appointment automatically ends at the expiry of twelve months and only a Court in exercise of Section 594 could extend the term of an administrator.

As per the applicant, since 2016, the 2nd and 3rd respondents had been in occupation of the applicant company and had run it down by engaging in conduct that was outright detrimental to the company. The Applicant denied the assertion that any of the directors or employees removed or ferried any of the equipment from the site and that on the contrary it was the 2nd and 3rd Respondents that had exposed the applicant and its equipment to the vagaries of nature including wear and tear.

According to the applicant, this mismanagement was clear by the 2nd and 3rd respondents terminating the contracts of the applicant's employees thereby leaving them destitute and with no source of livelihood; leasing or alienating the assets of the applicant to third parties at a gross undervalue; and despite the company being on its death bed, continuing to plunder and draw huge sums in form of salaries and allowances.

The assertion that the current application was res judicata was denied with the applicant contending that the orders sought herein were radically different from the previous applications that have been filed. That the determination by **Justice Olola** was not based on merit but he declined to deal with the issues on account of jurisdiction. It is therefore charged that this Court has jurisdiction to determine the said advocates are in conflict.

It was further averred that the instant application has never been litigated, that it sought the stay the Counterclaim for being Res Subjudice and an abuse of the Court process. It was contended that nowhere in the ruling dated 3rd February 2020 did the honorable Court address the Applicant's prayer to strikeout/stay the counterclaim.

Mr. Hussein deposed that circumstances have changed and nothing could prevent the honourable court to exercise its inherent jurisdiction to prevent an abuse of the court process including the reopening of a case. That in addition, whereas the matter had been scheduled for hearing on 31st March 2020, the same could not be heard but owing to no one's fault and if the matter was to proceed as it is, it would tantamount to a miscarriage of justice on the part of the applicant.

It was also contended that in all their filings, the respondents had always brought an incomplete copy of the debenture by omitting pages 2, 8 and 9. That it was therefore imperative that they are directed to bring the originals particularly the Deed of Assignment as the applicant had continuously challenged its authenticity

According to the applicant, the recusal of **Messrs Oraro** and Company advocates had never been subject of litigation in the current suit. That the said firm of advocates were conflicted since it cannot be that they instituted a counterclaim against the same company that they are supposed to guard their interests.

It was further reiterated that this application had never been litigated. That on the contrary it was the 1st respondent who was engaging in an abuse of the court process by introducing a counterclaim against the Applicant dated 11th April 2018. That this counterclaim was res subjudice **HCCC Number 467 of 2015** Kenya Deposit Insurance Corporation as the Liquidator of Dubai Kenya Limited (IL) VS Kemusalt Packers Production Limited and Others.

The applicant maintained that it does not seek to determine the suit at an interlocutory stage. In contradistinction, it only sought to vindicate its right of access to justice and to have a fair hearing guided by rules of natural justice. That further, the respondents assertion that no interlocutory applications are to be entertained in the suit is preposterous. It cannot be that the applicant can be barred to access justice or bring to the attention of the court facts that are necessary for the just determination of the suit.

It was further contended that since taking over as receivers, the 2nd and 3rd respondents had operated the affair of the applicant in secrecy and with a lack of accountability. That it was therefore nefarious for the same people who had run down the company to seek a statement of affairs when they are the were the ones in charge.

In closing it was averred that the instant application was neither Res Judicata nor an abuse of the court process. It raised weighty questions of law and fact worth consideration by the honourable court and it was as such fair and just that this honourable court intervened and granted the orders sought.

Applicant's Submissions

Mr. Munyua for the Applicant articulated four issues for the Court to consider. These are:

> **a. What are the principles that govern the doctrine Res Judicata and whether the current application is Res Judicata?**
>
> **b. Under what circumstances can the Honourable Court grant a mandatory injunction and whether the current circumstances warrant the granting of the said injunctions?**
>
> **c. What is the effect and nature of a counterclaim and whether a litigant can be allowed to introduce a counterclaim in a suit where there is pendency of a suit between the same parties touching on the same subject matter and where issues are directly the same?**
>
> **d. Does it amount to conflict of interest where an advocate is allowed to represent both the plaintiff and the defendant in a suit; conversely put can the same firm of advocates competently defend both the receivers (company) and the creditor in the same suit to recover the same debt?**
>
> **e. Whether the honourable court has jurisdiction to intervene where a party is indulging in the abuse of the Court process?**

On the res judicata issue, **Mr. Munyua** quoted Section 7 of the Civil Procedure Act Cap 21 which provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. He further referred that Court to the Black's Law Dictionary definition of defines *res judicata*. He thus submitted that the application dated 1st July 2020 was not *res Judicata* for the reasons that none of the following applications were determined on merit:

> **a. The application dated 8th November 2016 was never heard and determined. The said application did not address the issue of representation, mandatory injunction, production of the Original Deed of Assignment of the Debenture as well as the counterclaim being res subjudice;**
>
> **b. The application dated 20th July 2018 was not heard and determined. It never dealt with the prayers for recusal, striking out of the counterclaim and the grant of mandatory injunction to remove the receivers;**
>
> **c. Misc APP No 2 of 2019 (Malindi) was not determined on merit but rather the claim was deferred to the hearing of Civil Suit Number 28 of 2016; and**
>
> **d. The Application dated 4th February 2020 had no relationship to the applicant request to strike out the counterclaim. That there was no mention of such in the determination. It was filed and prosecuted by the 2nd defendant in the Counterclaim.**

On this basis, it was submitted that the Respondents had not proven to the satisfaction of the Court the Ingredients of res judicata to warrant it to decline the current application.

Regarding what circumstances would warrant the granting of the mandatory injunctions Counsel relied on **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** wherein the court held that :

> **"there must be special circumstances shown over and above the establishment of a prima facie case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once."**

Further reliance was placed on **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** where the court was of the view that:

> **"at the interlocutory stage, the case has to be unusually strong and clear before a mandatory injunction will be granted, and that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted."**

It was thus submitted that the circumstances of this case meet the legal threshold for the reasons that:

> **a. The 1st respondent purported to appoint the 2nd and 3rd respondents as receivers by way of Deed of Appointment dated**

6th September 2016 which was void ab initio. This was on the basis that the 1st respondent had no legal or equitable right under the debenture dated 5th March 2009.

b. There was no valid Deed Of Assignment of Debenture that was executed by EADB in favour of Dubai Bank(in liquidation) over any or all of the Applicant's assets;

c. If the power to appoint receivers would be exercisable at all, it would only be validly and legally exercised by EADB;

d. That EADB did not and has never appointed any receivers over any or all of the applicant's assets;

e. That even notwithstanding the foregoing arguments, under section 593 of the Insolvency Act of 2015, the tenure of the receivers was to expire automatically at the lapse of 12 months from the date of appointment. That their term can only be extended under section 594 of the Insolvency Act, 2015 by applying to the Court before the expiry of the said term;

f. No such extension has ever been applied for by the respondents despite their term having ended on 5th September 2017;

g. That the 2nd and 3rd respondents are in blatant breach of their duties as receivers/administrators of the plaintiff by retaining the same advocates that have sued the company that they are administering under receivership;

h. That the 2nd and 3rd respondents are in direct conflict of interest and thereby unable to independently and diligently discharge their mandate as receivers under the prevailing circumstances; and

i. They are bound to irredeemably bring down the company

Against the foregoing submissions it was urged that the Court grant the mandatory injunction sought to remove the receivers from the Applicant's property.

