



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL CASE NO. 5 OF 2019**

**ALMOND RESORT LIMITED.....PLAINTIFF**

**VERSUS**

**MOHAMED MAHAT KUNO.....1<sup>ST</sup> DEFENDANT**

**PALM OASIS RESORT LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**A. Introduction:**

1. Coming up for determination is the Plaintiff Application dated 18<sup>th</sup> April, 2019 and filed on 23<sup>rd</sup> April, 2019. The application is brought under Section 1A, 3, 3A and 63(e) of the Civil Procedure Act, Order 20 rule 1 and 2 of the Civil Procedure Rules, and is seeking the following orders: -

- a. *THAT this application be certified as urgent and it be heard ex parte in the first instance during the current court's vacation.*
- b. *THAT the operations of the plaintiff business and hotel known as Almond Resort be under the management of an Independent management company to be appointed within seven (7) days jointly by the Plaintiff and the 1<sup>st</sup> Defendant pending the hearing and determination of this application.*
- c. *THAT in the alternative to (2) above, the operations and management of the plaintiff business and hotel known as Almond Resort be under the management of two (2) joint managers each of whom shall be appointed by the plaintiff and the 1<sup>st</sup> defendant respectively pending the hearing and determination of this application.*
- d. *THAT the 1<sup>st</sup> defendant to furnish accounts of all income and expenditure of the hotel known as Almond Resort for the period between December 2017 to date.*
- e. *THAT the operation of the Plaintiff business and hotel known as Almond Resort be under the management of an independent management Company to be appointed within seven (7) days jointly by the plaintiff and the 1<sup>st</sup> Defendant pending the hearing and determination of this suit.*
- f. *THAT in the alternative to (5) above, the operations and management of the Plaintiff's business and hotel known as Almond Resort be under the management of two (2) Joint managers each of whom shall be appointed by the plaintiff and the 1<sup>st</sup> Defendant respectively pending the hearing and determination of this suit.*
- g. *THAT this Honourable Court do issue such other directions and or orders as the court may deem just and expedient to grant.*
- h. *THAT the cost of this application be in the cause.*

2. In response to the Applicant Application, the Defendant Respondent filed a Replying affidavit dated 8<sup>th</sup> May, 2019 together with a Preliminary Objection of even date. The Preliminary Objection raises the following grounds: -

- a. *The Plaintiff filed a Notice of Motion Application on 30<sup>th</sup> July, 2018 in which it sought orders restraining the defendant from the management and affairs of the plaintiff company. The Plaintiff Notice of Motion Application is still pending and is yet to be heard and determined. By a Chamber summons application dated 18<sup>th</sup> April, 2019, the Plaintiff has during the pendency of its Notice of Motion Application filed in court on 30<sup>th</sup> May, 2018, applied to this Honourable court for Orders with regard to the*

*management and operation of the Plaintiff Company. The Plaintiff's Chamber Summons Application offends the provisions of section 6 of the Civil Procedure Act as it seeks a determination of this Honourable Court in respect of a matters that is also directly and substantially in issue in a previously instituted proceeding between the same parties.*

*b. That the plaintiff Chamber Summons Application dated 18<sup>th</sup> April, 2019 is an abuse of the court process and the same should be stayed pending the hearing and determination of the Notice of Motion Application filed in court on 30<sup>th</sup> July, 2018.*

*c. That the amended Plaint dated 11<sup>th</sup> April, 2019 and filed in court on even date offends the provisions of Order 8 Rule 1 as the same has been filed without leave of the court and the same ought to be struck out.*

*d. That the Plaintiff's Chamber summons application dated 18<sup>th</sup> April, 2019 which is premised and predicated on the said amended Plaint is thus fatally defective.*

*e. That the Plaintiff Chamber summons application dated 18<sup>th</sup> April, 2019 couched and disguised as an application seeking for the control of the Plaintiff Company is a spurious attempt by the plaintiff to obtain a mandatory injunction to obtain possession in respect of Title Number Garissa/Block II/530 owned by the Defendant and his grandfather, Ali Dubat Fidhow.*

*f. That the Plaintiff Chamber Summons application dated 18<sup>th</sup> April 2019 is therefore an attempt to steal a march on the defendant and circumvent the due process of the law.*

*g. That the Plaintiff Chamber Summons application dated 18<sup>th</sup> April 2019 is unmerited and ought to be stayed or dismissed with costs.*

## **B: Background**

### **The Applicants case**

3. It is the applicant case that the 1<sup>st</sup> Defendant is a shareholder and a director of the Plaintiff, which is a Limited Liability Company, which has three directors namely; Mohamed Mahat Kuno, Abdi Aziz Mahat Kuno and Farhiya Mahat Kuno, each with 25 ordinary shares, and that all of them are siblings. And that the Plaintiff has invested substantially in the hospitality industry and has developed a hotel located in Garissa town on Title No. Garissa Municipality Block 2/530 known as Almond Resort with 75 en-suite guestrooms.

