



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 491 OF 2013

BETWEEN

GEOFFREY KIPKOECH suing as the administrator ad litem of the estate  
of JOHN KIPKEMBOI KILEL (Deceased) ..... PLAINTIFF

AND

INSURANCE REGULATORY AUTHORITY ..... 1<sup>ST</sup> DEFENDANT

SAMMY M. MAKOVE ..... 2<sup>ND</sup> DEFENDANT

HELEN ACHIENG OUMA ..... 3<sup>RD</sup> DEFENDANT

### RULING

#### **Introduction**

1. The 1<sup>st</sup> Defendant has moved the court by the Notice of Motion dated 21<sup>st</sup> January 2021 and made under **Order 2 Rule 15 (1)** of the **Civil Procedure Rules** (“the **Rules**”) where it seeks to strike out the Plaintiff’s suit commenced by the Plaintiff dated 8<sup>th</sup> November 2013 and filed on 11<sup>th</sup> November 2013.

2. The application is supported by the grounds on its face and the affidavit of Godfrey K. Kiptum, the Commissioner of Insurance and the Chief Executive Officer of the 1<sup>st</sup> Defendant, sworn on 21<sup>st</sup> January 2021. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also support the application and rely on the 1<sup>st</sup> Defendant’s deposition. It is opposed by the Plaintiff who relies on the Grounds of Opposition dated 28<sup>th</sup> January 2021 and the replying affidavit of Geoffrey Kipkoech, the Administrator *ad Litem* of the Plaintiff’s estate, sworn on the same date. The parties filed written submissions in support of their respective positions.

#### **Background**

3. Since the 1<sup>st</sup> Defendant seeks to strike out the suit, it is important to appreciate the case before the court. The substance of the case against the Defendants concerns Lakestar Insurance Company Limited (“the Company”), a company licensed under the **Insurance Act (Chapter 487 of the Laws of Kenya)** to do general insurance business. It was incorporated in 1996 by John Kipkemboi Kilel (“the Deceased”) and Zephania Juma Ajowi. The Deceased, who died on 23<sup>rd</sup> April 2016, was the majority shareholder in the Company with 4,000,000 ordinary shares of KES. 100.00 each making a total value of KES. 40,000,000.00.

4. On 13<sup>th</sup> June 2002, the 2<sup>nd</sup> Defendant, who was at the time material to this suit the Commissioner of Insurance, exercising powers under **section 67C(2)(i)** of the **Insurance Act** placed the Company under Statutory Management. On 1<sup>st</sup> July 2002, the 2<sup>nd</sup> Defendant appointed the 3<sup>rd</sup> Defendant as Statutory Manager in place of Marshall Osanya, the initial Statutory Manager. In due course, the Commissioner of Insurance lodged a Winding Up Petition against the Company, **HC Winding Up Cause 21 of 2003 In the Matter of Lakestar Insurance Company Limited**. On 27<sup>th</sup> June 2003, the court issued a winding up order and appointed an interim liquidator to undertake liquidation of

the Company.

5. By the Plaintiff dated 8<sup>th</sup> November 2013, the Plaintiff claims KES. 12,075,289,826.00, general damages, interest thereon and costs against the Defendants jointly and severally. The substance of the Plaintiff's claim is set out in the Plaintiff as follows:

[30] The plaintiff further aver(s) that the Defendants jointly and severally abused and/or misused their statutory powers and further contributed directly and/or indirectly to the collapse and/or placing of the said company into premature, forced and unnecessary liquidation.

[31] The plaintiff contend(s) that the said actions of the Defendants and the Interim Liquidator were contrary to the provisions of the law and amount to a blatant breach and abuse of his constitutional rights to property and further is a direct violation of his legitimate financial and investment expectations of earning from the said company and consequently the plaintiff has suffered loss and damage.

6. The Plaintiff's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is that they colluded to defraud the Company when it was under statutory management, frustrated efforts by local investors to inject capital into the Company in order to revive it and hatched a scheme to conceal mismanagement and misappropriation of the Company's assets during that period culminating in the filing of the Winding Up petition. The Plaintiff further pleads that the Winding Up Petition was procured through concealment and or misrepresentation of material facts. They further claim that even when the Interim Liquidator was appointed, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continued to control and supervise the activities of the Interim Liquidator causing him to neglect his duties and that they participated in illegal schemes resulting in the sale of the Company's prime properties at an undervalue and to the detriment of the shareholders.