Addressing the third issue, it was submitted that a Counterclaim as defined by the Black's law dictionary was, "**A claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a setoff against the plaintiff's claim"**

It was further submitted that Order 7 Rule 3 of the Civil Procedure Rules, 2010 allowed for the filing of a counterclaim or a cross claim. Counsel quoted for support from the Indian Supreme Court case of **Jag Mohan Chawla & Another v Dera Radha Swami Satsang & Ors**, going on to submit that a counterclaim was as good as a suit and even where the main suit was dismissed, the defendant could competently prosecute the counterclaim. Against that background, it was submitted, Section 6 of the Civil Procedure Act Cap 21 provided for staying of suits. For the ingredients of the doctrine of Res subjudice Counsel cited **Republic v Registrar of Societies - Kenya & 2 Others Ex Parte Moses Kirima & 2 Others [2017] eKLR**, **Kampala High Court Civil S No. 450 Of 1993 - Nyanza Garage vs. Attorney General** and **Barclays Bank Of Kenya Ltd v Elizabeth Agidza & 2 Others [2012] eKLR**.

Thence, it was submitted that the counterclaim dated 11th April 2018 was sub judice for the following reasons:

a. HCCC Number 416 of 2015 Kenya Deposit Insurance Corporation as the Liquidator of Dubai Kenya Limited(IL) VS Kemusalt Packers Production Limited and Others and Civil Suit Number 28 of 2016 Kemusalt Packers Production Limited VS Kenya Deposit Insurance Corporation as the Liquidator of Dubai Kenya Limited(IL) and Others involve the same parties;

b. The Counterclaim amended on 11th April 2018 in Civil Suit Number 28 of 2016 involves the same subject matter as the Plaint filed on 25th September 2015 in Civil Suit Number 467 of 2015;

c. Among other prayers, Civil Suit Number 467 of 2015 has prayed for:

i. an order of injunction to restrain the defendants by themselves, their collective or individual agents or servants from interfering with selling, charging, transferring or in any manner whatsoever dealing with the lands including LR 28851(MALINDI), LR 22138(MALINDI) and LR MN/V/1514 all belonging to the applicant;

ii. An order of injunction freezing and preventing the defendants from transferring, withdrawing or pledging monies from their collective or individual bank accounts to any third party and any money due and owing to the defendants jointly and severally be deposited in an account to the credit of the plaintiff;

iii. A mandatory order of injunction to compel the defendants to surrender to the plaintiff all property registered in their separate or joint names, bank accounts, monies in their separate or joint accounts, documents relating to Dubai bank of Kenya limited (IL) and to reveal the whereabouts of any property or money the defendants may have in their individual or collective possession or may have disposed to third parties.

d. On its part, the primary prayer against the applicant contained in Civil Suit Number 28 of 2016 is that the sum of Kshs 271,909,664.34 plus interest at commercial rates from the 1st defendant (in the counterclaim) from 6th September 2016 until repayment in full.

e. The foregoing claim is predicated on alleged fraud by the Applicant. The 1st respondent in the counterclaim in Civil Suit Number 28 or 2016 has particularized the alleged fraud by the 1 defendant as follows:

i. Obtaining the sum of Kshs 82,999,528 from the Bank Account 81026629 of Kamp Engineering a customer of the plaintiff bank so as to amongst others utilize the said sums to purchase salt refinery machines for use by the 1" defendant in the counterclaim

ii. Falsifying the details and status of Bank Account 81026629 in the name of Kamp Engineering so as to hide the overdrawing of the bank Account by the 2nd Defendant;

iii. Obtaining the sum of Kshs 82,999,528 from the Bank Account 81026629 of Kamp Engineering a customer of the plaintiff Bank with no intention of repaying the said sum; and

iv. Both matters relate to the same accounts relating to KemuSalt.

In addition to the foregoing, it was submitted that the counterclaim could not be conveniently tried by the Court without convoluting and obfuscating the issues. Accordingly, Counsel prayed that the counterclaim is struck out/stayed.

Turning to the fourth issue as regards the representation by the firm of **Messrs. Oraro & Company Advocates**, it was submitted that an advocate has a fiduciary duty towards a client to ensure that he does not disclose confidential information that he acquires in his professional capacity. This duty is so sacred that it is protected under the doctrine of Advocate-client confidentiality embedded under Section 134(1) of the Evidence Act. The said provision is to the effect that an advocate-client privilege can only be breached where the communication between an advocate and the client furthers an illegal purpose or where the advocate observes that the client used the privilege to commit a crime. Counsel quoted extensively from the court of Appeal case of **King Woolen Mills Ltd & Another vs Kaplan & Stratton Advocates** submitting that the firm of **Messrs. Oraro & Company Advocates** was conflicted for the following reasons:

a. The said firm acts for the 2nd and 3rd respondents who are the receivers of the applicant company;

b. That through their professional execution of duty, the receivers have confided with them on the issues of their accounts, assets, liabilities, financial turnover, creditors, the Applicant company's business among other things. This amounts to confidential information;

c. That using the disclosed confidential information, Messrs Oraro and Company Advocates have been instructed by the Creditor, Dubai Bank to institute a counterclaim against the said company;

d. The said firm of Messrs Oraro And Company are conflicted since they are in possession of confidential information that would be necessary to successfully defend the company from the counterclaim;

e. That this fact is not denied since none of the partners or advocates have sworn any affidavit refuting this. That Geoffery Muchiri, a partner in the said firm has continued to disclose information to the creditor which he learnt and obtained by virtue of his professional duty from the receivers Anthony Muthusi and Peter Kahi and the same is being invoked by the creditor, Dubai Bank in its prosecution of the Counterclaim particularly in the Affidavit dated 24th July 2020; and

f. it is therefore preposterous for the said firm to purport that it will impartially defend the interests of the company through the receivers and prosecute the counterclaim on behalf of the creditor (Dubai bank).