4. It is their allegation that the 1<sup>st</sup> Defendant who is a minority shareholder and a director forcefully took over the operations and management of Almond Resort in December, 2017 and excluded the other directors and has single handedly managed its operations to date, and attempts to amicably solve the situation failed necessitating the filing of the instant suit. Abdi Aziz Mahat Kuno who swore the affidavit in support of this application avers that as the directors of the plaintiff, they cannot access the plaintiff and attempts to do so are met with threats of violence from the 1<sup>st</sup> Defendant.

5. Additionally, the applicant states that the 1<sup>st</sup> Defendant together with one Mr. Ahmed Mahat Kuno incorporated another entity known as Almond Resort & Spa Limited and immediately thereafter began diverting the Plaintiff funds and revenue into the accounts of Almond Resort and Spa Limited. They lodged a complaint with the Registrar of Companies and Almond Resort & Spa Limited was deregistered, and in reaction the 1<sup>st</sup> Defendant filed **JR No. 3 of 2019** at Nairobi High Court challenging the Registrar decision to deregister Almond Resort & Spa Limited, however on the applicant making an application to be enjoined in the suit, the same was withdrawn.

6. Further, it is their allegation that the 1<sup>st</sup> Defendant has since incorporated another entity known as Palm Oasis Resort Limited, the 2<sup>nd</sup> Defendant herein, and began rebranding and repainting the Plaintiff Hotel with the intention of moving it to the management of the 2<sup>nd</sup> Defendant to their prejudice.

7. Furthermore, they aver that from the past history, the hotel generates an average of Kshs 8,000,000/= to 11,000,000/= a month and that since December, 2017 when the 1<sup>st</sup> Defendant forcefully and single handedly took over the management of the hotel, he has never accounted for the income to the plaintiff, and request for such account has been futile.

8. Moreover, the applicant avers that since the 1<sup>st</sup> Defendant is the minority shareholder, they believe that there is no justification for him to continue managing and receiving revenues from the plaintiff hotel in exclusion of other directors, and that he has used the opportunity to forge their signatures and secure bank facilities and registration of Almond Resort and Spa., which complaint they have instructed their counsel to lodge the same with the Directorate of Criminal Investigation.

9. In conclusion, they aver that it would be in the interest of all the parties in this matter for the management and operation of the Plaintiff Hotel to be under the Joint Managers or alternatively under consultant so as to preserve the subject matter and avoid further losses by the plaintiff, and urged the court to find the application meritorious. They admitted the existence of the application dated 30<sup>th</sup> July, 2018 which is pending determination.

### **The Respondent case**

10. As noted above, the Respondent opposed the instant application and filed a Preliminary Objection and a Replying Affidavit. The Preliminary Objection raises the grounds listed above.

11. Vide their Replying Affidavit sworn by Mohamed Mahat Kuno dated 8<sup>th</sup> May, 2019 the 1<sup>st</sup> Defendant opposes the instant application, and avers that the Plaintiff does not own the parcel of land known as Title Number Garissa/Block II/530 as alleged, and therefore it does not own any structure in the property, where in law the owner of the property owns anything on the land. He avers that the land is registered in the names of Dubat Ali Fidhow ½ a share, Mohamed Mahat ¼ share and Abdi Aziz Mahat ¼ share.

12. The Respondent avers that they developed the second phase of the hotel and its facilities comprising 75 rooms and conference together with appurtenant services. And that the hotel facility and the land it stands on is therefore owned by the 1<sup>st</sup> Defendant, his grandfather and Abdi Aziz Mahat Kuno as tenants in equal shares as stated above. It is his position that based on the above, the plaintiff has no proprietary rights or interest over the above property and is not entitled to any injunctive relief as sought.