7. The Plaintiff contends that following an order issued in **HCCC No. 363 of 2008, John Kipkemboi Kilel v Wilfred Riitho Njeru as Interim Liquidator of Lakestar Insurance Company Limited**, the interim liquidator, Henzlon Kamau Waithaka, filed an Audit Report dated 31<sup>st</sup> May 2013 ("the Audit Report") whereupon he discovered that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded with the previous Interim Liquidator to conceal information relating to the financial status of the Company from him, causing him to be arrested and arraigned in court in **Nairobi Criminal Case No. 234 of 2003** on unfounded charges.

8. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a joint defence dated 16<sup>th</sup> January 2014. In summary, they denied all the allegation of fraud, plunder, concealment, misrepresentation and collusion made against them by the Plaintiff. They accuse the Plaintiff of failing to disclose material facts including cases it had filed against the Defendants and other parties concerning the subject matter of this suit and which cases have been determined. The Defendants state that the 2<sup>nd</sup> Defendant has a discretion and duly exercised his powers under **section 67C(2)(i)** to appoint a Statutory Manager. Further, that the Plaintiff challenged the appointment of the Statutory Manager in **HC Misc. Application No. 674 of 2002**. The appointment was stayed but later lifted when the 3<sup>rd</sup> Defendant was appointed.

9. As regards the Winding Up Petition, the Defendants deny that they hatched a scheme to mismanage and or misappropriate the Company assets during the Statutory management period in order to wind up the Company. They contend that the Petition was filed in accordance with the law, duly advertised and heard and determined by Mutungi J., who concluded that the Petitioner had proved all the allegations entitling it to the winding up order issued on 27<sup>th</sup> June 2003 in addition to ordering the Directors of the Company including the Deceased to be charged with embezzlement of the Company's assets. The Defendants aver that the Plaintiff failed to appeal against the judgment winding up the Company and despite being granted extension of time to lodge an appeal, he failed to file his appeal.

10. In answer to the allegation that they colluded with the Interim Liquidators, the Defendants aver that at all times the Interim liquidator, who was subject to the control of the court, acted in accordance with the law. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that they were not party to the proceedings in **HCCC No. 363 of 2008, John Kipkemboi Kilel v Wilfred Riitho Njeru as Interim Liquidator of Lakestar Insurance Company Limited** and that in any case the Interim Liquidator was always under the supervision and the control of the court. The Defendants therefore pray that the suit be dismissed.

### **The Application**

11. The 1<sup>st</sup> Defendant's application is mainly grounded on preliminary matters of law that the Plaintiff's suit is time barred by limitations; statute barred by res judicata; lack of the court's jurisdiction by virtue of **section 173** of the **Insurance Act**; abatement of the suit upon the death of the Plaintiff; and incompetence of the suit for lack of locus standi by the Plaintiff to commence personal action for wrongs allegedly committed to a Company. The Plaintiff contends that if these preliminary issues of law are determined *in limine*, they are capable of disposing off the whole suit.

12. First, the 1<sup>st</sup> Defendant contends that this suit is time barred pursuant to **section 4(2)** of the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)** as it alleges torts of fraud and misrepresentation against the Defendants which allegedly arose when the Company was under statutory management and during liquidation. The Plaintiff states that statutory management preceded liquidation which was completed by the liquidation order made on 27<sup>th</sup> June 2003. It therefore submits that this suit is time barred having been filed outside the 3-year limitation period for torts in this case more than 10 years later on 11<sup>th</sup> November 2013 hence it should be struck out.

13. Second, that this suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is barred by **section 168** of the **Insurance Act** which prohibits institution of legal proceedings, or the making of any order for compensation against them in their personal capacity for anything done in good faith in the course of duty within their official capacity. It cites the case of **Malike Co., Limited v Attorney General NBI HC Civil Appl. No. 3739 of 1995 [2000] eKLR** where the court struck out a claim for negligence against the Commissioner of Insurance on the basis that **section 168** of the **Insurance Act**.