It was **Mr. Munyua's** submission that the consequence of the foregoing is that there is real mischief and the company in liquidation stands to be irreversibly prejudiced. It is therefore in the interests of justice that the said firm is barred from representing any party in the proceedings.

On the final issue, it was submitted that a lot of premium had been hinged on the fact that the case management had been concluded and that the matter had been certified ready for hearing. That the court had barred all interlocutory applications and that the application will delay the hearing of the main suit. It was submitted that the Court has unlimited jurisdiction and the requisite discretion to ensure that a party does not indulge in the abuse of court process. It was further submitted that in this case, the respondents had relied heavily on technicalities, a practice that was proscribed by the enactment of Article 159(2)d of the 2010 Constitution. Further, it was submitted that the respondents wanted the Court to turn a blind eye to their maladroit efforts to abuse the court process by making different courts hear and adjudicate the same suits with the risk that the courts of equal jurisdiction may reach different determinations thereby embarrassing them

Counsel went on to argue that the respondents' advocates were under a duty to declare a conflict of interest to avoid a situation where they would be breaching their professional duties an exposing the applicant to the violations of Article 48 as read together with Article 50 of the Constitution. Finally, it was urged that **Justice Grace Nzioka** had already made orders conserving all the assets of the company including the subject property.

In the end, it was submitted that the courts exists for the sake of administration of justice and not to punish litigants. In this regard, reliance was placed on **Cropper V. Smith (1884) 26 CHD 700.**

Against these arguments, the Court was urged to allow the application as prayed.

Respondents' Submissions

For the respondents, **Mr. Muchiri** intimated that he would address four issues, as well as the issues arising in the applicant's submissions. The four issues were:

> **a. Firstly, whether this application is res judicata in light of the other Rulings delivered in this matter and other related matters;**
>
> **b. Secondly, how does the application relate to the underlying declarations in the plaint which has not been prosecuted;**
>
> **c. Thirdly, whether the application is capable of compromising the substratum of the suit; and**
>
> **d. Fourthly, whether this matter and the time spent thus far as well as the non-disclosures of issues are best addressed at a hearing on merit given the duties set out in Section 1A of the Civil Procedure Act?**

Tackling the question of *res judicata*, **Mr. Muchiri** submitted that the prayers sought by the plaintiff/applicant were res judicata having previously determined and for the subject of determination in the following cases and rulings: the first having been the one dated 8th November 2016 filed in **HCCC 28 of 2016**; the second one dated 20th July 2018 filed in **HCCC 28 of 2016**; the third one dated 22nd October 2018 filed in **HC.Misc 266 of 2018 (Mombasa)** later **Misc.2 of 2019 (Malindi)**; the fourth being 4th February 2019 filed in **ELC.90 of 2018 (Malindi)** and which was determined on 13th March 2020; and the fifth application being the present one dated 1st July 2020 filed in **HCCC 28 of 2016.**

It was hence submitted that it was quite evident that several of the applications filed by the plaintiff/applicant in this Court and other Courts in Kenya had already been the subject of either consent orders, Rulings and/or directions of the Courts, therefore those applications are res judicata and the right forum to challenge those orders would be the Court of Appeal and not the filing of similar applications couched differently in a bid to have the High Court make different orders on similar applications for the umpteenth time. It was thus submitted that the applicant's efforts in the current application amounted to an abuse of process. Reliance was placed on the case of **Nishith Yogendra Patel v Pascale Mireille Baksh & Another (2009] KLR (CAK)** wherein the Court of Appeal held that it is an abuse of process for a Party to file and attempt to argue an application before one Court when a similar application is pending before another Court of competent jurisdiction. **Mr. Muchiri** further submitted that it was equally an abuse of Court process to file several applications seeking similar reliefs in different Courts or even the same Court when orders have been made disallowing these applications and/or staying them indefinitely.

Moreover, it was submitted that the plaintiff/applicant is estopped from filing and or arguing any injunctive relief applications for the following reasons:

> **a. On 12th March 2018 the applicant and the respondents recorded a Consent before this Court wherein orders were recorded inter alia allowing a status quo which allowed the 2nd and 3rd respondents to remain in possession and/or control of the plaintiff's salt plant. This consent disposed off the plaintiff's application for injunctive relief dated 8th November 2016 as well as the respondents' application seeking the setting aside of the Injunct Relief dated 15th November 2016;**
>
> **b. This order of 12th March 2018 also was to the effect that no further interlocutory applications would be filed in this matter and that this matter would be heard on merit.**
>
> **c. Once an order entered into with the Consent of the parties is adopted by the Court it becomes an order of the Court only subject to be set aside on a review as no appeal lies from a Consent Order, and**
>
> **d. This order of 12th March 2018 has never been set aside and remains in full force and effect. Reliance here was placed on Brooke Bond Liebig(T) Ltd v Mallya [1975] EA 266**

The submission by Counsel for the respondents is that the 1st respondent's Counter-Claim which the plaintiff/applicant sought to have stayed in prayer number seven of their application was a Counterclaim that was filed in Court vide a Consent recorded with the plaintiffs advocate on 12th March 2018 which allowed the filing of the Counter-Claim as drawn. For this reason, it is submitted, the Counter-Claim having been filed with the plaintiff's consent the plaintiff is estopped from challenging it especially having had ample occasion to do so before recording the Consent of 12th March 2018). Once again, Counsel placed reliance on the case of **Brooke Bond Liebig(T) Ltd v Mallya (1975] EA 266**

The next line of argument by Counsel was that the application seeking a Stay of the Counter-Claim was also *res judicata* as the same was the subject of a determination by this Court on 3rd February 2020 concerning an application filed by the 2nd defendant to the Counterclaim. That during the hearing of 10th December 2019, **Mr. Munyua advocate** for the applicant in this application made representations which were on the Court record on the need to have the Counter-Claim struck out and/or stayed and for that reason could not be heard to approach is Court for the second proverbial bite at the cherry seeking the same orders which were denied to him when he made a case for them.