13. Additionally, the Respondent avers that the instant application dated 18<sup>th</sup> April, 2019 offends the subjudice principle provided for under section 6 of the Civil Procedure Act, as it is similar to the application dated 30<sup>th</sup> July, 2018 and therefore ought to be stayed pending the determination of the same.

14. The respondent admitted that they registered a company by the name Almond Resort and Spa together with one Ahmed Mahat Kuno, but denied diverting funds to the said company. He avers that the registrar deregistered the said company, and they later registered another company by the name Palm Oasis Limited, which company they allege is in occupation of land known as Garissa/Block II/530.

15. And that the instant application is cunningly intended to obtain a mandatory injunction evicting the current occupant of the subject parcel of land and the applicant installing itself vide unorthodox means, arguing that such an application breaches rules of natural justice as the true owners of the property are not parties to this suit and therefore will be condemned unheard.

16. Further, the respondent avers that in fact it is him who is marginalized in the running of the plaintiff and that the majority shareholders, that is Abdi Aziz Mahat Kuno and Fariya Mahat Kuno, have been running and managing the plaintiff without involving him, and that they do not need court orders to secure the management of the plaintiff alleging that the instant application is an abuse of the court process.

17. Furthermore, the respondent denied the allegation that he is misusing or has been using the plaintiff motor vehicle for his own use.

18. Moreover, the respondent avers that the Plaintiff had used title number Garissa/Block II/530 to secure an advance from Equity Bank, however they failed to repay the loan forcing his father through his wife Nariyaa Mohamoud to repay the loan and have the title released after clearing the debt of Kshs. 75,000,000/=.

19. In sum it is the respondent case that the plaintiff does not own the subject parcel of land and therefore this court ought not to issue the orders sought and dismiss the application with costs.

### **Submissions**

20. Both parties filed their written submissions. The Plaintiff submissions are dated 8<sup>th</sup> July, 2019 and filed on 11<sup>th</sup> July, 2019, whereas the Respondent submissions are dated 24<sup>th</sup> January, 2020 and filed on even date. The matter came up for highlighting of submissions on 27<sup>th</sup> January, 2020.

21. Counsel for the applicant Mr. Ken Wilson submitted in support of the applicant application. The first issue addressed by the applicant Counsel is the Respondent Preliminary Objection in regard to their application dated 30<sup>th</sup> May, 2018 which application is alleged by the Respondent makes the instant application subjudice.

22. Counsel submitted giving the genesis of the instant application, and that the same was filed after the respondent went ahead and started rebranding the Plaintiff hotel necessitating the filing of the instant application.

23. He instead went ahead and withdrew the said application dated 30<sup>th</sup> May, 2018, and argued that costs ought not be paid as the filing of the instant application was as a result of the respondent actions which includes the rebranding of the plaintiff and attempts to divert funds to another entity (the 2<sup>nd</sup> Defendant herein).

24. The applicant reiterated their case as stated above. He gave the brief background of the dispute as follows, that the Plaintiff has three directors and shareholders, that is Farhiya Mahat Kuno, Abdiaziz Mahat Kuno and Mohammed Mahat Kuno (the 1<sup>st</sup> Defendant) each with 25 Ordinary shares, and that Farhiya Mahat Kuno is the wife of one Omar Sharif Mohamed who was a founding Director but resigned and transferred his share to her. It is their submissions that all of them are siblings or related.

25. Counsel submitted that the Plaintiff erected the Hotel Business known as Almond Resort on Land Title Number Garissa Municipality/Block 11/530, and that Omar Shariff injected capital as a director to the tune of Kshs 60,000,000/=, acquired a facility of Kshs 50,000,000/= from the First Community Bank and Kshs 100,000,000/= from Equity bank, which amount was used to construct the hotel business.

26. They submitted that on the 2<sup>nd</sup> day of August, 2018 the 1<sup>st</sup> Defendant with one Ahmed Kuno incorporated Almond Resort and Spa fraudulently with the intention of diverting funds from the Plaintiff, which act was stopped upon them launching a complaint with the Registrar of Companies who deregistered the company pursuant to section 58 of the Company's Act. And that the defendant in an attempt to further fraudulently divert the funds of the plaintiff registered another company by the name Palm Resort Oasis Limited, with the sole intention of pilfering the Plaintiff funds.

27. The Applicant in respect to the merits of their instant application submitted on two issues. The first on is on whether the court has the power to appoint independent managers, and in this regard they submitted that the court has the power to interfere with the internal management of a company in instances where there is fraud as was held in the case of **Foss vs Harbottle (1843)2 Hare 261**.