14. Third, the 1<sup>st</sup> Defendant submits that the suit should be struck out on the ground that the Plaintiff lacks capacity to sue claiming personal loss and compensation in respect of losses allegedly suffered by the Company as it is trite law that a company has separate corporate personality distinct from its members or directors. The 1<sup>st</sup> Defendant cites **Victor Mabachi & Another v Nuturn Bates Ltd NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR** where the Court of Appeal restated that principle established in **Salomon v Salomon [1897] AC 78** that a Company is a separate and distinct legal entity from its shareholders and directors and the case of **Geoffrey Kipkoech v UAP Provincial Company Limited and Another ML HCC No. 421 of 2014 [2020] eKLR** where the court held that the deceased could not sue to recover an asset in the name of the company.

15. Fourth, the 1<sup>st</sup> Defendant cites **section 173(1)** of the **Insurance Act** to submit that the Plaintiff, if aggrieved by a decision of the Commissioner to put the Company under statutory management and eventually into liquidation, should have appealed to the Insurance Tribunal within one month of the decision. It urges, that since the Plaintiff failed to do so, it cannot challenge the decision before this court which exercises appellate jurisdiction. Counsel for the 1<sup>st</sup> Defendant cites **The Speaker of the National Assembly v James Njenga Karume CA No. NAI 92 of 1992 [1992] eKLR** to support the proposition that the Plaintiff ought to have followed the procedure set out in the statute for redress of any grievances.

16. Fifth, that the suit is barred by *res judicata* on grounds that all the issues now raised in this suit were already heard and determined by decisions of various courts. In **HCCC 1016 of 2002 Hellen Olima v John Kipkemboi Kilel** the court, by a ruling dated 27<sup>th</sup> May 2003, struck out the Plaintiff's defence as a sham and made positive findings that he, together with other directors, shamelessly fleeced, embezzled assets and defrauded the Company in excess of KES 176 million over four years, leading to its collapse. The 1<sup>st</sup> Defendant states that the Plaintiff did not appeal against the judgment and all stay orders in his favour were discharged leaving the Plaintiff to settle the decree dated 29<sup>th</sup> May 2005 for KES 47,645,968.05 which remains unsettled.

17. Further in **Winding Up Cause No. 21 of 2003 In the Matter of Lakestar Insurance Company Limited**, Mutungi J., in the Judgment dated 27<sup>th</sup> June 2003, held that the Directors including the Plaintiff had, "*committed open theft and embezzled the Company assets*" and directed that the Directors be prosecuted for their acts of embezzlement of the Company's assets and that they be sued for recovery of those assets in addition to winding up the Company. By a ruling dated 21<sup>st</sup> July 2003, Mutungi J., dismissed the Plaintiff's application for a *de novo* hearing and review of the winding up order. On 12<sup>th</sup> November 2003, Mutungi J., also dismissed the Plaintiff's second application seeking to review and set aside the Winding up order. The 1<sup>st</sup> Defendant points out that the Plaintiff did not appeal against the Judgment winding up the Company and his attempts to seek extension of time to file an appeal out time in **NRB CA Civil Application 270 of 2004** and **NRB CA Civil Application No. 110 of 2005** were dismissed.

18. In **HCCC 363 of 2008 John Kilel v Wilfred Riitho Njeru as Interim Liquidator of Lakestar Insurance Co. Ltd**, Khaminwa J., by the ruling dated 21<sup>st</sup> October 2009 dismissed the Plaintiff's application to restrain the interim liquidator, on grounds that the Plaintiff remained indebted to the Company and should repay the decree against him in **HCCC 1016 of 2002**. The Court did not find any basis for removing the Interim Liquidator and directed the Plaintiff to repay the Company the funds he had misappropriated. The Plaintiff filed another application seeking to replace the Interim Liquidator with Hezlon Waitthaka which the court allowed.

19. In **Geoffrey Kipkoech v UAP Provincial Company Limited and Another (Supra)** Nzioka J. in the judgment dated 30<sup>th</sup> April 2020 dismissed the Plaintiff's suit that had challenged the sale by the Interim Liquidator of one of the Company's assets LR. 209/13453 Upphill for the benefit of the creditors.