Mr. Muchiri further reiterated the position that what the applicant's were seeking in the current application was for the court to sit in on Appeal of the orders of **Hon. Justice Olola** of 13th March 2020 in ELC.90 of 2018 which held that there were no valid grounds to allow **Messrs. Rachier & Amollo** to come on record for Kemusalt in place of **Messrs. Oraro & Company Advocates** as the plaintiff company had been sued in that case as a company in receivership; this Court's orders of 12th March 2018 determining the injunction application by Consent of the parties; and this Court's Ruling of 20th September 2019 in **HC. Misc 2 of 2019.**

Yet another thrust of the respondents' arguments was that the prayer to have the firm of **Messrs. Oraro & Company Advocates** barred from participating in these proceedings was not only *res judicata* but unmeritorious as was highlighted by Hon. Justice Olola in his Ruling of 13th

March 2020 in **ELC 90 of 2018- Suleiman Enterprises v Kensalt & Kemusalt (In Receivership).**

In Counsel's view, it is trite that once a Company is placed under Receivership, its directors lose power to sue on behalf of the Company using the Company's name as that is a power exercised by the Receiver. It was urged that the only exception to this was where the proceedings being brought to challenge the Receivership may be brought in the name of the Company by the Directors. However, it was contended that in this case the applicant sought to have the Court dictate who would represent the Receivers and the 1st defendant- Bank (In Liquidation) which said application ought to be dismissed as being unmeritorious. These reliefs, it was submitted, were unmeritorious as firstly, the applicant had never furnished the 2nd and 3rd respondents with a Statement of Affairs concerning its financial health therefore the Company's financial health and/or state pre-6th September 2016 when it was placed under the Receivership of the 2nd and 3rd Respondents remained unknown.

Secondly, it was submitted that the firm of **Messrs. Oraro & Company Advocates** had never represented the applicant before it was placed in receivership and for that reason they were never privy to any information before the receivership which fact had not been disproved by the applicant neither did they assert to having previously engaged **Messrs. Oraro & Company Advocates** to represent them in dealings with EADB or even Dubai Bank (In Liquidation) at any time before the applicant was placed Under Receivership and with regards to the transactions concerning the securities in dispute in this suit or at all. Accordingly, it was submitted that the **King Woolen Mills v Kaplan & Stratton** case did not apply to this case given the fact that the **King Woolen Mills v Kaplan & Stratton** case related to a case wherein **Messrs. Kaplan & Stratton Advocates** had represented both the Lender and the borrower **(King Woolen Mills)** and was thus privy to confidential information that may be used against **King Woolen** when the lender sought to enforce the securities.

The second issue addressed by **Mr. Muchiri** for the respondents was the question of how the current application sat with the underlying declarations contained in the plaint which were yet to be prosecuted. It was submitted that the applicant sought to have this Court make a determination on issues which can only be determined once the suit has been heard and determined on merit at a viva voce hearing. That the injunctions and orders which they sought could only be granted once a determination is made after hearing witnesses for both the plaintiff and the defendants as the Court would need to ascertain if the plaintiff is entitled to challenge its being placed in receivership; and if not how much it owes to the 1st defendant and how much it will need to pay to justify the lifting of the receivership.

It was submitted that the 1st defendant claims that it is owed the sum of Kshs.271,909,664.34 by the plaintiff and that is the reason why it placed the plaintiff under receivership as contractually provided under the Debenture in its favour which was assigned to it by EADB for valuable consideration in the sum of US$1,000,000. Further that the defendant also claims that it advanced the KemuSalt further sums raising its indebtedness to Kshs.271,909,664.34. The plaintiff on the other hand has not demonstrated if it has repaid EADB the sums owed and which served as the basis for the furnishing of the Debenture and Charge over its land and whether it has repaid the 1st defendant the sum Kshs.271,909,664.34. For that reason, it is submitted, the Plaintiff's claim to injunctive relief fails as for one to successful obtain injunctive relief one must establish the existence of a cause of action in its favour thereby entitling it to injunctive relief. On this, reliance was placed on **The Siskina [1977] 3 All ER 803**

It was hence submitted that the dicta in the **Siskina case** and arguments in the **Siskina** applies equally to injunctive relief sought in a permanent form as it does to injunctive relief sought during the pendency of a case. Further reliance was placed on **Mrao Ltd v First American Bank [2003] KLR 125 at p.128**, where it was held that in the case of a default by a borrower there exists no basis upon which the Borrower in default can obtain an injunction. It was submitted that as the plaintiff was still indebted to the 1st defendant in the sum of Kshs.271,909,664.34, the 1st Defendant was thereby justified in placing the Plaintiff in receivership.

Given the foregoing, it was submitted that it would be neigh impossible for the Court to determine without hearing witnesses whether the plaintiff is entitled to impugn its being placed in receivership or whether the defendant's actions in placing the receivership were justified.

According to **Mr. Muchiri**, the reference to the plaintiff's unpaid employees who are suffering also lacked credibility as the deponent to the plaintiff's Supporting Affidavit made a claim through the Labour Officer for terminal dues on 22nd February 2017 (under a letter title Severance Pay). The letter from the Labour Officer established that KemuSalt only had ten permanent employees and 61 casuals and not 300 as has been exaggerated by the plaintiff. It was further submitted that in any event the plaintiff's few employees had not paid their salaries and/or daily wages for several months and the electricity bills had not been paid, a clear sign of an insolvent company not entitled to any injunctive relief.

For the respondents, Prayer Number (5) seeking the production of the Deed of Assignment was unnecessary and did not require a formal application a simple Notice to Produce the Document would have been sufficient and this was an issue which ought to have been raised at the Trial/Case Management Conference on 12th March 2020. That the 1st Defendant undertakes to produce the original document at Trial, which said document had already been produced in the defendants List and Bundle of Documents in 2018 as well as in this Affidavit at pages 47 to 50 of **Exhibit "JMO1".**

In Counsel's view, the prayer seeking police assistance was unlawful as was held by the Court of Appeal in the case of **Kamau Mucuha v Ripples Ltd.[1990-1994] EA 388 at p.392 and p.395** where the Court of Appeal admonished and termed as illegal the practice of seeking police assistance to enforce civil court orders given that the Civil Procedure Rules contains a comprehensive procedure to enforce injunctive relief without seeking police assistance. Accordingly, this prayer ought to be outrightly dismissed.

Lastly, on this issue, it was submitted that the plaintiff having impugned the Debenture and Charges in favour of the 1st defendant cannot be heard to state that the 1st defendant should not be allowed to rely on its Counterclaim wherein it relied on those very same Charges and Debenture sought to be impeached. Moreover it was submitted, **HCCC.467 of 215** which the plaintiff invoked as being the reason why the Counterclaim ought to be stayed would equally apply to its own plaint as the Counterclaim addressed the claims raised in the Plaint and therefore if the order to stay the Counterclaim would be issued it would apply to the entirety of the proceedings.

It was contended that the Counterclaim was distinguishable from **HCCC.467 of 2015**. Staying the Counterclaim and allowing the plaint to continue would be greatly prejudicial to the 1st defendant/respondent which must rely on its Counterclaim given the Charges and Debenture in its favour are being impugned by the plaintiff in its plaint. Staying the Counterclaim only would be a contravention of Article 50 of the Constitution bearing in mind it was the plaintiff that initiated and instituted these proceedings and going by the plaintiff's own arguments it would be the entire suit that would have to be stayed.

