



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. E099 OF 2021**

**AUTO JAPAN (MOMBASA) LIMITED.....PLAINTIFF**

**-VERSUS-**

**MALIK ALI ZAKA.....1<sup>ST</sup> DEFENDANT**

**MUHAMMAD SULEIMAN.....2<sup>ND</sup> DEFENDANT**

**QAMAR U-ZAMAR.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. There are three applications before me for determination. The 1<sup>st</sup> one is dated the 22<sup>nd</sup> September, 2021. It was filed on 24<sup>th</sup> September, 2021 by the plaintiff. It has been brought under the provisions of Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 142, 145, 146, 148 and 155 of the Companies Act and other enabling provisions of the law. It seeks the following orders-

(i) Spent;

(ii) That pending the hearing and determination of this application, this Honourable Court be pleased to issue a temporary injunction restraining the defendants/respondents, their agents, servants, employees or other parties through whom they may act from in any way dealing with the plaintiff/applicant's property, including the sale of the plaintiff/applicant's motor vehicles pending the hearing and determination of this application (sic);

(iii) That pending the hearing and determination of this application this Honourable Court be pleased to issue a temporary injunction restraining the defendants/respondents, their agents, employees, servants or other parties through whom they may act from in any way dealing with the following plaintiff/ applicant's bank accounts pending the hearing and determination of this application (sic)-

(a) Absa Bank – Kenya Shillings Account No. xxxxxx held at Nkrumah Branch Mombasa, Kenya;

(b) Equity Bank – Kenya Shillings Account No. xxxxxx held at Moi Avenue Branch Mombasa;

(c) Diamond Trust Bank – Kenya Shillings Account No. xxxxxx held at Moi Avenue Branch Mombasa;

(d) Gulf African Bank – Kenya Shillings Account No. xxxxxx held at Nkrumah Branch Mombasa;

(e) Gulf African Bank – Dollar Account held at Nkrumah Branch Mombasa.

(iv) That pending the hearing and determination of this application, this Honourable Court be pleased to issue orders compelling the defendants/respondents to return with immediate effect the plaintiff/applicant's assets namely-

(a) Eight Hundred (800) original log books for motor vehicles owned by the plaintiff/applicant;

(b) One Hundred and nine (109) car keys for motor vehicles owned by the plaintiff/applicant;

(c) One Hundred and nine (109) original importation and registration documents for motor vehicles owned by the

plaintiff/applicant; and

(d) The showroom keys to the plaintiff.

(v) That the Officer Commanding Police Division, Central Police Station Mombasa to ensure compliance with orders of the Court with immediate effect; and

(vi) That costs of this application be provided for.

2. The application is anchored on the grounds on the face of it and the supporting affidavit of Sajid Malik Jamshed sworn on 22<sup>nd</sup> September, 2021.

3. On 29<sup>th</sup> September, 2021, the 1<sup>st</sup> defendant filed an application of the same date brought under the provisions of Section 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The 1<sup>st</sup> defendant seeks the following orders-

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) That this Honourable Court be pleased to dismiss the plaintiff's application dated 22<sup>nd</sup> September, 2021 with costs; and

(v) That the costs of this application be provided for.

4. The application is premised on the grounds in support of it and the supporting affidavit of Malik Ali Zaka, the 1<sup>st</sup> defendant, sworn on 29<sup>th</sup> September, 2021. On the same date, the 1<sup>st</sup> defendant also filed a Notice of Preliminary Objection against the whole of the plaintiff's suit.

5. On 30<sup>th</sup> September, 2021, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed an application of even date under the provisions of Sections 1A, 1B and 63(e) of the Civil Procedure Act, Order 40 Rule 7 of the Civil Procedure Rules and Section 257 of the Companies Act and based on all enabling provisions of the law. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants seek the following orders-

(i) Spent;

(ii) That the orders made by Hon. Lady Justice Njoki Mwangi on 24<sup>th</sup> September, 2021 be varied to the extent that-

(a) Prayer 3 be varied to the extent that the plaintiff's company's bank, that is-

(i) Absa Bank – Kenya Shillings Account No. xxxxxxx held at Nkrumah Branch Mombasa, Kenya;

(ii) Equity Bank – Kenya Shillings Account No. xxxxxxx held at Moi Avenue Branch Mombasa;

(iii) Diamond Trust Bank – Kenya Shillings Account No. xxxxxxx held at Moi Avenue Branch Mombasa;

(iv) Gulf African Bank – Kenya Shillings Account No. xxxxxx held at Nkrumah Branch Mombasa;

(v) Gulf African Bank- Ditta Account (sic) held at Nkrumah Branch Mombasa unfreeze the aforesaid bank accounts to enable the plaintiff company pay for the general expenses of the plaintiff company (sic).

(b) Spent;

(iii) That Mr. Sajid Malik Jamshed re-opens the Company System to enable the plaintiff company access the same for the purposes of serving third party clients who have purchased motor vehicles from the plaintiff company and the Court directs that their transactions be completed and a report presented to the Court; and

(iv) Spent;

6. The said 3<sup>rd</sup> application is premised on the grounds in support of it and the affidavit of Muhammad Suleiman, the 2<sup>nd</sup> defendant sworn on 30<sup>th</sup> September, 2021. On 5<sup>th</sup> October, 2021, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants also filed grounds of opposition to the application dated 22<sup>nd</sup> September, 2021 to the effect that the applicant Sajid Malik Jamshed who is seeking relief on behalf of the plaintiff failed to file a derivative suit to determine if the claim has merit and to represent the plaintiff company as provided under Section 239 of Company law (sic) and that he failed to obtain a valid board resolution authorizing the filing of the suit by the plaintiff. It was also stated that the procedural omissions are incurably defective hence the suit ought to be struck out and/or dismissed.

7. This Court gave directions for the filing of responses to all the applications on record. On 6<sup>th</sup> October, 2021, Sajid Malik Jamshed filed replying affidavits to the applications dated 29<sup>th</sup> September, 2021 and 30<sup>th</sup> September, 2021.
8. The 2<sup>nd</sup> defendant filed a replying affidavit to the application dated 22<sup>nd</sup> September, 2021 on 5<sup>th</sup> October, 2021. Additional affidavits were filed on the same day by Titus Ekapolon Obonyo, Mohamed Said Mrumwengu and Adam Chengo Kalama in response to the application dated 22<sup>nd</sup> September, 2021.
9. The 1<sup>st</sup> defendant, Malik Ali Zaka on 5<sup>th</sup> October, 2021 filed a replying affidavit sworn on 4<sup>th</sup> October, 2021 in response to the application dated 22<sup>nd</sup> September, 2021.
10. On 7<sup>th</sup> October, 2021 the 3<sup>rd</sup> defendant, Qamar U-Zamar filed an affidavit sworn on the same day in response to the 1<sup>st</sup> defendant's application dated 29<sup>th</sup> September, 2021.
11. On the same day, the 1<sup>st</sup> defendant filed a supplementary affidavit sworn on even date in response to the replying affidavit of Sajid Malik Jamshed sworn on 4<sup>th</sup> October. In addition to the said affidavit, on 8<sup>th</sup> October, 2021 another affidavit was filed that had been sworn on 7<sup>th</sup> October, 2021 by Joshua Okoth Adang.
12. On 8<sup>th</sup> October, 2021, Sajid Malik Jamshed filed a supplementary affidavit in response to the 1<sup>st</sup> defendant's replying affidavit of 4<sup>th</sup> October, 2021.
13. On 16<sup>th</sup> October, 2021, the 1<sup>st</sup> defendant filed an affidavit sworn on 11<sup>th</sup> October, 2021.
14. Sajid Malik Jamshed on 13<sup>th</sup> October, 2021 filed two 2<sup>nd</sup> supplementary affidavits in response to the 1<sup>st</sup> defendant's further replying affidavit sworn on 11<sup>th</sup> October, 2021 and in response to the 1<sup>st</sup> defendant's further replying affidavits sworn on 7<sup>th</sup> October, 2021 and 11<sup>th</sup> October, 2021.
15. Having noted that the plaintiff is tottering on the brink of collapse due to divergent interests by the defendants alongside those of Sajid Malik Jamshed and Hussain Javed, with the plaintiff's customers being caught in the middle, this Court directed Counsel on record to make oral submissions for expeditious hearing of this matter.
16. Mr. Kimani Mwangi, learned Counsel for the plaintiff stated the assets of the company are in the hands of one of the directors who is the 1<sup>st</sup> defendant. He submitted that under the provisions of Section 780 of the Companies Act, this Court has original and unfettered jurisdiction to deal with issues of companies when disputes of their internal mechanism arise. He relied on the case of **Martin Lemaiyan Mokoosio & another v Reshma Praful Chandra Vadera & others**, Machakos High Court Petition No. 13 of 2020, which addressed the issue of the unfettered jurisdiction of the High Court. He indicated that in the said case, it was held that the High Court has jurisdiction to protect the rights of a company or the directors of the company. The plaintiff's Counsel relied on the provisions of Article 159(2)(d) of the Constitution which speaks of substantive justice versus procedural technicalities.
17. He also relied on the case of **Telkom Kenya Limited v John Ochanda & 999 others** [2015] eKLR, which states that each Court must look at the substance of the matter and not procedural technicalities.
18. He submitted that there was a likelihood of the operations of the plaintiff being liquidated due to the actions of the 1<sup>st</sup> defendant. He stated that the board resolution annexed to the supporting affidavit by the plaintiff authorized the law firm of Kimani Mwangi Advocates LLP to file suit against the 1<sup>st</sup> to 3<sup>rd</sup> defendants. He also indicated that a copy of the CR12 exhibited in an annexure to the said affidavit shows the shareholding of the plaintiff and that Sajid Malik Jamshed is a director of the said plaintiff with 500 ordinary shares. He stated that Muhammad Suleiman has 100 ordinary shares, Hussain Malik Javed 100 ordinary shares, Malik Ali Zaka has 200 ordinary shares and Qamar U-Zamar has 100 ordinary shares. Mr. Kimani submitted that under the provisions of Section 258 of the Companies Act, the above are the shareholders of the company (plaintiff).
19. On the challenge raised with regard to the invalidity of the resolution filed by the plaintiff, he relied on Nairobi High Court **Petition No. 412 of 2019 Paragon Electronics Limited v Njeri Kariuki** [2021] eKLR, where the Court held that a case can be filed without a resolution of a company as no prejudice is suffered by anyone. In making reference to page 44 of the documents annexed to the supporting affidavit to the application dated 22<sup>nd</sup> September, 2021, Mr. Kimani stated that the said document shows that Malik Zaka Ali (the 1<sup>st</sup> defendant) is the sole director/shareholder of Erum Motors Limited. The plaintiff's Counsel further stated that the 1<sup>st</sup> defendant as shown on pages 22, 24, 26 and 35 of the said documents transferred to his company colossal amounts of money yet there was nothing to show that he had supplied anything to the plaintiff.
20. He indicated that on pages 39 to 42 of plaintiff's documents, 2 directors of the plaintiff have sworn affidavits in this case and that since Sajid Malik has 500 shares and Hussain holds 100 shares, they are the majority shareholders of the plaintiff.
21. In making reference to the supplementary affidavit filed on behalf of the plaintiff, Mr. Kimani reiterated about the pilferage of the funds from the plaintiff and that the same had not been controverted by the defendants.
22. In stating that Sajid Malik is the chairman of the plaintiff, reference was made to the said deponent's replying affidavit sworn on 5<sup>th</sup> October, 2021 and filed on 6<sup>th</sup> October, 2021 in response to the 2<sup>nd</sup> defendant's application dated 30<sup>th</sup> September, 2021. The plaintiff's Counsel indicated that the said affidavit contains an annexure marked SMJ10 which is an email dated 31<sup>st</sup> January, 2021 from the 2<sup>nd</sup>