20. The 1<sup>st</sup> Defendant states that multiple judicial decisions of this Court hold the Plaintiff and his co-directors personally liable for defrauding the Company, leading to its liquidation and that the Plaintiff is also a fugitive from the law having failed to pay this Court's decree dated 29<sup>th</sup> May 2005 in **HCCC 1016 of 2002** declaring him personally liable to pay KES 47,645,968.05. That therefore the doctrine of *res judicata* applies to bar this suit that attempts to re-litigate **Winding Up Cause No. 21 of 2003** and shift blame for the collapse of the Company to the Defendants. It urges that this is being invited to mischievously re-consider matters already canvassed and decided in this Court in the matters outlined. On the basis of the facts disclosed, the 1<sup>st</sup> Defendant supported by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants urge the court to strike out the suit.

### **The Plaintiff's Response**

21. The Plaintiff opposes the application by citing **Articles 22(1)** and **50(1)** of the Constitution which give this court jurisdiction to hear cases concerning violation of fundamental rights and freedoms and protect the right to a fair hearing. He submits that the court has power and authority to hear and determine the suit herein and that the application is intended to delay the quick disposal of the suit. He adds that the application is an abuse of the court process having been filed 7 years since the suit was filed. He submits that the application is intended to shield 1<sup>st</sup> and 2<sup>nd</sup> Defendants from being called upon to account for their illegal and unlawful actions leading to the Company being liquidated. The Plaintiff affirms that as a majority shareholder of the Company, any loss of value to the Company affects him personally hence he is entitled to agitate this suit on his own behalf.

22. The Plaintiff submits that the suit is not statute barred under the **Limitation of Actions Act** as he became aware of the fraud and misrepresentation committed by the Defendants on 7<sup>th</sup> June 2013 when the court appointed Interim Liquidator filed the Audit Report pursuant to the order made on 1<sup>st</sup> March 2013 in **HCCC No. 363 of 2008** and that the time applicable started to run from that date when he became aware of it. He stated that this suit was filed on 11<sup>th</sup> November 2013 upon discovery of the fraud and misrepresentation committed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants between 1<sup>st</sup> July 2002 to 14<sup>th</sup> February 2012. The Plaintiff accuses the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants of preventing him from receiving information and/or obtaining account records during the tenure of the Statutory Manager and the Interim Liquidator between 13<sup>th</sup> June 2002 to 14<sup>th</sup> February 2012.

23. The Plaintiff submits that it shall rely on the Audit Report to support its case that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants committed acts of fraud and

misrepresentation. He therefore disputes the 1<sup>st</sup> Defendant's assertion that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acted in good faith and are protected by the law. This issue which has never been determined, he submits, can only be determined at a full hearing of the suit. The Plaintiff argues that the issue of compensation which the present suit is about has never be adjudicated upon by a court of competent jurisdiction hence the doctrine of *res judicata* does not apply to this case.

24. The Plaintiff further submits that the order winding up the Company in **Winding Up Cause No. 21 of 2003** was obtained through misrepresentation and in apparent abuse of the court process. He accuses the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants of ensuring that the Deceased was charged in two criminal cases which were determined 2007 and 2009 respectively and that the cases were meant to keep him in court in order to prevent him from challenging their actions. The Plaintiff contends that the Deceased was never convicted of any offence of embezzling the Company's assets despite the fact that the 2<sup>nd</sup> Defendant had sought an order to that effect which was granted. The Plaintiff contends that it is on record that the 2<sup>nd</sup> Defendant testified against the Deceased in **NRB Chief Magistrate's Criminal Case No. 234 of 2003** which case was dismissed under **section 210 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya** without him being placed on his defence.