As regards whether the application is capable of compromising the substratum of the Suit, it was submitted that a determination of this application would not have the effect of compromising the substratum of the suit as the parties would still need to tender evidence at viva voce hearing in order to validate their respective claims. For that reason, precious judicial time is better spent on hearing and determining the case on merit and not on determining the fifth interlocutory application in this suit with no end in sight.

It was further submitted that the contention that the 1st defendant had licensed out the Salt Plant to a competitor failed to consider that it was the plaintiff's directors actions of flagrantly violating the Court Order of 21st November 2016 which enabled them to cart away machines belonging to the plaintiff and resulted in the salt plant being inoperable with the machines carted away that led to the licence being given to a competitor.

For the fourth and final issue, it was submitted that on 12th March 2020 this matter came up for a Trial Case Conference which would have been the ideal time for the plaintiff to articulate any issues it wished to bring to the Court's attention ahead of the hearing of the suit on merit which was scheduled for 31st March 2020. Unfortunately, the Covid-19 Pandemic caused the suspension of all Court proceedings and that was the only reason that this matter did not proceed on 31st March 2020.

Counsel for the respondents submitted that it beggars belief that exactly four years after this suit was filed and two years after the Amended Statement of Defence and Counterclaim as well as Witness Statements were served on the plaintiff's Counsel, that the plaintiff views this period as the most appropriate to file an application seeking injunctive relief and the ouster of the Receiver and Advocates for the umpteenth time. T was submitted that Section 1A of the Civil Procedure Act provided that the overriding objective of the Act and the Rules is to facilitate the just and expeditious disposal of disputes. Section 1A(3) imposed a duty on parties to civil proceedings and their advocate to assist the Court in achieving the overriding objective of the Act. It was submitted that the plaintiff and its Counsel had not lived up to this overriding objective as they had filed five interlocutory seeking similar reliefs to those sought before this Court and other Courts. That must be an end to litigation and in particular interlocutory litigation. Counsel submitted that Order 11 Rule 7 (3) of the Civil Procedure Rules 2010 was quite clear that any party that fails to comply with the provisions of Order 11 is deemed to have violated the provisions of Sections 1A and 1B and liable to pay costs. The filing of the application dated 1st July 2020 three months after the date set for the hearing of this suit on merit was a clear sign of a party that is not keen on proceeding with a hearing and is bent on delaying the Court in its bid to achieve an expeditious disposal of the suit.

Bolstered by these arguments, it was submitted that the instant application ought to be dismissed with costs.

Applicant's Supplementary Submissions

In a rejoinder to the submissions by Counsel for the respondents, **Mr. Munyua** for the applicant submitted that contrary to the assertion by the respondents that the application dated 1st July 2020 was *Res judicata,* none of the issues that were raised in the application had been raised and determined in the previous applications of 8th November 2016, 20th July 2018, 4th 2020 and **Misc. APP No 2 of 2019** dated 22nd October 2018. It was further submitted that the issues raised herein of the stay of the counterclaim and the ouster of **Messrs Oraro and Company** had never been adjudicated by the Court. It was submitted that for an application to be *Res judicata*, three essential ingredients must be established wit; there must be an earlier decision on the issue (subject matter); There must be a final judgment on the merits; and the involvement of the same parties in privity with the original parties. Reliance was placed on **M W K vs. AM W [2016] eKLR**, wherein, **Professor Joel Ngugi** quoted from the Court of Appeal decision in **The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880.** It was hence submitted that all the four applications were not determined on merit but rather on technicalities and were accordingly not res judicata.

With regard to the consent order dated 12th March 2018, which compromised the applicant's application dated 8th November 2016 it was submitted that no such order had been exhibited and as such no terms could be inferred or deduced from the vacuum; that a court record capturing the proceedings of a day does not amount to a consent unless and until is executed parties the consent who must exhibit full appreciation of its import and purpose; a consent must have been entered into with the authority of the client and executed by the advocates as the agent; that an illegal consent that is entered into contrary to the law is void initio; that you cannot enter into consent barring party form accessing justice such consent would offend Articles 48 and 50 of the Constitution.

On the request for the recusal of **Messrs Oraro and Company**, it was submitted that the ruling of **Justice Olola** on 13th March 2020 did not in any way determine the legality or otherwise of **Messrs Oraro** and Company representing the applicant herein. On the contrary, he left the determination to the High Court since according to the learned judge those issues are better left to the insolvency court. Borrowing from the ingredients of res judicata, it was submitted that the application dated 14th July 2020 was not *res judicata* **Justice Olola's** decision rendered on 13th March 2020 as it was not determined on merit. Additionally, it was submitted that the case of **King Woolen Millers vs Kaplan and Stratton** was of fundamental application since the said case was not restricted to where an advocate acted in drafting the contractual documents. Further, the argument that the said firm did not represent the receivers prior to 6th September 2016 is narrow and tapered for the reasons that even from the said 6th September 2016, the said firm had come across confidential information by way of records, statements and other materials that were necessary for defending the company from alleged creditors including the 1st defendant; this information could not be used against the said company without breaching the duty of confidentiality; that the 1st respondent was in full possession of all the documents that hitherto belonged to the plaintiff thereby prejudicing the plaintiff in mounting a meaningful defence; that the said firm had not ceased from representing the creditors of the company, as such, there was actual danger of being conflicted; and it was therefore ridiculous for the said firm to represent both the plaintiff and the respondent in the current suit.

It was submitted that the applicant did not in any way rely on the Debenture and the Charges herein to support any cause of action against the respondents but only for the sole purpose of demonstrating that the 1st respondent had no contractual, legal or equitable right to have appointed the 2nd and 3rd respondents as receivers. It was submitted that the Deed of Assignment of Debenture that existed was the one by the applicant and EADB and not the 1st respondent and that it was therefore preposterous to suggest that the applicant cannot rely in its own document to prove its case.

In sum, it was submitted that the applicant's suit was straight forward in that it sought to remove the respondents who were by all means trespassers for want of any authority to enter the applicant's property. It was equally an abuse of the court process for the 1st respondent to pursue a parallel suit **HCCC NO 467 of 2015** alongside this current one which then risks making the courts reach different conclusions. That the 1st respondent could not litigate in piece meal. It ought to decide conclusively on which forum it intends to litigate its suit but cannot file multiple claims in all forums. It is for the foregoing reasons that Counsel urged that the application dated 1st July 2020 be allowed.