defendant stating as follows- “now we are requesting to your kind office to finalized (sic) the lease agreement as soon as possible as our chairman Mr. Sajid Malik is traveling back to Japan within two or three days.”, and the said words evidently demonstrate that Sajid Malik is the chairman of the plaintiff.

23. Mr. Kimani referred to two other emails marked as SMJ 9(a) and SMJ 9(b) annexed to the affidavit sworn on 4<sup>th</sup> October, 2021 in which two different clients were complaining about the delay in having their motor vehicles being released to them and annexure SMJ 9(c) where another customer was requesting the plaintiff to check the logbook transfer fee for motor vehicle registration No. KDB 436Z Honda Fit new shape.

24. He submitted that even after this Court gave directions for the plaintiff’s showrooms to be opened, the defendants had declined to do so. He indicated that on 29<sup>th</sup> and 30<sup>th</sup> September, 2021, he sent emails to the Counsel for the 1st defendant and that the said Counsel sent him a consent to sign but he declined to do so as they had not complied with orders of this Court. He indicated that the showrooms are closed and that the plaintiff’s clients were suffering. He submitted that the defendants’ intention by forming their company is to ensure that the plaintiff does not go on with business.

25. Mr. Kimani relied on the annexure marked SMJ3 being minutes of a special meeting of directors/shareholders convened on 21<sup>st</sup> September, 2021. On the challenge posed by the defendants on his being appointed to represent the plaintiff in this case, he relied in the decision in **Republic v National Land Commission & 2 others exparte Magnate Ventures Limited** [2017] eKLR.

26. On the sale agreement annexed to the affidavit filed by Joshua Okoth Adang on 8<sup>th</sup> October, 2021, Mr. Kimani stated that he did not see the plaintiff’s name, company seal or stamp on the said document.

27. He prayed for the defendants’ applications to be dismissed as they are based on a reaction from the Court orders of 24<sup>th</sup> September, 2021. He was of the view that in the absence of obedience of Court orders, the Counsel for the defendants should not be given audience. He indicated that they were not able to serve the defendants on 25<sup>th</sup> September, 2021 because the showroom was not opened.

28. The plaintiff’s Counsel submitted that contrary to the contention by the defendants, there was no misrepresentation of material facts by the plaintiff’s deponent. He made reference to paragraph 8 of the supplementary affidavit sworn on 7<sup>th</sup> October, 2021 and filed on 8<sup>th</sup> October, 2021, by Sajid Malik, where he deposed that the person who had possession of all the showroom keys and car keys was the 1<sup>st</sup> defendant.

29. Mr. Kimani indicated that he had not submitted on the issue of the supply operating system in Japan as it is not operated by the plaintiff as the supplier has control of the said system. He further indicated that he had not heard any evidence from the defendants that they were unable to make their sales in Kenya because the supply operating system was closed in Japan. He stated that the said system is operated by Malak Boeki, a company based in Japan.

30. In highlighting submissions for the 1<sup>st</sup> defendant, Mr. Deche stated that in a further replying affidavit that had been filed on 8<sup>th</sup> October, 2021 by Joshua Okoth Adang on behalf of the 1<sup>st</sup> defendant, he deposed that Hussain Malik had released a motor vehicle to him. The 1<sup>st</sup> defendant’s Counsel stated that the foregoing was indicative of the fact that Hussain Malik had possession of the keys for the showroom along Moi Avenue.

31. He submitted that Section 780 of the Companies Act provides that the Court should be approached by way of an application to file a derivative suit. He stated that the 1<sup>st</sup> defendant was challenging the lack of a valid resolution having been passed by the plaintiff to institute this suit. He relied on the case of **Kenya Commercial Bank Limited v Stage Coach Management Limited** [2014] eKLR, in which the Court cited the case of **Raila Odinga v IEBC & others** [2013] eKLR, where it was stated that the Court should not pay undue attention to procedural technicalities. Mr. Deche however submitted that the issue of the validity of a resolution of a company is not a procedural issue but a legal issue, as a company has no legs or arms but operates through its directors.

32. He submitted that a resolution must be a valid one and relied on the case of **Affordable Homes Africa Limited v Henderson & 2 others**, where the Court cited the case of **Shaw & Sons (Salford) Ltd v Shaw**, in which a decision was made that even a majority shareholder cannot purport to be a company.

33. Mr. Deche cited the provisions of Section 257 of the Companies Act which deals with the issue of a special resolution under Section 257(6) and states that if a resolution is passed at a meeting, the resolution is only a special resolution if the notice of the meeting included in the text of the resolution an intention to specify the resolution as a special resolution. He indicated that no notice was issued by the plaintiff thus the resolution annexed to the affidavit of Sajid Malik offends the Companies Act.

34. The 1<sup>st</sup> defendant’s Counsel stated that Section 257(1) of the Companies Act provides that a resolution is a special resolution of members if passed by a majority of not less than 75%. He submitted that sub-section 2 thereof states that a written resolution is passed by a majority of not less than 75% if it is passed by members representing not less than 75% of the total voting rights of eligible members. He submitted that it was indicated by the plaintiff’s Counsel that Sajid Malik and Hussain Javed hold a total of 600 shares, which constitute 60% and not 75% of the shares. Mr. Deche pointed out that Section 257(1) of the Companies Act does not provide for a simple majority but a special majority. He further stated that the actions of Sajid Malik and Hussain Javed were an act of bad faith as the two resolutions they were relying on were passed without involving the other directors.

35. He further submitted that no meeting was held pursuant to the special notice issued, marked as MS2 which sought the removal of a director. He indicated that the Companies Act provides for a 21 days’ notice for a general meeting and 28 days’ notice for an extraordinary meeting. He stated that the actions of Sajid Malik and Hussain Javed were malicious as in less than a week, the notice of a meeting was

issued for 21<sup>st</sup> September, 2021, which was the day when the defendants had been summoned by the Director of Criminal Investigations (DCI).

36. Mr. Deche was of the view that Sajid Malik was not a *bonafide* shareholder of the company as he is a supplier of motor vehicles to the plaintiff as confirmed by Muhammad Suleiman in his affidavit filed on 5<sup>th</sup> October, 2021, in which he stated that 500 shares were transferred to Sajid Malik as security in case the plaintiff failed to pay him for supply of the vehicles. He stated that the 1<sup>st</sup> defendant, Malik Ali Zaka was the one who incorporated the plaintiff as shown in his affidavit filed on 5<sup>th</sup> October, 2021 and that he transferred shares to the other shareholders and that although pages 7 and 8 of the transfer deed shows that Kshs. 10,000/= was paid for the shares, that was not the case.

37. The 1<sup>st</sup> defendant's Counsel submitted that the 1<sup>st</sup> defendant had paid Sajid Malik the sum of Kshs. 354,669,580.00 for all the cars supplied to the plaintiff as per the annexures at pages 11-91.

38. It was submitted for the 1<sup>st</sup> defendant that the orders of 24<sup>th</sup> September, 2021 were obtained through misrepresentation of facts and non-disclosure of material information as Sajid Malik had not disclosed that he holds the keys to the showroom along Moi Avenue and for the said reason, it was not possible to execute the Court order.

39. On the issue of non-disclosure of material information, Mr. Deche stated that the plaintiff did not disclose that the company operates through an online system operated from Japan and that Sajid Malik had closed down the said system. He pointed out that the plaintiff was unable to operate without the said system, which enables the directors to see the supplies that have been made and the clients who have fully paid. The 1<sup>st</sup> defendant prayed for the orders issued on 24<sup>th</sup> September, 2021 to be set aside for misrepresentation of facts and non-disclosure of material information.