28. It is therefore their submissions that the 1<sup>st</sup> respondent actions which included registering of several companies with the intention of defrauding the Plaintiff gives this court the authority to appoint independent managers.

29. The second issues addressed by the applicant is on whether this court has the power to order that the 1<sup>st</sup> Defendant to furnish accounts of all income and expenditure of the Plaintiff Hotel, and their answer to this is in the affirmative relying on Order 20 rule 1 of the Civil Procedure rules, 2010 and the cases of **Bethlehem Engineering & Construction Co. Limited(In receivership) vs Mara Mining Company Limited (2016) eKLR** and **Christopher Ndolo Mutuku & Another vs CFS Stanbic Bank Limited(2014) eKLR**.

30. Counsel Mr. Masese submitted in opposition to the applicant's application. The respondent did not object to the applicant application to withdraw their application dated 30<sup>th</sup> May, 2018, however they sought to be awarded costs for the same.

31. They submitted that the instant application although is seeking orders in respect of rendering accounts and control of the Plaintiff Company, but in essence and at its core, it seeks orders in respect of ownership and use of Property known as Garissa Municipality/Block 11/530. This they submit is a matter regarding land ownership and therefore this court lacks the jurisdiction to adjudicate on the same as the matter ought to be determined by the Environment and Land Court as specified under Article 162 of the Constitution, section 12 of ELC Act and section 150 of the Land Act. In support of this they rely in the case of **Co-operative Bank of Kenya vs Patrick Kangethe Njuguna (2017) eKLR**. It is their submissions that based on the above this court ought to allow their Preliminary Objection.

32. In regard to the applicant application to render accounts and appointment of independent managers, the Respondent submitted that this court cannot issue the said orders on account of the fact that the Plaintiff is not the registered owner of Garissa Municipality/Block 11/530, and that the court cannot therefore grant orders sought under Order 20 rule 1 on this account.

33. In addition, the Respondent submitted that under the legal theory of land ownership, it is clear that he who owns land owns everything on it, and therefore in this case the owners of the land Garissa Municipality/Block 11/530 owns everything on it, and that the owner is not the plaintiff, and since the owners of the said parcel land are not joined in this suit it would be unfair to issue the sought orders without hearing them contrary to the rules of natural justice.

34. Further, they submitted that the respondent is a minority shareholder in the Plaintiff company and therefore issuing the sought orders would amount to the court interfering unnecessarily with the internal affairs of the company, yet in reality the 1<sup>st</sup> Respondent is a minority shareholder who has been locked out of the management of the company and therefore he is not in a position to avail accounts. In this they rely in the case of **Samuel Gutu Macharia & 4 Others vs Patrick Mwangi and 6 Others (2017) Eklr**.

35. It is their submission that the appointment of a manager over the suit property would in sum amount to granting a mandatory injunction to the plaintiff to enter into the suit property without affording the registered owners' a right to be heard

36. In sum, they submitted that the applicant has not satisfied the grounds for grant of a mandatory injunction, and that there is no evidence backing the criminal element raised by the plaintiff and therefore urged the court to dismiss the instant application with costs.

#### **DETERMINATION**

37. I have looked at the pleadings, affidavits, annexures, submissions and authorities filed in court, and the arguments advanced by both parties. I have identified two issues for determination, **the first one, is whether the Respondent Preliminary Objection is merited and secondly, whether I should grant the orders sought by the applicant herein.**

38. **On the Respondent Preliminary Objection**, the Respondent objection herein carries two strands. The first being that the instant application is subjudice as allegedly a similar application dated 30<sup>th</sup> May, 2018 filed by the Applicant is yet to be determined and is pending before this court.

39. The Applicant Counsel in their submission before the court withdrew the said application, which position was not objected to by the respondent save as to costs. The said application being withdrawn, I will not therefore delve into the issue of subjudice as raised.

40. The second ground is that this Court lacks the Jurisdiction to adjudicate on the matter pursuant to Article 162 of the Constitution, section 12 of the ELC Act and section 150 of the Land Act, on the basis that the applicant claim relates to the ownership of Land Parcel Garissa Municipality/Block 11/530.

41. They contend that the dispute ought to be adjudicated by the Environment and Land Court, as the Plaintiff is sitting on Land Parcel Garissa Municipality/Block 11/530 which allegedly it does not own, and that he who owns the land owns everything on it, in this case including the Hotel.