Analysis and Determinations

I have arduously grappled with the extensive pleadings filed by the parties for and against the application dated 1st July 2020. I have also contemplated at great length the submissions by **Mr. Munyua** and **Mr. Muchiri**. Having distilled them so, I adjudge as falling for this Court's determination the sole question of whether in light of the issues highlighted by the parties herein, the applicant is deserving of the reliefs sought.

It bears repeating what orders are sought herein. The applicant prays that:

> **a. Pending the hearing and determination of this application interpartes, the Honourable court be pleased to issue a mandatory injunction directing the respondents either by themselves, their agents, servants or employees to forthwith cease and desist from running, managing, occupying or in any other way interfering with the applicant's asset LR NO 22138 (GRANT 28851/1) NORTH OF MALINDI, KILIFI COUNTY;**
>
> **b. Pending the hearing and determination of this application and the suit, the Honourable court be pleased to issue a mandatory injunction directing the respondents either by themselves, their agents, servants or employees to forthwith cease and desist from running, managing, occupying or in any other way interfering with the applicant's asset LR NO 22138(GRANT 28851/1) NORTH OF MALINDI, KILIFI COUNTY;**
>
> **c. The Honourable court be pleased to disqualify the firm of Messrs Oraro and Company Advocates from further acting for any party in this matter;**
>
> **d. The honourable court be pleased to order that the 1st respondent produces the Original Deed of Assignment of Debenture dated 5th March 2009 for court's inspection;**
>
> **e. The Honourable court be pleased to direct that the O.C.S. MARERENI POLICE STATION to help enforce these orders;**
>
> **f. The honourable court be pleased to strikeout and/or stay the Defendants' Counterclaim dated 11th April 2018 as against the applicant;**
>
> **g. Costs of this application be borne by the respondents.**

Without expending any more judicial ink than is necessary, I am of the steadfast stance that the preceding prayers, especially when taken together with the history of the suit and its procedural matrix which I found fit to elaborate at the beginning of this Ruling, are but a guise by the applicant to have yet another bite at the cherry where previous attempts have fallen by the wayside. Put differently, the application dated 1st July 2020 is an abuse of the Court process. While this determination might seem harsh at this somewhat early juncture in my ruminations, it is neither far-fetched nor without basis, as I shall presently demonstrate.

Before I validate my position, first, a primer on abuse of the Court process. According to the Black's Law Dictionary, 10th Edition, it is *'the improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope.*

In the case of **Satya Bhama Gandhi V Director Of Public Prosecutions & 3 Others [2018] eKLR t**he **Hon. Justice Mativo** elaborated what would entail an abuse of the court process in the following manner:

> **"The concept of abuse of Court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. The situation that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations: -**
>
> > **a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.**

b. Instituting different actions between the same parties simultaneously in different Courts even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right for example a cross Appeal and Respondent notice.

d. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.

e. Where there is no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.*" (Emphasis Supplied).*

In **South Nyanza Sugar Company v Alfred Sagwa Mdeizi T/A Pave Auctioneers Civil Appeal No. 147 Of 2001 [2014] eKLR** filing a multiplicity of claims seeking the same relief was considered an abuse of the Court process. The court then held:

> **"11. I have now carefully read through the pleadings on this file. I note from the above, that the applicant herein has filed several applications before the court seeking same prayers, both before this court and before the lower court at Migori Principal Magistrate's Court. The question that arises for determination is whether the applicant is deserving of the orders sought.**
>
> **12. In my considered view, the applicant is not deserving of the orders sought vide the Notice of Motion dated 22nd August 2013. To start with the orders sought by the applicant in the said application are similar to those sought vide the application dated 31st May 2011. It is also worthy noting that when this court refused the applicant stay orders at the ex-parte stage of hearing the application dated 31st May 2011, he immediately rushed to the lower court seeking similar orders. The applicant is clearly a vexatious litigant who takes every opportunity to abuse the process of the court. The rules of natural justice do not allow him to do so and this court will not allow him to do so."**

Again, in ***Heritage Insurance Company Limited v Patrick Kasina Kisilu*** **Machakos HC Civil Appeal No. 142B of 2015,** the Court took a dim view of filing of similar applications over the same subject matter seeking similar reliefs. It held:

> **"I agree with the general tenor of the court decisions that take the view that to file similar application over the same subject matter seeking similar reliefs is an abuse of the court process. Indeed, where such applications have previously determined the matter the subsequent applications are barred by the principle of *res judicata (see Mburu Kinyua v. Gichini Tuti* (1978) KLR 69); where an application is dismissed for want of appearance, the applicant cannot be allowed to bring a second application unless he seeks reinstatement of the application for good cause (*Wanguhu v. Kania (1987) KLR 51) and where the earlier one is not concluded, a similar subsequent application is sub judice by virtue of section 6 of the Civil Procedure Act."**

Finally, given the circumstances of this case, I find it de rigueur to quote and infer *in extenso* from the Ruling rendered by my counterpart **Hon. Prof. Ngugi J** in **Civil Suit 215 of 2008 Joppa Villas LLC V Overseas Private Investment Corporation & 2 Others [2012] eKLR**. The Learned Judge was faced with a curiously similar position as the one that prevails herein. The applicant in that instance had sought for orders that:

> **"a. That an inquiry commences to establish the author of security documents that are but not limited to the Charge, Debenture, and Deed of Appointment of Receiver in view of the ruling delivered on 4th of August 2011 by His Lordship Justice Waweru and consequently the orders emanating therefrom and/or in the alternative a declaration that the said documents are null and void.**
>
> **b. That an order to be issued restraining the respondents from foreclosing on the suit property by relying on the security documents that are but not limited to the Charge, the Debenture and Deed of Appointment of Receiver.**
>
> **c. That the Court makes an order for the preservation of the suit property pending the inquiry into the authenticity of the security documents as registered.**
>
> **d. That an order be issued restraining the 1st respondent from selling and or alienating and/or disposing land known as LR No. 27253/42 pending the hearing and determination of this Application.**
>
> **e. That an order be issued restraining the 1st respondent from selling and/or alienating or disposing land known as LR No. 27253/42 pending the hearing and determination of this suit."**

The history of that matter was that the plaintiff/applicant had been advanced a loan by the 1st respondent, which loan had been secured by a Charge and Debenture. When the plaintiff/applicant defaulted, the 1st respondent had recalled the entire loan and proceeded to appoint a receiver and manager under the terms of the Debenture. The applicant filed suit together with an application seeking to block the appointment of receivers/managers and seeking to injunct the respondents from selling off the Suit Property. The main arguments advanced by the applicant were two-fold: that the deed of appointment of receivers/managers was null and void; and that the debenture was invalid because the President of the applicant Company had not properly executed it. The application for injunctive relief was dismissed whereupon the applicant had filed a Notice of Appeal against the Ruling and simultaneously filed an application for an injunction at the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules. The Applicant had also gone on to file two applications at the High Court seeking, in essence similar orders; these were dismissed by **Lenaola J (as he then was)** who declared that the multiple applications lodged by the applicant in the two courts amounted to an abuse of the process of the Court.