40. Mr. Gikandi who was also representing the 1<sup>st</sup> defendant submitted that the plaintiff is a limited liability company with 5 shareholders and 5 directors and that 3 of them are the defendants herein. He indicated that Sajid Malik and Hussain Javed Malik are the other 2 directors. He stated that all the shareholders have a right to participate in the decisions of the company but Sajid Malik had made the mistake of thinking that he is the plaintiff. He submitted that in the case of **Affordable Homes Africa Ltd v Henderson & 2 others** (supra), Njagi J relied on **Salmon v Salmon (1897) A.C. 22** to show that shareholders are distinct from the company. He made reference to the affidavit filed on 6<sup>th</sup> October, 2021, where it was deposed that a meeting was called via a telephone call. He cited the case of **Wambeye Kimweli v Board of Directors Nzoia Water Services Co. Ltd & 2 others**, where Judge Riechi stated that in order to have a proper meeting there must be notice.

41. Mr. Gikandi submitted that Section 387 of the Companies Act provides that a special meeting should have a 28 days' notice but the one called in this case had no notice. He relied on the case of **Habiba Mohamed Al-Amin & 2 others v Standard Chartered Kenya Ltd & others** [2020] eKLR, where the Court held that when a meeting does not attain the meeting threshold, anything done is a nullity. The 1<sup>st</sup> defendant's Counsel contended that the resolution arrived at to file this suit is a nullity.

42. Mr. Gikandi stated that since Sajid Malik as a shareholder in the plaintiff company was purporting to protect the interests of the plaintiff by asking that other directors be stopped from doing what they are doing, then the suit herein amounts to a derivative action as per the provisions of Sections 238 -241 of the Companies Act. He relied on the case of **Ghelani Metals Ltd & 3 others v Elesh Ghelani Natwarlal & another** [2017] eKLR, where Judge Onguto dealt with the issue and found that a derivative action cannot succeed unless the mandatory requirements have been met. He stated that this being a derivative action, no leave was sought to institute the suit.

43. He further stated that the 1<sup>st</sup> defendant had deposed that Sajid Malik is a supplier of motor vehicles who had been paid fully but he wants to take over control of the plaintiff company. Mr. Gikandi explained that the 1<sup>st</sup> defendant is a brother of Sajid Malik and that the latter was left in Japan sourcing for vehicles to sell to the plaintiff as well as to several other companies. He stated that the plaintiff had paid for all the vehicles supplied.

44. He contended that there was no *prima facie* case made out by Sajid Malik and Hussain Javed in their application and that they had no *locus standi* to file this suit. He explained that Sajid Malik has married the sister of Hussain Javed and indicated that they had ganged up to dispossess the other three shareholders. He stated that they misled the Court to issue the *ex parte* orders and that the plaintiff was under the control of Malik Ali Zaka (1<sup>st</sup> defendant).

45. Mr. Gikandi further stated that he was not sure why transfers were made from the plaintiff company's bank account to Erum Motors Limited. He contended that the plaintiff had not demonstrated that it would suffer irreparable loss and if at all there will be any loss suffered by Sajid Malik, then the same would be a quantifiable. He was of the view that the balance of convenience tilts in favour of the 1<sup>st</sup> defendant. He indicated that in their submissions, they had addressed the Court on their application seeking the dismissal of the application dated 22<sup>nd</sup> September, 2021.

46. Mr. Tindi for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the Notice of Motion dated 22<sup>nd</sup> September, 2021 was defective as the manner in which the orders were drafted meant that the plaintiff company did not intend to await the hearing of the main suit as there was no prayer seeking an injunction pending the hearing and determination of the main suit. He relied on the case of **Catherine Njeru Macharia v Macharia Kagio & another** [2013] eKLR, where the Court held that a prayer in the nature sought by the applicant herein cannot be granted in the absence of a prayer for an injunction pending the hearing of the case as prayers 2 and 3 therein would be spent pending the pronouncement of the ruling in the application. He indicated that in the said case, the Court relied on the ruling by Justice Ochieng in HCCC No. 2047 of 2000 **Wilfred O. Musingo v Habo Agencies Ltd**, where the Judge stated that if such orders were to be granted, they would expire immediately after the ruling was delivered in the case.

47. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants also relied on the decision in HCCC No. 329 of 2003 **Shariff Mohamed v Abdulkadir Shariff**

**Abdulkadir** on the same issue. He stated that the plaintiff could not be granted the orders of an injunction and for the said reason, the application by the plaintiff was incurably defective.

48. Mr. Tindi cited the decision in **John Kubai Maringa v Fredrick Ntongai M'eringa** [2009] eKLR, where Justice Emukule held that an order of injunction under Order XXXIX Rule 1 may be granted as an interlocutory order if it appears that it is just and convenient to do so but the words to be construed and understood should not be limited to granting an injunction ancillary to and comprised within the scope of the substantive relief in the proceedings.

49. The Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants stated that Section 780 of the Companies Act was relied on by the plaintiff's Counsel to show that this Court has unlimited jurisdiction to grant the orders sought. Mr. Tindi cited Machakos Petition No. 13 of 2020, **Martin Lemaiyan Mookosio & another v Reshma Praful Chandra Vadera** (supra) where the Court stated that ideally an application of this nature should be by way of a petition. Mr. Tindi indicated that the Court also held that claims against the wrongs committed to a company are to be instituted by way of a derivative action and more importantly, by a shareholder in a company or under Section 239 of the Companies Act. He stated that Section 782 of the said Act gives the procedure to be followed by a member making the application and that such a member has to seek leave to bring suit on behalf of and for the company.

50. He submitted that Section 782(4) of the Companies Act provides that the company must appear as a respondent in the suit. He indicated that in the application filed on 24th September, 2021, the plaintiff company was not a respondent. He also contended that Sajid Malik had made himself the company and that he had not sought leave of the Court to represent the company.

51. In making reference to paragraph 19 of the authority which was relied on by the plaintiff's Counsel in **Telkom Kenya Limited v John Ochanda & 996 Others** (supra), Mr. Tindi submitted that the Supreme Court held that rules of procedure are not irrelevant but are handmaidens of justice. That similarly, in the case of **Nicholas Kiptoo Arap Korir v Electoral and Boundaries Commission & 6 others** [2013] eKLR, the Court of Appeal cited the case of **Ayub Murumba Kakai v Town Clerk of Webuye County** [2010] eKLR, where it was stated that it ought to be clearly understood that the Courts have not belittled the role of procedural rules and that the oxygen principles should not be wrongly invoked.

52. The Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the oxygen principles cannot be applicable to an application seeking leave to file a derivative suit. He indicated that in paragraph 3(ii) of the replying affidavit of Muhammad Suleiman sworn on the same day, it states that the filing of the suit herein was done without a valid board resolution. Mr. Tindi stated that under Section 257 of the Companies Act, the board should approve by a percentage of 75 which did not happen in the case herein as Sajid Malik and Hussain Javed do not constitute 75% of the shareholding. In making reference to the case relied on by the plaintiff's Counsel of **Paragon Electronics Limited v Njeri Kariuki** (supra), Mr. Tindi explained that in the said case, the directors ratified a decision made by the petitioner to file suit without a board resolution. He indicated that in this instance, the directors had not ratified the decision by the plaintiff to file suit. In making reference to Annexure MS1 annexed to Muhammad Suleiman's replying affidavit sworn on 5<sup>th</sup> October, 2021, Mr. Tindi submitted that there were summons requiring attendance of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to a meeting at the DCI headquarters, Nairobi on 21<sup>st</sup> September, 2021 at 1000 hours in which they were requested to surrender their shareholding.

53. It was submitted that the plaintiff had not met the basic requirements for grant of an injunction. The Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' relied on the case of **Sunrise Properties Limited v Fifty Investments Ltd & another** [2007] eKLR, where it was stated that the principles for grant of an injunction are well known. It was contended that the applicant had not shown a *prima facie* case as all the elements had to be proved. He explained that the plaintiff's business had been closed for 40 days and that Sajid Malik had occasioned the said closure by disrupting the online system as explained in paragraph 6 of the 2<sup>nd</sup> defendant's replying affidavit sworn on 5<sup>th</sup> October, 2021.

54. Mr. Tindi submitted that a look at the plaint shows that the plaintiff herein had applied for a refund of a quantifiable amount of 43 Million, which could be repaid. He was of the view that the balance of convenience did not tilt in favour of the plaintiff as what had been alleged required proof but a *prima facie* case had not been established.

55. In regard to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' application dated 30<sup>th</sup> September, 2021, Mr. Tindi stated that they were praying for the plaintiff's accounts to be unfrozen so that it could run its affairs. He indicated that his clients were praying for the show room keys to be placed at a neutral place and for Sajid Malik to be ordered to open the operating system so that the plaintiff's customers could be served. He indicated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had also prayed for police officers to guard the plaintiff's premises so that motor vehicles could not be moved from the showroom to other premises.

56. He relied on the case of **Kilima Limited & another v Samuel Ruto & others**, Eldoret ELC No. 91 of 2018, wherein the case of **Tate Access Floor v Boswell** (1990) 3 All ER 303 was cited on non-disclosure of material information. He indicated that in this case, Sajid Malik failed to disclose at *ex parte* stage that he had blocked the company's operating system which has details of the company's financial system. He also indicated that the plaintiff had paid suppliers Kshs. 354,669,580.000. He elaborated on the issue of the alleged non-payment by indicating that Sajid Malik had alleged that suppliers in Japan had not been paid, yet they had.