25. The Plaintiff maintains that the 2<sup>nd</sup> Defendant should be called upon to account for his activities in the interest of justice. It points out that the Audit Report shows that the 3<sup>rd</sup> Defendant misappropriated the Company funds during her tenure amounting to KES 3,343,916.00 and could not account for motor vehicle insurance certificates worth KES 84 million. Further, that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continued to control the Interim Liquidator long after an order of liquidation had been made and that they participated in disposal of the Company's real properties and yet their mandate ceased once the Interim Liquidator was appointed on 27<sup>th</sup> June 2002. The Plaintiff accuses the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of shielding the 3<sup>rd</sup> Defendant from giving crucial information sought by the Interim Liquidator during the inquiry and that this application is a further attempt to shield her from accounting to this court.

26. The Plaintiff submits that he has pleaded that his constitutional rights to property were breached and by virtue of **Articles 22 (1) and 50 (1)** of the Constitution, the Court has constitutional powers and jurisdiction to hear and determine the issues raised in this suit. He further submits that at no time did the Winding Up Order empower the Defendants to plunder the assets of the Company in liquidation. It accuses the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants of using their privileged position as public officers for their benefit. Thus, the Plaintiff urges the court to exercise its constitutional authority and power to hear and determine this case at the full hearing instead of striking it out at the interlocutory stage based on technicalities.

#### **Whether the suit has abated**

27. Before I proceed to determine the matter, I think it is important to dispose of the issue whether this suit has abated since it is not in dispute that the Deceased died on 23<sup>rd</sup> April 2016. **Order 24 Rules 1 and 3** of the **Rules** are relevant to this determination and provide as follows:

##### **1.No abatement by party's death if right survives [Order 24, rule 1.]**

The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

.....

##### **3. Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 3.]**

1. Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

2. Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

28. The sequence of the procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death (see **Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others NRB CA Civil Appeal No. 283 of 2015 [2017] eKLR**).

29. The record indicates that on 1<sup>st</sup> November 2016, Geoffrey Kipkoeh filed an application dated 27<sup>th</sup> October 2016 seeking substitution of the Plaintiff with himself as he had been appointed Administrator *ad Litem* for the Plaintiff's Estate. In his deposition, he annexed a Limited Grant of Letters *ad Litem* issued by the court on 12<sup>th</sup> July 2016 and for purposes of "*Taking over and prosecuting to completion HCC No. 363/2008, HCCC No. 421/2014, Winding Up Cause No. 21 of 2003, HCCC 491/2013....*". On 16<sup>th</sup> November 2016, Tuiyott J., allowed the application for substitution without any objection by counsel for the Defendants.

30. Since the application for substitution was filed within a year of the Deceased's death and the Defendants did not object to it, it follows that the issue of abatement does not arise. The Deceased's suit survives and continues with his legal representative and Administrator *ad Litem*, Geoffrey Kipkoeh.

## Whether the suit is *res judicata* or an abuse of the court process

31. Although the 1<sup>st</sup> Defendant has raised five grounds to challenge the Plaintiff's suit, I propose to deal with a singular issue and it is whether this suit is *res judicata* and an abuse of the court process for reasons that will become clear and apparent. But before I proceed further, it is important to recall that the power of the court to strike out a suit is drastic and must only be resorted to in the clearest of cases (**D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another NRB CA Civil Appeal No. 37 of 1978 [1980] eKLR**). Where there are facts to be ascertained and the defence raises triable issue then the court will not exercise that power and instead allow the matter to be ventilated at a full hearing.

32. From my narrative of the facts of the case, it is not dispute that the parties have been engaged in litigation over issues regarding the Company. In this case, the Plaintiff seeks recompense for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's acts in the course of performing their statutory duties which resulted in winding up of the Company. Is the claim *res-judicata* and an abuse of the court process in light of previous decisions of the court relating to the Company?

33. The doctrine of *res judicata* is anchored in **section 7** of the **Civil Procedure Act** which provides that:

7. 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 can 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.

34. Thus the following elements must all be satisfied for the doctrine of *res judicata* to apply; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit in which the issue is raised (see **Gichuki v Gichuki [1982] KLR 285, Karia and Another v The Attorney General and Others [2005] 1 EA 83**).

35. I have gone through the said previous decisions together with the issues raised by the Plaintiff in the instant suit. I cannot say that the litigation was between the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants although the matters centred on the Company and the fact that it was placed under Statutory management and then under liquidation. While those matters do not fall within the strict definition of *res judicata*, it does not mean that the subsequent litigation may constitute an abuse of the court process as claimed by the 1<sup>st</sup> Defendant. It is to this issue that I now turn.