Undeterred, the applicant in **Civil Suit 215 of 2008** had gone on to file three other similar applications with one of them seeking the ouster of the advocates on record for their opponents. In arriving at a verdict, the learned judge made a number of summations which I am content to reproduce verbatim for their full tenor and effect:

> **"15.It was William Shakespeare who placed the following memorable words in the name of one of his characters, Juliet, in that famous romantic play, Romeo and Juliet: "What's in a name" That which we call a rose, by any other name would smell as sweet."[1] Although there is nothing romantic about the numerous applications filed by the applicant here, the ethos of Juliet's words apply here: An injunction by any other name is still a restraining order. What, in effect, the applicant is attempting here is a fourth bite at the cherry. It has failed three times before to get a restraining order and now attempts this innovation to obtain the same. That attempt must fail. Three reasons readily recommend themselves for my stance.**
>
> **16.First, the issue of the authenticity of the security documents has been a core issue in this litigation from the get-go. The applicant vigorously urged the issue before Justice Lenaola. He considered what it had to say and ruled that prima facie the security documents were bona fide. This application is a round-about way to challenge that interlocutory finding. It must not be allowed. The applicant can only take up the issue on appeal if it thinks Justice Lenaola misperceived the weight of evidence.**
>
> **17.Second, the authenticity of the security documents can only properly be pursued at trial when the applicant will be expected to marshal evidence to demonstrate to the Court that the security documents are, indeed, inauthentic. Such a finding cannot conclusively be made at this stage in the proceedings. What the applicant is, in fact, trying to do, is enlist the help of the Court to prosecute its case by asking the Court to conduct an inquiry or a commission. It is an inappropriate role for the Court. Whatever the outer limits of Section 52 of the Civil Procedure Code or Order 28, Rule 7, it does not include doing the heavy lifting the applicant assigns to it here. If the Court acquiesced to the applicant's request, it will, in effect, be sitting on appeal of its own interlocutory decision.**
>
> **18.Third, I would agree with Mrs, Opiyo-Kinyenje that the applicant has wholly misread the import of Justice Waweru's reading. A plain reading of Justice Waweru's ruling is clear that Justice Waweru meant that the firm of Kaplan & Stratton had not represented the applicant in the drawing of the debenture documents or in any other capacity. The ruling did not mean that the firm of Kaplan & Stratton did not participate in the preparation of the debenture documents in any capacity at all as the applicant now claims. It does not take too much literary work to come to this conclusion: the very cover page of the document whose authorship Justice Waweru was trying to decipher has the full name and address of the firm of Kaplan & Stratton. How, then, could my brother Justice Waweru be interpreted to mean in his ruling that the self-same firm was not involved in its drafting"**
>
> **19.Mrs. Opiyo-Kinyenje was right when she used the famous aphorism: Litigation must come to an end. Indeed. The end of this line of litigation has, in this Court's opinion, come. <u>The Court cannot be asked to determine the same issue multiple times in the guise of protean applications which seem to mutate with each adverse ruling</u>. It is time for the 1st respondent to realize its security. It is the least the Court can do to maintain some semblance of predictability and integrity in our commercial practice after so many years of waiting. <u>The Applicant must await the ventilation of its grievance at the full hearing of the suit</u>."** *(Emphasis supplied)*

Having elaborated what abuse of the Court process entails, let me now affirm my viewpoint. Per the Court record—lest we forget, this is a Court of record—on 12th March 2018 the following proceedings transpired verbatim:

> **"12.3.2018**
>
> **Before on. W. Korir,J**
>
> **Omar - Court Assistant**
>
> **Parties:**
>
> **Mr. Gicharu for plaintiff present**
>
> **Mr. Muchiri for defendants present**
>
> **Muchiri:**

It is for mitigation and sentencing. We duly extracted summons but we are unable to effect service. Our attempts to verify whether they still have shareholding was not successful. We propose that the warrants be lifted and we proceed to hearing of the matter on merits. Mr. Gicharu has agreed with our proposal. The pending application dated 27.9.2017 for the amendment of joint statement of defence dated 23.1.2017 be allowed as prayed. We be given 30 days to file our amended statement of defence and counter claim as well as witness statements. The plaintiff do have 30 days within which to file any pleadings in response thereto and or further witness statements if need be. We propose to come back for case conference on 21.5.2018. We ask for a tentative hearing date in September, 2017. There are two pending applications. One is dated 8.11.2016 and the other one is dated 15.11.2018, The two applications can be disposed of by an order that status quo be maintained pending the hearing and determination of the suit.

W. Korir

Judge

12.3.2018

Gicharu:

I confirm that we have agreed that the warrants against Hassan Zubeidi, Ahmed Hassan and Hassan Ahmed Abdullahi be lifted. We are not opposing the application for amendment of the defence. They can have 30 days and we also have 30 days to do the necessary We are no opposed to mention on 21.5.2018 to confirm compliance and take pre-trial directions. I propose that we take a hearing date during the pre-trial conference. With regard to the two pending applications, status quo can be maintained. The receiver manager to continue operations.

W. Korir

Judge

12.3.2018

Court:

Consent entered as prayed. Mention on 17.5.2018 for pre-trial directions.

W. Korir

Judge

12.3.2018

The Record as reproduced above is in my understanding of the following purport: one, the pending warrants against **Hassan Zubeidi, Ahmed Hassan and Hassan Ahmed Abdullahi** were lifted. Two, an application by the respondents to amend their joint statement of Defence was allowed. Three, the respondents were allowed to file their amended Defence and Counterclaim. Four, the matter was to be set down for hearing on its merits. Five, the status quo be maintained, meaning that the 2nd and 3rd respondents in the main suit would continue their operations as receiver managers pending the hearing and determination of the suit in compliance with the position that prevailed at the time as a result of the order issued by **Chitembwe J** on 21st November 2016.

The position obtaining from the anterior reproduction is that the parties had consented that the receiver/managers would stay put until the suit had been heard and determined. Further, the applicant had acceded to the Counterclaim filed by the 1st respondent. Moreover, the parties had agreed to this matter being set down for a hearing on its merits. However, the applicant does not see it that way. Its position was to deny the existence of any such consent and to contend that even if such consent existed it was void ab initio for being in contravention of the law; that a court record capturing the proceedings of a day does not amount to a consent unless and until is executed parties the consent who must exhibit full appreciation of its import and purpose; that a consent must have been entered into with the authority of the client and executed by the advocates as the agent; and that you could not enter into consent barring party form accessing justice such consent would offend Articles 48 and 50 of the Constitution.