57. On the issue of non-compliance of the Court orders, it was claimed that Sajid Malik had not told the Court that he and Hussain Javed had the keys to the showroom along Moi Avenue. He submitted that a supplementary affidavit sworn on 7<sup>th</sup> October, 2021 by Qamar U-Zamar had dealt with the issue of the keys at paragraph 2. It was indicated that in the said affidavit at paragraph 7, the said deponent had stated that Hussain Javed had received cash sales of Kshs. 6,010,000/= but the said cash had not been accounted for.

58. He further stated that Sajid Malik had claimed that on 21st August, 2021, he received a complaint from his brother-in-law Hussain Javed and he came to Kenya and that he registered Auto Toyoma Company Limited on 30<sup>th</sup> August, 2021 with himself and Hussain Javed as directors. Mr. Tindi contended that Mr. Hussain had the keys to the showroom and there was evidence that a motor vehicle was transferred from the plaintiff's showroom to Auto Toyoma Company Limited. He stated that the *ex parte* Court orders were obtained by false misrepresentation of facts.

59. In regard to the issue of Sajid Malik having been referred to as the chairman of the plaintiff company, Mr. Tindi stated that the minutes of the plaintiff indicated that any director can be elected to chair the meetings of the plaintiff. He indicated that there was a separate suit that had been filed on 21<sup>st</sup> September, 2021 namely, Mombasa HCCC E095 of 2021 where the issue of shareholding would be determined. He also indicated that the plaintiff's Counsel had served them with a supplementary affidavit which demonstrated that the plaintiff had no *prima facie* case. He stated that his clients were requesting for the business to run as usual, awaiting the determination of the application herein. He also relied on their grounds of opposition dated 5<sup>th</sup> October, 2021.

60. In response to the submissions filed by Counsel for the defendants, Mr Kimani indicated that they had filed two 2<sup>nd</sup> supplementary affidavits on 13<sup>th</sup> October, 2021, one of which was sworn by Sajid Malik. The Plaintiff's Counsel in response to Mr. Tindi's submissions asserted that there was a distinction between the plaintiff and Mr. Sajid Malik, who had come in on behalf of the company. He submitted that Section 780 of the Company's Act addresses the issue of shareholders (members) of the company and that the CR12 relied on by Sajid Malik shows that all the shareholders are also directors of the company. He stated that in the 2<sup>nd</sup> supplementary affidavit sworn by Sajid Malik, the annexure thereto in Articles 9 to 10 demonstrates that the convening of meetings by directors need not be in writing and that only 2 directors need to be present. He submitted that in the affidavit of Sajid Malik sworn on 4<sup>th</sup> October, 2021 and filed on 6<sup>th</sup> October, 2021, the annexure thereto marked as SMJ3 showed that there were 2 directors who were present at the meeting of 21<sup>st</sup> September, 2021, thus the resolution exhibited to the said affidavit showed that there was a coram.

61. Mr. Kimani indicated that Mr. Tindi had attacked their application at page 3 by stating that at its heading, the plaintiff has invoked the jurisdiction of this Court under Order 40 of the Civil Procedure Rules, yet injunctive orders were not being sought in the plaint. He submitted that their pleadings had been deliberately drafted in the way they appear as the plaintiff was seeking temporary relief. He stated that they had couched their orders in the way they had done as it is the internal mechanisms of the company that have fallen apart and that Sajid Malik has the best interest of all the parties to this suit, hence they had extended an olive branch to the defendants. He submitted that there has been loss of funds and paralysis of the day to day running of the plaintiff's business but the defendants did not want the best interest of the company.

62. The plaintiff's Counsel indicated that prayer No. 4 of the application dated 22<sup>nd</sup> September, 2021 seeks the return of the company assets, car log books, car keys, original importation and registration documents and show room keys. He invited the Court to look at the resolutions exhibited in the affidavit of Sajid Malik sworn on 22<sup>nd</sup> September, 2021. Mr. Kimani stated that they had brought in the decision in **Martin Lemaiyan Mokoosio** (supra) to show that the case herein is not a derivative action but Mr. Tindi had relied on the said authority to distinguish between shareholders' and directors' rights.

63. On the issue of misuse of police power, he stated that all the directors were summoned to the DCI Headquarters, Nairobi due to theft of company funds and that at paragraphs 10 and 11 of the 1<sup>st</sup> defendant's affidavit sworn on 11<sup>th</sup> October, 2021, he Malik Ali Zaka had admitted that he transferred Kshs. 24,500,000/= to Erum Motors Limited from the plaintiff. Mr. Kimani contended that the claim before this Court is a valid one but the defendants had not fully complied with the orders of this Court.

64. While referring to Mr. Tindi's contention that some vehicles had been moved from the showroom as per the affidavit sworn by Joshua Adang, wherein he attached a sale agreement, Mr. Kimani stated that the said agreement dated August, 2021 did not bear the real signature of Hussain Malik as the purported signature thereon was not similar to the one appended to his affidavit. It was also indicated that the said agreement had no stamp or seal of the plaintiff.

65. The plaintiff's Counsel stated that Mr. Hussain Javed had explained the shareholding of the plaintiff and that Sajid Malik was the one who brought in the 1<sup>st</sup> defendant to Kenya and that he was working under a work permit.

66. In regard to Mr. Gikandi's submissions, Mr. Kimani asserted that the plaintiff had come to Court on behalf of its directors and that the present case was not a derivative action. He reiterated that the shareholding of Mr. Sajid was still 500 shares, whereas the shareholding of the other directors was a 100 shares each, apart from the 1<sup>st</sup> defendant whose shareholding is 200 shares. The plaintiff's Counsel reiterated that under the Articles of Association of the plaintiff, two directors form a coram.

67. The plaintiff's Counsel indicated that in HCCC No. E095 of 2021, the 1<sup>st</sup> defendant has sued his fellow directors in their personal capacities but the plaintiff has not been sued. He indicated that the company does not have its own operating sub-system as the system is owned by Malak Boeki, and that it was disconnected the minute the company failed to pay Malak Boeki of Japan for the supply of motor vehicles. He explained that the motor vehicles are given on credit to the plaintiff. He further stated that Malak Boeki had been given a loan by the Japanese Government and that once the plaintiff is supplied with the motor vehicles, it sells them and pays Malak Boeki what it owes. He stated that since the operating system is controlled by Malak Boeki, it took the said measures it did to protect itself. He further stated that the plaintiff had custody of car importation documents and that there was an attempt to hinder the running of the business of the plaintiff by affecting its operations.

68. Mr. Deche indicated that Mr. Kimani had relied on Articles 10 and 11 of the Articles of Association exhibited to the 2<sup>nd</sup> supplementary affidavit of Sajid Malik to justify the resolutions that were passed by the plaintiff. The 1<sup>st</sup> defendant's Counsel indicated that there was no evidence that notices for a meeting were issued. He further stated that the special resolution relied on by the plaintiff was passed by a simple majority and did not comply with the provisions of Section 257 of the Companies Act. He contended that the notice which was issued was not a reasonable one as 21 days' notice is required for a general meeting and 28 days for an extraordinary meeting, yet the plaintiff's Counsel had indicated that a meeting was called via a phone call on 21<sup>st</sup> September, 2021 but that was the same day when the resolution was passed as per the annexures marked SMJ3 and SMJ4.

69. The Counsel for the 1<sup>st</sup> defendant further stated that on 21<sup>st</sup> September, 2021, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as well as Sajid Malik and Hussain Malik were at the CID Headquarters, Nairobi hence it was a misdirection for Sajid Malik to state that a meeting was held and a resolution passed on the said date. In reference to the annexures marked SMJ4 and SMJ5, Mr. Deche indicated that they only detail what was resolved but the minutes of the meeting are not exhibited. He also argued that the resolutions were just drafts but not valid as the procedure

followed did not conform with the Companies Act. He submitted that on the 2<sup>nd</sup> page of the resolution, Sajid Malik Jamshed and Hussain Javed had given themselves authority to file suit and had attested to the company seal. He relied on the case of **Bactlabs Limited v Bactlabs East Africa Limited & 5 others** [2012] eKLR, where at page 2 of the said decision, the Court found that there was no board of director's resolution to undertake proceedings.

70. In making his final submissions, Mr. Gikandi stated that parties are bound by their pleadings but the plaintiff was asking for orders pending the hearing and determination of the application herein but could not be granted orders over and above the hearing of the said application.

71. He further indicated that there was deliberate misrepresentation of facts, especially as to the persons who have the keys to the showrooms, as some keys were being held by Sajid Malik and Hussain Javed. With regard the claim that some money was owed to Malak Boeki of Japan, Mr. Gikandi indicated that there was no evidence to support the said claim. He was of the view that Sajid Malik had made up facts to whip up sympathy for himself.

72. Mr. Gikandi reiterated that in the meetings which Mr. Kimani had indicated were held, three directors who are the defendants herein were not invited to attend. He contended that call logs were not availed to show that Sajid Malik and Hussain Javed made calls to the defendants to invite them for the said meetings. With regard to the special resolution that was referred to by the plaintiff's Counsel, he concurred with the submissions made by Messrs Deche and Tindi that no proper notice was issued for the said meeting and that a coram of 75% was required to pass the said resolution. He prayed for this Court to dismiss and/or strike out the resolutions.

### **ANALYSIS AND DETERMINATION**

73. Since the applications filed by the parties hereto are 3 in number, supporting affidavits and various replying and supplementary affidavits were sworn by the plaintiff's directors, 3 employees of the plaintiff, the plaintiff's customer by the name of Joshua Okoth Adang. Most of the supplementary affidavits were reiterating averments already made in the supporting affidavits. This Court has considered all the depositions contained in the affidavits when writing the ruling herein. The Court has also considered the Notice of Preliminary objection filed on 29<sup>th</sup> September, 2021 by the Counsel for the 1<sup>st</sup> defendant and the grounds of opposition filed on 5<sup>th</sup> October, 2021 by the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The authorities cited by the Counsel on record have also been borne in mind.