42. In sum, the respondents contend that the dispute herein affect the ownership of Land Parcel Garissa Municipality/Block 11/530 and therefore the Environment and Land Court established pursuant to the provisions of Article 162 (2) (b) of the Constitution is one with the jurisdiction to handle the instant matter.

43. Indeed, according to the provisions of Article 162 (2) (b) of the Constitution, Parliament was mandated to establish courts with the status

of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, thus the enactment of the Environment and Land Court Act No.19 of 2011.

44. The Jurisdiction of the court is found at Section 13(1) of the Environment and Land Court Act No. 19 of 2011 which is an exposition of the provisions of Article 162(2) (b), which is to determine disputes relating to the Environment and the use, occupation and ownership of land.

45. Therefore, the question before me is whether the instant case concerns the use, occupation and ownership of land as alleged by the Respondent. Upon a critical look and analysis of the Plaintiff claim herein, it is apparent to this court that the applicant Plaintiff case is centered on some of the directors of the plaintiff and also laced with fraud allegations allegedly committed by the 1<sup>st</sup> Respondent, which allegations includes locking out the other directors of the company from the management of the Plaintiff. It is prima facie in my view a dispute between directors of a Company.

46. In this regard, Section 780 of the Company Act 2015 provides for the protection of members of a company against oppressive conduct and unfair prejudice. It states: -

**“A member of a company may apply to the Court by application for an order under section 782 on the ground-**

**1. that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or**

**2. that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial”**

47. The High Court exercises unlimited jurisdiction except on matters Land, Environment and Employment which are litigated the respective special courts of equal status. Therefore, matters relating to disputes over directorship of a company or general affairs of a company fall within the Jurisdiction of the High Court.

48. In this case, it is clear to me that there is a disagreement between the directors of the Plaintiff, and that one of the allegations is that the 1<sup>st</sup> Respondent conduct is allegedly oppressive towards the other shareholders and directors. Therefore, this court jurisdiction has clearly been invoked from the above section 780 of the Company Act.

49. Additionally, a look at the ownership of the Plaintiff and the Land Parcel Garissa Municipality/Block 11/530 in which the Plaintiff sits on reveals that it has similar owners, except for one Dubat Ali Fidhow. The Plaintiff has three directors and shareholders, that is Farhiya Mahat Kuno, Abdiaziz Mahat Kuno and Mohammed Mahat Kuno, whereas as per the Respondent case the land Parcel Garissa Municipality/Block 11/530 is owned as follows Dubat Ali Fidhow ½ a share, Mohamed Mahat ¼ share and Abdi Aziz Mahat ¼ share.

50. Considering the ownership of the Plaintiff vis a vis the Land Parcel Garissa Municipality/Block 11/530, it is apparent that going with the respondent alleged ownership of the subject property, it is clear that the two directors of the plaintiff, that is Mohamed Mahat and Abdi Aziz Mahat are also listed as owners of the subject parcel of land in which the plaintiff sits on.

51. It is also not disputed that the directors of the Plaintiff are siblings, and in view of the foregoing, it is my finding that the contested issue before this court is the control and management of the Hotel owned by the Plaintiff, which is a registered company and the dispute in question centers on directors' disagreement which this court pursuant to the provisions of the Company's Act has the jurisdiction to deal with the issue.

52. Further, it is notable that the said Environment and Land Court as established is of equal status with the High Court and where a suit has been filed in one court and it raises issues that cut across, the suit would not be dismembered so that each court can determine its respective issue as the same would amount to an absurdity and miscarriage of justice which was not what was intended by the Constitution, in such circumstances any of the two courts should be able to adjudicate upon it and make a determination. The two courts have concurrent jurisdiction. In the circumstances and for the reasons above, it is my finding that this court has the jurisdiction to hear and determine this suit.

53. **On whether this court ought to issue the orders sought by the applicant?** At this juncture, I wish to note that I am alive to the position that the court ought not to determine the merits or demerits of the main suit at this stage. I have considered all the averments in the affidavits as well as the submissions of the parties on the substantive issues herein. I take the following view of the matter; that very serious allegations have been levelled against the 1<sup>st</sup> Respondent.

54. Some of the allegations border on fraud geared towards divesting the plaintiff from the ownership of the Hotel Almond Resort. Similarly, matters of alleged threats of violence and denial of access to the other directors by the 1<sup>st</sup> Defendant are also grave. At this stage this court should not express any opinions or make any finding of fact which may prejudice the hearing of the main cause.