In light of these averments, it is requisite that I contend with the validity of the consent. I seek refuge in the position advanced by the Court in **Geoffrey M. Asanyo & 3 others v Attorney-General Supreme Court Petition 7 of 2019 [2020] eKLR** where it affirmed that the adoption of a consent is a process and a consent order becomes valid once it has been formally adopted by the Court. It was held:

"[38] We turn now to the standing of the consent filed by the parties before the Appellate Court. The pertinent question is: When does a consent by the parties transmute into an Order of the Court? What is the role of the Court in the adoption of the consent?

[39] In this Court's Order of 20 November 2018, we directed that the Appellate Court do adopt the consent of the parties.

[40] Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the

risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court.

In the current instance, the consent by the parties was formally adopted by the Court when it stated, '*Consent entered as prayed.*' It therefore remains a valid consent despite the averments to the contrary. While on this point, it is curious to note that even as the applicant denies the existence of the consent order to the extent that it applies to the maintaining of the receiver managers during the pendency of the suit; admitting the Counterclaim by the 1st respondent; and directing that the matter be set down for a hearing on its merits, the applicant does not seem to appreciate that it is this same consent order whose existence it is challenging that let its directors off the hook for contempt of court. I suspect that is the reason why despite its avid denials, the order has not been challenged. It is trite that a consent can only be set aside on the terms that would justify setting aside a contract, that is to say the grounds of inter alia fraud, mistake or misrepresentation. In **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR** the Court referred to **Hirani v Kassam (1952)**, **19EACA 131**, where **Seton on Judgments and Orders, 7th edition, Vol.1 p.124** had been quoted with approval as follows:

> **"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an *agreement."***

Similarly, in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another Civil Appeal 6 of 2015 [2016] eKLR** it was held:

> **"It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example on grounds of fraud, mistake or misrepresentation. (See Brooke Bond Liebeg (T) Ltd v. Mallya [1975] EA 266; Flora Wasike v. Destimo Wamboko [1988] KLR 429, and Kenya Commercial Bank Ltd v. Benjoh Amalgamated & Another, CA No. 276 of 1997)."**

In the same vein, in **KCB Limited v Specialized Engineering Co. Ltd {1982} KLR** the court held:

> **"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or in misapprehension or ignorance of suit facts in general for a reason which would enable the court to set aside an agreement."**

Tellingly, the applicant has not advance any of the aforesaid grounds. This conduct is what made me draw the conclusion that the instant application is only intended to vex the Court. To take it a step further, the applicant had filed another application on 20th July 2018. Therein, the prayers sought were for an order summoning the 1st Respondent by itself, or through its Liquidation Agent, **Mr. Adam Boru** to appear in Court at the interpartes hearing of that application and produce the original Deed of Assignment of Debenture dated 5th March 2009 that purportedly gave the 1st respondent the power to appoint the 2nd and 3rd respondents as receiver managers of the applicant. Coterminous with this, the applicant had wanted a mandatory injunction removing the 2nd and 3rd respondents as receiver managers of the applicant pending the hearing and determination of this suit. Similar prayers as the ones sought in the instant application. In that instance, when the matter came up for hearing on the 20th September 2018, in the presence of Counsel for the respective parties, **Korir J** had expressed his resolute view that the matter be set down for a hearing of the main suit as opposed to dwelling on interlocutory applications. Counsel had agreed to his view and the Court ordered that the application dated 20th July 2018 be suspended and the matter proceed to hearing of the main suit. Thais was not to be. I can therefore do no better than wholly align myself with the Court's assertion in **Josephat Supare Ole Sakunda & 10 Others v Harison Musau & Another [2007] eKLR that:**

> **"There is no action on the part of the parties through counsel more prejudicial, embarrassing, delaying, vexing or abusive of the Court process than back-tracking on an earlier recorded agreement to withdraw or dispense with all intervening applications in favour of hearing the main suit."**

It is not lost on this Court that this Suit had been set down for hearing on 31st March 2020, having finalized case management. For the applicant to now aver that this fact does not stop the Court from coming to its aid is being disingenuous. The applicant has not complied with an Order of the Court, yet seeks its intervention ostensibly due to what it terms as a change in circumstances that prevailed at the time the matter was set down for Ruling. As my preceding analysis lays bare, these circumstances have not been satisfactorily explained by the applicant if at all. What the Court has been bombarded with are a litany of averments regarding issues that have been previously addressed by this Court or another at one point during the pendency of the suit. This is the hallmark of vexatious litigation bent on abusing the Court process. This Court ought not to, and will not countenance such conduct. Directions issued by the Court and the rules of procedure must count for something. I am guided by the stance taken by the Court in Panton JA in Port Services Ltd v Mobay Under Sea Tours Ltd & Firemains Fund Insurance Co. SCCA 18/2001 where it was held:

> **"For there to be respect of the Law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this court has to set its fact firmly against inordinate and inexcusable delays in complying with the rules of procedure. The court should be very reluctant to be seen to be offering a helping hand to the recall a trial litigant with a view to giving relief from the consequences of the litigants own deliberate action or inaction."**

Suffice it to say, this Court has not been moved in any way that would see it accede to the request for a mandatory injunction at this interlocutory level. The considerations for granting interlocutory mandatory injunctions were well stated in the case of ***Kenya Breweries Ltd & Another v Washington O. Okeyo*** **[2002] eKLR** where the Court of Appeal said:-

> **"The test whether to grant a mandatory injunction or not is correctly started in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read:-**
>
> **'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.'"**

The Court of Appeal quoted with approval an English decision in the case of ***Locabail International Finance Ltd vs Agroexport and others*** **(1986) 1 ALLER 901** 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."**

Expressing a similar viewpoint, in ***Nation Media Group & 2 others vs John Harun Mwau*** **[2014] eKLR** the Court of Appeal stated:-

> **"It is strite 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."**

No exceptional circumstances have been espoused herein that would warrant the Court to grant an interlocutory order of mandatory injunction. To the contrary, the circumstances that avail themselves herein predicate the denial of any such order as the Application is an abuse of the Court process.

It is for the foregoing reasons that I find no merit in the Application dated 1st July 2020. For the issues germane to this suit to be resolved, the matter must proceed to a hearing on its merits.

In the upshot, the Application dated 1st July 2020 is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021

…….

R. NYAKUNDI

JUDGE

NB: This Ruling has been emailed to the advocates pursuant to the causelist of 26.2.2021

ezekiel@rachieradvs.co.ke

geoffrey@oraro.co.ke