74. The issues for determination in the applications dated 22<sup>nd</sup>, 29<sup>th</sup> and 30<sup>th</sup> September, 2021 are-

**(i) If the meetings held on 21<sup>st</sup> and 22<sup>nd</sup> September, 2021 were valid;**

**(ii) If the resolutions of the said meetings of 21<sup>st</sup> and 22<sup>nd</sup> September, 2021 are valid and legally binding on the plaintiff;**

**(iii) If the suit filed herein is a derivative action; and**

**(iv) What orders can the Court grant in the best interest of the plaintiff?**

75. Due to the allegations and counter allegations raised by the parties in the 3 applications before this Court, the above issues cannot be addressed without first summarizing the depositions made by the deponents in the several affidavits filed. In the affidavit sworn on 22<sup>nd</sup> September, 2021 by Sajid Malik Jamshed, he deposed that he is the majority shareholder in the plaintiff company with 500 ordinary shares and that he is based in Japan where he coordinates export of motor vehicles which are sold in showrooms in Nairobi and Mombasa by his co-directors who are the defendants in this case. He attached a copy of the CR12 for the plaintiff to his affidavit to demonstrate the shareholding. He deposed that the defendants are involved in the day to day running of the plaintiff's business in Kenya and that the plaintiff has always paid their salaries, house rent and school fees for the 1<sup>st</sup> defendant's children.

76. Sajid Malik further deposed that on 12<sup>th</sup> August, 2021, Hussain Malik Javed informed him that the applicant's bank credentials held at Gulf African Bank, Nkrumah Road Branch and Equity Bank, Moi Avenue, Mombasa had been changed. He further indicated that he found that the 1<sup>st</sup> defendant had taken into his possession some of the key applicants' assets necessary for operations and had been transferring the plaintiff's funds in the said accounts to his personal accounts hence instructions were given to the law firm on record to institute the present proceedings on the plaintiff's behalf.

77. He also deposed that on 4<sup>th</sup> September, 2021, he reported the incident to Equity Bank, Mombasa branch and requested them to restrict the 1<sup>st</sup> defendant from undertaking further transfers as they were illegal and without authority from other directors or a resolution by the company. He further deposed that upon asking for the plaintiff's bank account's statements held at Equity Bank, he realized that the 1<sup>st</sup> defendant had transferred funds amounting to over Kshs. 41,000,000/= to a company associated with him, without any approved resolution or consent by other directors. Copies of the bank statements for the plaintiff's bank accounts held at Equity Bank and Gulf African Bank were annexed to Sajid Malik's affidavit.

78. He averred that the defendants by their acts had sabotaged the operations at the plaintiff's showroom since there was no access and they continued to withdraw funds from the accounts. He also stated that there was real risk of failure to transfer log books to the clients who had since completed payment in full, as the 1<sup>st</sup> defendant had confiscated the log books, original importation and registration documents for motor vehicles owned by the plaintiff. He claimed that the plaintiff continues to make losses in the sum of Kshs, 300 Million per month in running costs, without having made any sales as the showroom had been closed for 40 days. He averred in his affidavit that the plaintiff owes approximately 330 Million to Malak Boeki Co. Ltd which must be settled from the said business.

79. He stated that on 21<sup>st</sup> September, 2021 the plaintiff passed a resolution which required the 1<sup>st</sup> defendant to return to the plaintiff car keys, log books and keys to the show room but he failed and/or neglected to do so. A copy of the resolution was attached to Sajid Malik's affidavit sworn on 22<sup>nd</sup> September, 2021.

80. The deponent stated that the present suit had been filed with the aim of seeking to have the defendants ordered to return the plaintiff's property as disclosed in the preceding paragraph which are necessary tools in the business, to enable it to resume operations as well as refund the funds which had been illegally transferred to the 1<sup>st</sup> defendant's company. He further stated that the plaintiff had been making losses due to acts of the defendants.

81. The application dated 22<sup>nd</sup> September, 2021 was also supported by an affidavit sworn on the same day by Hussain Malik Javed, one of the plaintiff's director. He deposed that on or about 11<sup>th</sup> August, 2021 he requested the Office Assistant to prepare tax cheques for Kenya Revenue Authority (KRA) as usual for delivery to the 1<sup>st</sup> defendant for signing. He indicated that the amounts were to be paid from Gulf African Bank but on the same day he discovered that the 1<sup>st</sup> defendant had changed the online credentials for access to the account. The deponent stated that on 12<sup>th</sup> August, 2021 he reported the change of password of the account held at Gulf African Bank and Equity Bank to one of the directors, Sajid Malik Jamshed who is based in Japan, as the changes had been done without authority from the other directors or vide a resolution of the company.

82. Hussain Malik outlined several transfers that had been made from the plaintiff's company by the 1<sup>st</sup> defendant to Erum Motors Limited, a company in which the 1<sup>st</sup> defendant is the sole director. A copy of the CR 12 for the said company was annexed to the affidavit of Hussain Malik. He stated that apart from the bank transfers, on 1<sup>st</sup> September, 2021, the 1<sup>st</sup> defendant withdrew Kshs. 990,000/= from the plaintiff's account at Equity Bank. Copies of the statements of accounts from both Equity Bank and Gulf African Bank were annexed to Hussain's affidavit as evidence.

83. He averred that on 23<sup>rd</sup> August, 2021 the 1<sup>st</sup> defendant took some of the plaintiff's assets into his possession from its showroom, namely, 800 original log books for motor vehicles owned by the plaintiff, 109 car keys and original importation and registration documents for motor vehicles owned by the plaintiff and showroom keys to the plaintiff's premises. A copy of the inventory of all the assets in possession of the 1<sup>st</sup> defendant was annexed to the affidavit of Hussain Malik.

84. He deposed that the acts of the defendants had sabotaged the operations at the plaintiff's showroom since there was no access and that the 1<sup>st</sup> defendant continued to withdraw funds from the accounts.

85. He also stated that there was real risk that the KRA duty had not been paid by the plaintiff thus exposing it to the taxman. He averred that there was also a real risk of failure to transfer log books to their clients who had since completed making payments as the 1<sup>st</sup> defendant had confiscated the logbooks, original importation and registration documents for motor vehicles owned by the plaintiff.

86. He deposed that they were seeking to have the defendants ordered to return the plaintiff's properties which are necessary tools in the business to enable the plaintiff to resume its operations. He stated that they were also seeking the refund of the funds which had been illegally transferred to the 1<sup>st</sup> defendant's company.

87. In support of the 2<sup>nd</sup> application dated 29<sup>th</sup> September, 2021 and in opposition to the plaintiff's application dated 22<sup>nd</sup> September, 2021, the 1<sup>st</sup> defendant Malik Ali Zaka filed an affidavit on 29<sup>th</sup> September, 2021 to the effect that he was the Managing Director of the plaintiff and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were directors of the plaintiff.

88. He deposed that the application dated 22<sup>nd</sup> September, 2021 and the entire suit herein of even date were incompetent as they were filed without due authority from the plaintiff company. He further deposed that the plaintiff and/or its board of directors had not passed a resolution or valid resolution approving the institution of the application dated 22<sup>nd</sup> September, 2021 and suit of even date, noting that the plaintiff had the right and ability to sue in its name with the sanction of its board of directors or by a resolution in a general or special meeting.

89. Malik Ali Zaka deposed in his affidavit that the plaintiff and/or its board of directors had not passed a resolution or valid resolution appointing the firm of Kimani Mwangi Advocates LLP to institute this suit for and on behalf of the plaintiff noting that when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at the company or board of directors meeting and recorded in the minutes to that effect. He further stated that the filing of the application dated 22<sup>nd</sup> September, 2021 and the suit of even date by the firm of Kimani Mwangi Advocates LLP was invalid for want of authority from the plaintiff. He also stated that the plaintiff and/or its board of directors did not authorize Sajid Malik Jamshed to swear the supporting affidavit in respect to the application dated 22<sup>nd</sup> September, 2021.

90. He averred that on the said date, Sajid Malik and Hussain Malik purportedly passed a special resolution which he believed to be invalid for reasons that the same did not adhere to the provisions of the Companies Act. He annexed a copy of the special resolution to his affidavit and stated that no notice was issued to all the directors and shareholders of the plaintiff company as is required before a meeting to pass a special resolution was convened.

91. The 1<sup>st</sup> defendant averred that the orders granted to the plaintiff were obtained through misrepresentation of facts to this Court and through non-disclosure of material facts on the part of Sajid Malik and Hussain Javed.

92. He also deposed that Sajid Malik is a supplier of motor vehicles to the plaintiff and that the Malik Ali Zaka transferred 500 shares to him to hold as security for the supply of motor vehicles in case of non-payment and therefore he is not a *bonafide* shareholder of the plaintiff

company. Minutes of a board of directors meeting of the plaintiff marked MAZ2 were annexed to the affidavit. He further deposed that Sajid Malik has no interest in the plaintiff except for his payment for the supplies he makes to it as he is not a *bonafide* shareholder and is only an employee of the plaintiff company having been appointed a director. He also stated that Sajid Malik had been paid for all the supplies and that the plaintiff owes him no money.

93. Malik Ali Zaka averred that in the year 2019 he transferred a total of 100 shares to Hussain Malik but he had not paid any consideration for the shares transferred to him and he is therefore not a *bonafide* shareholder of the plaintiff. The 1<sup>st</sup> defendant also averred that the orders granted under the application dated 22<sup>nd</sup> September, 2021 by this Court were granted irregularly through concealment of material facts, and that the same should be discharged and/or set aside.