36. In my view, two decisions relating to the Company and the Deceased are germane. First, there is the ruling dated 27<sup>th</sup> May 2003 delivered by Waki J., in **HCCC 1016 of 2002 Hellen Olima v John Kipkemboi Kilel**, where he struck out the Deceased's defence in a suit filed the Statutory Manager claiming money misappropriated by the directors including the Deceased from the Company. The learned Judge held that the Deceased together with other directors shamelessly fleeced and embezzled Company assets in excess of KES 176 million over four years, leading to its collapse. In that case, a judgment of KES. 47 million against the Deceased remains unsatisfied. The Plaintiff has not appealed against the decision.

37. The other important decision is the judgment dated 23<sup>rd</sup> June 2003 delivered by Mutungi J., in the **Winding Up Cause No. 21 of 2003** which resulted in the winding up and liquidation of the Company. The court found as a fact that the Company was unable to pay its debts, had violated various provisions of the **Insurance Act**, that the Directors including the Deceased had Company land in their names, that the Company had failed to meet reasonable expectation of its policy holders, that it was insolvent and that it was just and equitable in the circumstances to liquidate it. In addition to winding up the Company and appointing an Interim Liquidator, the court ordered that, "*The Directors of Lakestar Insurance Company Limited be prosecuted for their acts of embezzlement of the insurer's assets and be sued for recovery of the insurers assets for their beneficial application to the creditors of the insurer ....*" The Deceased did not appeal the decision and his attempts to set aside the decision were not successful.

38. The Plaintiff's case, which is succinctly captured in paras. 30 and 31 of the Plaintiff, is that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants abused and misused their power and drove the Company into unnecessary liquidation causing the Deceased loss and damage as a shareholder. It is at this stage that I must state that the court has already resolved the issue of liquidation and accepted that based on the evidence before it, the liquidation and other orders were justified. I would also point out that in both cases, the Deceased was granted the full opportunity to participate in the proceedings. If this court were to allow this matter to proceed for trial, it would amount to a collateral attack on the orders of the court which allowed the winding up. All the actions by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants prior to the presentation of the petition including the statutory management merged into the Judgment which adjudicated on the status of the Company and resulted in the winding up orders being made. Assuming the facts presented by the Plaintiff are true and correct, the court would have to find and hold that the Judgment in the **Winding Up Cause No. 21 of 2003** was wrong!

39. The Plaintiff also anchors its cause of action on the Audit Report filed in **HCCC No. 363 of 2008, John Kipkemboi Kilel v Wilfred Riitho Njeru as Interim Liquidator of Lakestar Insurance Company Limited**. While the Plaintiff's case is that the Deceased discovered subsequent facts showing that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants fraud and concealment before and after the presentation of the petition, this would not change the position. This court would still be called upon to review the findings of the court not only in the Winding Up Cause but also the finding that the Deceased embezzled funds from the Company.

40. The Plaintiff has framed his claim as a claim for losses due to him as a shareholder of the Company. I understand him to be saying that had the Company not been placed under Statutory Management or in liquidation because of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant actions, he would not have lost KES. 12,075,289,826.00. This amount includes a claim for opportunity cost based on the revenue and assets appreciation, loss of earnings for 132 months, loss of earnings from investment in Treasury bills, loss of property and capitals gains, cash loss and loss of payment of professional fees and consultancy fees. He also seeks damages for name and brand reputation, loss of credit, damage to character and

mental anguish. I agree with counsel for the 1<sup>st</sup> Defendant that Plaintiff cannot agitate a claim on behalf of the company. Even if I accept that the Deceased had a personal action against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, all these claims are tied inextricably to the Company and in reaching any findings on this claim, the court would have to adjudicate on the judgment in the Winding Up Cause and find that in fact that there was no basis for the liquidation order.