94. In the affidavit in support of the application dated 30<sup>th</sup> September, 2021, Muhammad Suleiman, the 2<sup>nd</sup> defendant and a director of the plaintiff deposed that no valid resolution was passed to allow Sajid Malik to file suit on behalf of the company and that the resolution dated 22<sup>nd</sup> September, 2021 contravenes the provisions of Section 257 that makes it mandatory that the members of the company can pass a special resolution with a majority of not less than seventy-five per cent. He stated that the coram of the members was only Sajid Malik and Hussain Malik, which demonstrates that only two shareholders were present without notice to the other shareholders.

95. Muhammad Sulieman reiterated what Malik Ali had deposed to in his affidavit that 500 shares were transferred to Sajid Malik as security for supplying motor vehicles to the plaintiff and 100 shares were transferred to Hussain Malik in a meeting of the plaintiff's directors held in the year 2019. The deponent averred that Sajid Malik had been paid for all the supplies of the motor vehicles he made to the plaintiff and he should be ordered to open the system. He also stated that Sajid Malik who is purporting to be a majority shareholder of the plaintiff had been sued by the 1<sup>st</sup> defendant in Mombasa High Court Commercial Cause No. 95 of 2021 and that the former had misled this Court at the *ex parte* stage by stating that he is a majority shareholder of the plaintiff. The deponent claimed that Sajid Malik is an exporter being a director of Malak Boeki Co. Ltd based in Japan with the arrangement that the plaintiff would pay for the motor vehicles that were supplied from Japan to Malak Boeki. It was stated that Sajid Malik misled the Court by stating that he pays the salaries, house rent and school fee for the 1<sup>st</sup> defendant (sic).

96. It was averred by Muhammad Suleiman that the special resolution dated 22<sup>nd</sup> September was invalid as the coram offended the Companies Act. He stated that Sajid Malik had filed a false complaint at DCI headquarters, Nairobi and that they were summoned to appear therein on 21<sup>st</sup> September, 2021 at 1000hrs and that they were shocked when they were informed that they were required to transfer their shares to Sajid Malik to enable him become the sole shareholder, but they declined to sign the transfer document before the police and in the presence of their lawyer. A copy of the requisition to compel attendance was annexed to the affidavit by Muhammad Suleiman and marked as MS4.

97. He further stated that within the office of the DCI Nairobi, there was an attempt to serve them with a resolution purporting to remove them as directors of the plaintiff which their Lawyer advised them not to receive within the Police Station as it was highly unprocedural and demonstrated coercion. Copies of two documents were annexed to his affidavit and marked as MS5. He also alleged that Sajid Malik had gone to the extent of sabotaging the day to day running of the affairs of the plaintiff as the two showrooms could not operate since he had the keys of one showroom and wanted to take over the keys of the 2<sup>nd</sup> showroom and as such, the deponent was apprehensive that Sajid Malik would sabotage the operations of the 2<sup>nd</sup> showroom if the keys for the said showroom were handed over to him.

98. It was stated that Sajid Malik had blocked access to the plaintiff's system which had placed the company under peril since third party clients who had purchased motor vehicles from the plaintiff had been unable to access their motor vehicles, hence the urgent need for this Court to make an order that the plaintiff's system be re-opened for the purpose of serving third parties. It was alleged that the claim by Sajid Malik that the plaintiff was losing Kshs. 300 Million per month was totally false as the claim in the plaint was for Kshs. 41 Million. It was also stated that the money due to Sajid Malik had been settled and he had been overpaid but he was the saboteur. The deponent sought to have this Court vary the orders granted at the *ex parte* stage on 24<sup>th</sup> September, 2021.

99. The 3<sup>rd</sup> defendant, Qamar U-Zamar in his supplementary affidavit sworn on 7<sup>th</sup> October, 2021 reiterated what has already been deposed to, by the 1<sup>st</sup> and 2<sup>nd</sup> defendants save for the claim that Hussain Javed had received Kshs. 6,010,000/= from sale of motor vehicles but that the amount was not banked and the same should be banked in the plaintiff's account.

**If the meetings held on 21<sup>st</sup> and 22<sup>nd</sup> September, 2021 were valid.**

100. The defendants' point of contention was that there were no valid meetings held on 21<sup>st</sup> and 22<sup>nd</sup> September, 2021 thus any resolutions flowing therefrom are equally invalid and not binding on the company and the directors. A copy of a special resolution was annexed to the supporting affidavit of Sajid Malik sworn on 22<sup>nd</sup> September, 2021.

101. Malik Ali Zaka in his affidavit sworn on 29<sup>th</sup> September, 2021 contended that Sajid Malik and Hussain Malik did not have the authority to file the suit in this case or to file the application dated 22<sup>nd</sup> September, 2021 and that the board of directors did not authorize the firm of Kimani Mwangi Advocates LLP to represent the plaintiff in this case. The said position was also taken by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The defendants stated that they were never invited for a meeting whereas Sajid Malik was of the position that the directors were invited for a meeting through phone calls.

102. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants stated that they could not have attended the said meeting as they had been summoned to attend a meeting at the DCI headquarters in Nairobi scheduled for 21<sup>st</sup> September, 2021. Annexed to the replying affidavit of Sajid Malik sworn on 4<sup>th</sup> October, 2021 is the 1<sup>st</sup> page of the minutes of the special meeting of directors/shareholders of the plaintiff convened, held and constituted virtually on 21<sup>st</sup> September, 2021 at 10.00 a.m. It shows that it was attended by Sajid Malik who chaired the meeting and Hussain Malik was the Secretary at the meeting. The defendants were absent. The agenda of the meeting is outlined thereon as notice and confirmation of the

agenda, adoption of the agenda, reading and confirmation of the previous minutes, matters arising, confiscation of company assets by directors, course of action to resume business, filing of a legal suit and AOB. A special resolution being an extract from the minutes of the ordinary meeting of the plaintiff duly convened held virtually on 21<sup>st</sup> day of September, 2021 at 10.00 a.m was drawn.

103. The said special resolution of 21<sup>st</sup> September, 2021 was signed by Sajid Malik and Hussain Malik. It is duly sealed with the seal of the plaintiff and stamped with a stamp of the said company. The defendants' Counsel relied on the provisions of Section 257 of the Companies Act to demonstrate that the resolution said to have been passed by Sajid Malik and Hussain Javed does not qualify as such, for the reason that it was not passed by 75% of the members of the company. Section 257 of the Companies Act states that-

**“(1) A resolution is a special resolution of the members (or of a class of members) of a company if it passed by a majority of not less than seventy-five percent.**

**(2) A written resolution is passed by a majority of not less than seventy-five percent if it is passed by members representing not less than seventy-five percent of the total voting rights of eligible members (see Division 2).**” (emphasis added).

104. The above provisions must be read together with the provisions of Section 257(6) of the Companies Act. The said provisions state as follows-

**“If a resolution is passed at a meeting, the resolution is a special resolution ... only if the notice of the meeting-**

**(a) included the text of the resolution; and**

**(b) Specified an intention to propose the resolution as a special resolution, but if the notice of the meeting specified such an intention, the resolution may be passed only as a special resolution.** (emphasis added).

105. In the instant case, there is no indication that the text of the special resolutions relied on by Sajid Malik and Hussain Javed were included in the notice of the meeting. The notice calling for the said meeting was not exhibited by either Sajid Malik or Hussain Javed in their affidavits. When the issue of failure to issue a notice for the meeting was raised by the defendants in their replying affidavit, Sajid Malik in his affidavit of 4<sup>th</sup> October, 2021 annexed the 1<sup>st</sup> page of the minutes of the **special meeting** of the directors/shareholders of the company duly convened, held and constituted virtually on 21<sup>st</sup> day of September, 2021 at 10.00 a.m. This Court holds that the 1<sup>st</sup> page of the minutes of a meeting cannot by any means be equated to a notice that has been properly issued to directors to convene a meeting.

106. The defendants' Counsel submitted that for a meeting to qualify as a general meeting a 21 days' notice should have been given in accordance with the provisions of Section 281(1) of the Companies Act. In this Court's understanding the type of a general meeting contemplated in the said Section is an Annual General Meeting. The foregoing is informed by the provisions of Section 257A of the Companies Act which provides as follows-

**“275A. Annual general meeting**

**(1) Every company shall convene a general meeting once a year.**

**(2) Subsection (1) does not apply to single member companies.** (emphasis added).

107. Under Part IV, Division V of the Fourth Schedule of the model articles of companies limited by shares, Article 34 makes provisions for general meetings. It states thus-

**(1) The company shall, in respect of each financial year of the company, hold a general meeting as its annual general meeting. (This subarticle does not have effect if the company has only one member or has passed a resolution dispensing with the holding of an annual general meeting).**

**(2) The directors may, if they consider appropriate, convene a general meeting.**

**(3) If the directors are required to convene a general meeting under section 277 of the Act (Right of members to require directors to convene general meeting), they shall convene it in accordance with section 278 of the Act (Directors duty to convene general meetings required by members).**

**(4) If the directors do not convene a general meeting in accordance with section 278 of the Act, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all of them, may themselves convene a general meeting in accordance with section 279 of the Act (Power of members to convene general meeting at the expense of the company).”**

108. In regard to the duration of the notice that should be issued for a general meeting, Article 35 of the said Articles provides that-

**“(1) The directors may convene an annual general meeting only by giving members at least 21 days' notice of the meeting.**

**(2) The directors may convene a general meeting other than an annual general meeting only by giving members at least 14 days'**

**notice**. (emphasis added).

109. It is apparent therefore from a reading of Sections 257 and 275A of the Companies Act and Articles 34 and 35 of the model articles of companies limited by shares that the purported meeting held on 21<sup>st</sup> September, 2021 was neither a special meeting nor a general meeting of the plaintiff. If indeed the said directors' intention was to hold either a special meeting or a general meeting then they failed to comply with the provisions of the law by giving adequate notice to the defendants for the said meetings.

110. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants contention was that on the day the meeting of 21<sup>st</sup> September, 2021 was allegedly held at 1000hrs, they had been summoned to the DCI Headquarters, Nairobi for a meeting at the same time, and as such, there was no way in which they could have attended the meeting. It is evident that the conduct of Sajid Malik and Hussain Javed was ill-intentioned and was an act of bad faith. Secondly, from the resolutions exhibited at the annexures to Sajid Maliks's affidavit sworn on 4<sup>th</sup> October, 2021, the meeting of 21<sup>st</sup> September, 2021 was said to be an **ordinary meeting**, but there was no evidence of the defendants having been notified of the said meeting.

111. Mr. Kimani's view was that under Article 9 of the model articles of association, a notice need not be in writing. Under Division 2 Article 9 of the model Articles of Association, it provides-

***“(1) Any director may convene a directors' meeting by giving notice of the meeting to the directors or by authorizing the company secretary to give such notice.***

***(2) A notice of a directors' meeting is not effective unless it indicates—***

***(a) its proposed date and time; and***

***(c) where it is to take place***

***(3) The company shall give notice of a directors' meeting to each director, but the notice need not be in writing.*** (emphasis added).

112. It is trite that an ordinary meeting of a board of directors would not require a prolonged notice, however, as Mr. Gikandi put it, if telephone calls were made to the defendants notifying them that the meetings would be held on 21<sup>st</sup> and 22<sup>nd</sup> September, 2021, which was disputed, call logs made to the defendants should have been exhibited by either Sajid Malik or Hussain Javed. It is also contradictory for Sajid Malik to say in one breath that an ordinary meeting was held by exhibiting a resolution extracted from an **ordinary meeting** of Auto Japan (Mombasa) Limited held on 21<sup>st</sup> September, 2021 and in the other breath to exhibit the 1<sup>st</sup> page of the minutes of a **special meeting** of directors/shareholders held on 21<sup>st</sup> September, 2021 at 10.00 a.m. It is evident that something does not add up.

113. It is the finding of this Court that no valid meeting of the plaintiff was convened and held on the 21<sup>st</sup> September, 2021 due to want of notice. Since the explanation given by Sajid Malik and Hussain Javed about the meeting of 21<sup>st</sup> September, 2021 is the same as that given for the meeting of 22<sup>nd</sup> September, 2021, this court holds that the provisions of Section 257 (6) of the Companies Act were not complied with in regard to the two meetings.

114. The defendants also challenged the chairing of the two meetings by Sajid Malik and stated that he was not the chairperson of the board of directors of the plaintiff. Hussain Javed exhibited copies of emails which the 2<sup>nd</sup> defendant had written to a prospective landlord requesting for a showroom for the plaintiff's business. In the said emails the latter had referred to Sajid Malik as the chairman of the plaintiff. The Articles of Association of a Company determine if the chairmanship of a company will be rotational or if the position will be held by a specific director or if a chairman shall be appointed on the day scheduled for each meeting.

115. Surprisingly, in such a protracted matter, Sajid Malik, Hussain Javed and the defendants did not exhibit the Memorandum and Articles of Association of the plaintiff to shed light on many aspects concerning its operations. Sajid Malik did not exhibit any resolution of the company which appointed him as the chairman of the plaintiff's board of directors and in the absence of such a resolution, this Court cannot hold with certainty that he is the duly appointed chairman of the board of the plaintiff or if the meetings of the plaintiff are chaired on an adhoc basis.

**If the resolutions of the meetings of 21<sup>st</sup> and 22<sup>nd</sup> September, 2021 are valid and legally binding on the plaintiff.**

116. The plaintiff in this case is a company limited by shares. Its decision making organ is the board of directors or its members in an annual general meeting or a special general meeting. The defendants herein have averred that the resolutions arrived at were not valid and the board of directors did not give the mandate for the company to institute the suit herein and for the law firm of Kimani Mwangi Advocates LLP to file the suit.

117. In the case of *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] eKLR, Justice Mumbi Ngugi concurred with the reasoning held in *Affordable Homes Africa Limited v Ian Henderson & 2 others* HCCC No 524 of 2004 as follows-

***“that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers...The upshot of these considerations is that in the absence of a***

***board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff.”***

118. Having held that there was no valid meeting that was held on 22<sup>nd</sup> September, 2021, the resolution made by Sajid Malik and Hussain Javed to institute the present proceedings was not valid and the same finding applies to the resolution made for the law firm of Kimani Mwangi Advocates LLP to institute the current proceedings.

119. The defendants argued that Sajid Malik had not been authorized by the board of directors to sign any documents on behalf of the company. Order 9 Rule 2 (c) of the Civil Procedure Rules, 2010 provides as follows-

***“The recognized agents of parties by whom such appearances, applications and acts may be made or done are—***

***(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.”*** (emphasis added).

120. A minute extract of the minutes of the ordinary meeting of Auto Japan (Mombasa) Limited held virtually on 21<sup>st</sup> day of September, 2021 at 10.00 a.m., shows that the meeting was attended by Sajid Malik and Hussain Malik. The said minute extract further shows that it was resolved as follows-

***“Auto Japan (Mombasa) Limited the “Company” herein do authorize Mr. Sajid Malik Jamshed and Hussain MALIK Javed to swear affidavits and make statements necessary to enable the company institute legal proceedings against Malik Zaka, Muhammad Suleiman and Qamar U-Zamar in recovery of lost funds and return the assets confiscated.”***

121. Having found that the meeting of 21<sup>st</sup> September, 2021 was invalid, any decisions including the resolutions extracted by Sajid Malik and Hussain Javed, arising from a flawed meeting were similarly invalid, null and void. As such, Sajid Malik and Hussain Javed could not make statements and swear affidavits on behalf of the plaintiff. This Court therefore holds that they lacked the *locus standi* to institute the present proceedings.

**If the suit filed herein is a derivative action.**

122. Had this Court found that that the meetings of 21<sup>st</sup> September and 22<sup>nd</sup> September, 2021 were valid, then it would have held that the suit filed by Sajid Malik and Hussain Javed does not fall in the ambit of a derivative action. Part XI of the Companies Act makes provisions for what constitutes a derivative action. In the present instance, the suit was filed on behalf of the plaintiff by Sajid Malik, a director of the plaintiff company.

123. A simple reading of the provisions of Section 238(1) of the Companies Act makes it clear that a derivative action can only be brought by a member of the company in respect of a cause of action vested in the company and seeking relief on behalf of the company. Secondly, under Section 238(6) of the Companies Act, a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law. In the instance case and in order to determine if the submissions by the Counsel for the defendants are legally sound that Sajid Malik and Hussain Malik should have filed a derivative action, it is of critical importance to look at the CR12 which was exhibited to the Court as evidence.

124. A copy of the CR12 dated 25<sup>th</sup> August, 2021 annexed to the affidavit of Sajid Malik from the Business Registration Service of the Registrar General’s Office and marked as SMJ1 shows that he is a director/shareholder of Auto Japan (Mombasa) Limited with a shareholding of 500 ordinary shares. Since a CR12 is the authoritative legal document that gives the shareholding/directorships of companies, this Court has no valid reason to depart from the contents of the said document that Sajid Malik is a shareholder of the plaintiff company and that he is indeed the majority shareholder as he has 500 shares, Hussain Malik Javed 100 shares, Muhammad Suleman 100 shares, Malik Ali Zaka 200 shares and Qamar U-Zamar 100 shares. As per the CR12, all the shareholders hold ordinary shares. A transfer deed exhibited to Malik Ali Zaka’s affidavit sworn on 4<sup>th</sup> October, 2021 demonstrates that the said deponent transferred 500 ordinary shares to Sajid Malik at a consideration of Kshs. Fifty Thousand only.

125. A derivative action was well explained by Cumming – Bruce, Templeman & Brightman L.JJ, in the case of **Prudential Assurance Company Limited vs Newman Industries Limited and Others** [1982] 1 All E.R 364 (at 357) in the following terms-

***“The classic definition of the rule in Foss v Harbottle is stated in the judgment of Jenkins LJ in Edwards vs Halliwell [1950] 2 All E.R 1064 at 1066-067 as follows.***

***(1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation.***

***(2) where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter, because, if the majority confirms the transaction, cadit question; or, if the simple majority challenges the transaction, there is no valid reason why the company should not sue,***

***(3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot confirm the transaction,***

(4) *There is also no room for the operation of the rule if the transaction complained of could be validly sanctioned only by a special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority,*

(5) *There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.* (emphasis added).

126. Still on the issue of what constitutes a derivative action, in the case of *Sultan Hashem Lalji & 2 Others v Ahmed Hasham Lalji & 4 others* [2014] eKLR, it was held thus-

*“It is the minority shareholders that are availed the protection by the exceptions since generally majority shareholders exercise power of the company and control its affairs”.* (emphasis added).