41. It must now be abundantly clear that the Plaintiff's claim is a collateral attack on the Judgment in **Winding Up Cause No. 21 of 2003** and consequently an abuse of the court process. The decision in **Hunter v Chief Constable of West Midlands & Another [1981] 3 ALL ER 728** summarized the meaning of a collateral attack as follows:

The initiation of proceedings in a Court of justice for the purpose of mounting a collateral attack on a final decision adverse to the intending Plaintiff reached by a Court of competent jurisdiction in previous proceedings in which the Plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the Court. The fact that the collateral attack was by means of a civil action raising an identical issue decided against the Plaintiff in a competent Court of criminal jurisdiction was immaterial, since if the issue had been proved against the Plaintiff beyond all reasonable doubt in the criminal court it would be wholly inconsistent if it were not decided against him on the balance of probabilities in the civil action.

42. The forum for attacking a judgment liquidating the Company is not through the filing of a second suit dressed up under the guise of an action for damages against the person holding the position of Commissioner of Insurance and Statutory Manager but to lodge an appeal against the judgment or apply to set aside that judgment. In **Wilson v The Queen [1983] 2 S.C.R 594** the court observed that:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exists. Without attempting to a complete list, such grounds would include fraud or the discovery of new evidence.

43. In this case, a court of competent jurisdiction has already pronounced itself on the status of the Company as a result of a petition brought by the Commissioner of Insurance who at the material time was the 2<sup>nd</sup> Defendant after it had been under statutory management of the 3<sup>rd</sup> Defendant. The Plaintiff was an active participant in the Winding Up proceedings and unsuccessfully applied to set aside the order at least twice. To permit the Plaintiff to proceed with the cause contemplated would amount to re-opening what the court has already adjudicated on with finality. In addition, the court has already adjudicated on the complicity of the Deceased and his fellow directors in the collapse of the Company by a judgment issued against them. That judgment cannot be wished away by a side wind in collateral proceedings.

44. The position I have taken is also buttressed by the fact that the Plaintiff also grounds its case on the Audit Report prepared and produced by the Interim Liquidator is an important consideration whether this suit proceeds for hearing. The Interim Liquidator is appointed by the court to supervise the winding up of the Company for the benefit of all the creditors. Under **section 241** of the **Companies Act (Repealed)**, which is applicable, the Interim Liquidator has the power to collect debts and sue those involved in malfeasance and misfeasance in relation to the Company. If the contents of the Audit Report are true that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were involved in activities that caused the Company any loss or damage, the Interim Liquidator would be entitled to sue for damages but such damages would only accrue to the Company in order to make the creditors good. It is only after all the creditors are made good that the shareholders would be entitled to any residue.

45. In addition, since the Audit Report is prepared by the Interim Liquidator, any issue concerning it ought to be raised in the Winding Up proceedings rather than by filing a separate suit. Indeed, the provision applicable, that is **section 324** of the **Companies Act (Repealed)** provides that:

324 (1) If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just.

(2) The provisions of this section shall have effect notwithstanding that the offence is one for which the offender may be criminally liable.

46. Finally, if the Audit Report discloses new material which was not available at the time the court issued the Winding Up order, it would form the basis for an application to review or setting aside of the Winding Up order. Such an application ought to be filed in the Winding Up Cause and not by a separate suit intended to achieve the same purpose by way of a collateral attack.

## **Disposition**

47. For the reasons I have stated, I find and hold that the Plaintiff's case is a collateral attack on the Judgment in **Winding Up Cause No. 21 of 2003 In the Matter of Lakestar Insurance Company Limited** which culminated in liquidation of the Company. Allowing the matter to proceed for hearing will result in the court prying open matters that a court of competent jurisdiction has already adjudicated upon.

48. The 1<sup>st</sup> Defendant's application dated 21<sup>st</sup> January 2021 is allowed and the suit be and is hereby struck out with costs to the Defendants.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF AUGUST 2021**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Oyugi instructed by Oyugi and Company Advocates for the Plaintiff.

Mr Leiteipan, Advocate instructed by the Office of the Attorney General for the 1<sup>st</sup> Defendant.

Mr Ochieng instructed by Rachier and Amollo Advocates LLP for the 2<sup>nd</sup> Defendant.

Mr Onguru instructed by Ochanda Onguru and Company Advocates for the 3<sup>rd</sup> Defendant.