127. In the Kenyan context, the Court discussed the exceptions to the rule in *Foss v Harbottle* [1843] 2 Hare 461 in derivative actions in *Grace Wanjiru Munyinyi and Another v Gideon Waweru Githunguri and 5 others* [2011] eKLR as follows-

*“There is also another remedy arising from the English Legal precedent on corporate law which continues to apply in Kenya more than 160 years since it was decided: Foss vs Harbottle (supra). As stated earlier, in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. This is the rule in Foss v Harbottle. But there are four exceptions to that rule which appear in the leading case itself but also in subsequent decisions on the subject.*

*Firstly, where the directors or a majority use their control of the company to paper over actions which would be ultra vires the company or illegal.*

*Secondly, if some special voting procedure would be necessary under the company’s constitution or under the company’s Act, it would defeat both if they could be side stepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed (Edwards v Halliwell [1950] 2 ALL ER 1064, Thirdly, where there is invasion of individual rights, such as voting rights (Pender vs Lushington [1887] 6 ch D 70. Fourthly, where a fraud on the minority is being committed. In all those cases, a “derivative action” could be brought before the court on behalf of the company where the wrongdoer is in control of the company or by the shareholder where his personal rights are violated.”.* (emphasis added).

128. In *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* (supra), which decision was made after the Companies Act 2015 came into force, Judge Onguto stated as follows-

*“37. Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see Wallersteiner v Moir (No.2) [1975] 1 All ER 849.*

*38. Until 2015, in Kenya, the common law guided derivative actions in Kenya. Ordinarily under common law , one had to fall under the exceptions to the rule in Foss –v- Harbottle [1843] 2 Hare 461 that “a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it” :see also Hawes v Oakland 104 U.S 450 [1881]. The exceptions to the rule in Foss v Harbottle were mainly where there was fraud on a minority caused by majority shareholder(s). The action to be commenced had also to be in the best interest of the company and without any ulterior motive: see Nurcombe v Nurcombe [1985] 1 All ER 65.*

*39. The rule in Foss v Harbottle along with its exceptions held sway locally as well: see Rai & Others v Rai & Others [2002] 2 EA 537. A party seeking to ‘by-pass’ the company had, in limine, to show that he fell within the exceptions to the rule: see Murii v Murii & Another [1999] 1 EA 212.”*

129. Arising from the above decisions by various Courts, the exceptions to the rule in *Foss v Harbottle* (supra) would not have applied in this case as the wrongs complained of have been brought by majority shareholders against minority shareholders. I say so as Sajid Malik and Hussain Javed hold 600 ordinary shares of the plaintiff company as against the three defendants who hold 400 ordinary shares in total.

130. The 1<sup>st</sup> defendant asserted that he transferred shares to Sajid Malik as security for the supply of motor vehicles to the plaintiff company, and as such, the latter was not a *bonafide* shareholder. He exhibited a board resolution for the transfer of shares to Sajid Malik but nowhere is it written on the said resolution that the said transfer of shares was to act as security for supply of motor vehicles. The said assertion by Malik Ali Zaka is therefore of no consequence and does not advance his argument in this case about the shareholding of the company. The issue of whether the Sajid Malik, Hussain Malik, Mohammad Suleiman and Qamar U-Zamar paid any money for the transfer of shares is not an issue that is before me for determination.

131. Considering the allegations leveled against the defendants who are the minority shareholders, the law permits the majority shareholders, and in this case, Sajid Malik and Hussain Malik to commence legal proceedings for and on behalf of the plaintiff and in the name of the plaintiff to protect its interests. This Court therefore concurs with the stand taken by Counsel for the plaintiff that the suit herein does not fall in the ambit of a derivative action. If anything, the authorities cited by the Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants tend to support the

submissions made by Mr. Kimani that Sajid Malik and Hussain Malik did not need to seek leave of the Court to file the present suit against the defendants.

132. The Companies Act, 2015 makes it clear that even in circumstances where a suit has been filed without leave of the Court to commence a derivative action, leave of the Court can be sought after the filing of the suit with the aim of continuing with the suit as a derivative action. Judge Onguto in the case of **Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another** (supra), addressed the issue succinctly in the following words-

**“40. With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in Foss v Harbottle was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance.”**

133. This Court therefore concludes that had the meetings of 21<sup>st</sup> and 22<sup>nd</sup> September, 2021 been properly convened, then this Court would have held that the suit filed by the Sajid Malik and Hussain Malik on behalf of the plaintiff was properly before this Court.

#### **What orders can the Court grant in the best interest of the plaintiff?**

134. It was properly submitted by the defendants' Counsel that the orders which were sought for injunction by the Counsel for the plaintiff were short lived and meant to last until the hearing and determination of the application herein. In the said circumstances the plaintiff would be left without any relief and the affairs of the company would go back to the stalemate that paints the picture of a company that is going downhill. One of the allegations leveled against the 1<sup>st</sup> defendant is that he transferred a whopping Kshs. 41 Million to a company he had registered to compete with the plaintiff in the sale of motor vehicles. Sajid Malik's and Hussain Javed's affidavits in support of the application of 22<sup>nd</sup> September, 2021 exhibited bank statements of the plaintiff company. The said statements clearly show that bank transfers were made from the said bank accounts to Erum Motors Limited. A CR12 availed by the two directors shows that Malik Ali Zaka is the sole director of the said company. In his affidavit sworn on 11<sup>th</sup> October, 2021 and filed in Court on 12<sup>th</sup> October, 2021 in paragraph 10, he admitted that he transferred a total sum of Kshs. 24,500,000/= to his company known as Erum Motors Limited. He claimed that he did the transfer legally and denied that the transfer was for Kshs. 41 Million as alleged by Sajid Malik. He however failed to exhibit a board resolution that approved the transfer of the said money to his company Erum Motors Limited.

135. In paragraph 11 of the said affidavit, Malik Ali Zaka deposed that he is ready to re-transfer the sum of Kshs. 24,500,000/= to the plaintiff if directed to do so by the Court. He however also stated that he honestly believes that as the said money belongs to him as the *bonafide* sole shareholder of the plaintiff, the said re-transfer would not be necessary. This Court when dealing with the issue of whether the suit herein is a derivative action has found that as per the CR12 which is the authoritative document that demonstrates the shareholding and directorships of companies, the plaintiff company has 5 directors, namely Sajid Malik, Malik Ali Zaka, Hussain Javed, Muhammad Suleiman and Qamar U-Zamar. The 1<sup>st</sup> defendant cannot therefore purport to be the only *bonafide* shareholder. His offer to refund the sum of Kshs. 24,500,000/= and at the same time his expression of interest to retain the said amount smirks of double speak and dishonesty. Due to factors mentioned by this court which bars it to deal with the plaintiff's case conclusively, the Court goes by the admission made by the 1<sup>st</sup> defendant and leaves the issue of any other outstanding claims of financial impropriety to the directors of the plaintiff to resolve by way of reconciliation of their accounts.

136. The Counsel for the plaintiff was of the view that the defendants should not have been heard as they had not complied with Court orders. In the course of the proceedings, it became clear that Sajid Malik and Hussain Javed were not being candid in regard to the allegation they were making that the defendants had all the keys to the showrooms along Moi Avenue and Meru Road in Mombasa. This Court believed the defendants' assertion that the Sajid Malik and Hussain Javed had control of the keys to the showroom along Moi Avenue and it was on that basis that the Court decided to give audience to the defendants due to non-disclosure of material information to this court by Sajid Malik and Hussain Javed. It is also noted that the two directors did not file an application seeking to have the defendants cited for contempt of Court.

137. Having considered what has been analyzed in the preceding pages of this ruling, this Court makes the following orders;

(i) That the application dated 22<sup>nd</sup> September, 2021 is hereby dismissed;

(ii) Following his own admission, Malik Ali Zaka, the 1<sup>st</sup> defendant herein is ordered to refund the sum of Kshs. 24,500,000/= which he transferred to Erum Motors Limited from the plaintiff's bank accounts without the approval of the board of directors of the plaintiff;

(iii) That the application dated 29<sup>th</sup> September, 2021 is hereby allowed to the extent that the orders granted *ex parte* on 24<sup>th</sup> September, 2021 are hereby discharged;

(iv) That the application dated 30<sup>th</sup> September, 2021 is hereby allowed in that the order freezing the plaintiff's bank accounts is hereby discharged. The said bank accounts are-

(a) Absa Bank Kenya – Kenya Shillings Account No.: 2038150769 held at Nkrumah Branch Mombasa Kenya.

(b) Equity Bank Kenya Shillings Account No.: xxxxxx held at Moi avenue Branch Mombasa.

(c) Diamond Trust Bank – Kenya Shillings Account No.: xxxxxx held at Moi Avenue Branch Mombasa.

(d) Gulf Africa Bank – Kenya Shillings Account No.; xxxxxxx held at Nkrumah Branch Mombasa; and

(e) Gulf African Bank – Dollar Account held at Nkrumah Branch Mombasa.

(v) That Sajid Malik Jamshed shall reopen the plaintiff's operating system to enable the plaintiff company to access the same for purposes of serving third party clients who have purchased motor vehicles from the said company;

(vi) The plaintiff's directors are hereby directed to hold a board meeting in the next 7 days to discuss the future of the plaintiff company, to reconcile their bank accounts and resolve the dispute surrounding the payments made to Malak Boeki Company of Japan;

(vii) If the parties herein fail to reach an amicable settlement, they should resort to Alternative Dispute Resolution of their choice or any other available dispute resolution mechanism including the Court; and

(viii) Having granted the above orders, there is nothing left of the suit herein that can go to trial. I uphold the preliminary objection by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the effect that the suit herein is incurably defective and should be struck out. The suit shall stand struck out as soon as the orders herein have been extracted.

(ix) Some directors of the plaintiff company are guilty of various misdeeds. Each party shall bear his own costs.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 30<sup>th</sup> day of November, 2021. In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the Judgment herein has been delivered through Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

Mr. Kimani Mwangi for the plaintiff

Messrs Gikandi and Deche for the 1<sup>st</sup> defendant

Mr. Tindi for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants

Mr. Oliver – Musundi – Court Assistant