55. My duty at this juncture is to consider whether the applicant has established a prima facie case warranting the issuance of the sought orders. I agree with the 1<sup>st</sup> Respondent that the orders sought herein fall within the category of Mandatory injunctions as they are intended to compel the respondent to perform some action.

56. The considerations for granting mandatory injunctions were well articulated by the Court of Appeal in the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** when it was held: **“The test whether to grant a mandatory injunction or not is correctly started in Vol.24 Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948 which read: -**

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

57. Additionally, the Court of Appeal quoted with approval an English decision in the case of **Locabail International Finance Ltd vs Agroexport and others (1986) 1 ALLER 901** where it was stated: -

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”**

58. Further, In the case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal said: -

**“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”**

59. Therefore, the main principle that can be discerned from the above decisions is that a court, when considering an application for interlocutory mandatory injunction, must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. In this case the ultimate issue to be determined by this court in this suit will be whether to interfere and make orders affecting the internal affairs of the Plaintiff Company, and therefore at this stage I ought to exercise restraint as the matter is yet to be heard.

60. It is trite that the Court can interfere with the Internal affairs of a company in restricted circumstances such as fraud as was held in the case of **Foss vs Harbottle (1843), 2 Hare 261**, it was stated:

**“...an elementary principle is that court does not interfere with the internal management of companies acting within their powers.**

**...Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted; take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company ....”**

61. The question therefore is whether the applicant has met the principles of granting a mandatory injunction as explained above. Considering the entire circumstances of the instant case, it is my finding that the applicant has a cause of action, which this court will be called upon to make a determination after hearing the parties and their evidence.

62. I note that the applicant has not established any allegation of mismanagement of the Plaintiff, except for the alleged use or misuse of the Plaintiff motor vehicle by the 1<sup>st</sup> Defendant, which at this stage are just allegations.

63. Therefore, on the issue of appointment of Independent managers, it is apparent to this court that the deponent of the applicant’s affidavit is a serving director, he has also brought the suit on behalf of the other director one **Farhiya Mahat Kuno**, who both allege that they have been oppressed by the 1<sup>st</sup> Defendant. I believe that as serving directors they ought to have a say in the management of the affairs of the plaintiff.

64. However, considering the issue of balance of convenience, in my view, appointing independent managers at this interlocutory stage will disrupt the management of the plaintiff company.

65. And therefore it is the interest of the Company that the current management continues to conduct the affairs of the plaintiff, having in mind that they are answerable to the shareholders and must conduct the affairs of the company as provided in the Memorandum and Article of Association and law governing companies. Therefore, I decline at this stage the appointment of joint managers.

66. On the issue of furnishing of accounts, Order 20 rule 1 of the Civil Procedure Rules, 2010 provides that: -

**“Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.”**

67. I also take note that the two directors have alleged that the 1<sup>st</sup> Defendant has since December, 2017 forcefully took control of the Plaintiff and kept the other directors in the dark on management and affairs of the Plaintiff company.

68. This is also an issue that will be ultimately decided after the hearing of the case. However, there is no prejudice in the same being furnished during trial for purposes of scrutiny by the parties during the hearing of the suit. Therefore, at this stage am persuaded in view of the length of time the applicant claims the 1<sup>st</sup> Defendant forcefully took control of the Plaintiff, that is over two years and therefore this court will be in a position to issue substantive orders upon hearing the suit. The parties ought to expedite the matter in view of the above.

**Conclusion**

69. Based on the foregoing, it is my finding that the applicant has failed to demonstrate the existence of special circumstances to warrant this court to issue the sought orders in the nature of mandatory injunction except for furnishing of account. Be as it may, the applicant has to that extent established a prima facie case. The alleged registration of another company bearing the names Almond Resort without the consent or inclusion of the other directors prima facie points to some acts of fraud.

70. And therefore this court at this stage is not precluded in the interest of justice from issuing direction with a view of preserving the subject matter of the suit, in view of the allegation that the 1<sup>st</sup> Defendant Registered Palm Oasis Resort Limited the 2<sup>nd</sup> defendant and is allegedly in the process of rebranding the Plaintiff Almond Resort.

71. This creates the need for this court to intervene and protect the rights of the other members of the company pending the hearing and determination of this suit. In the circumstance, this court hereby issues orders to the effect that;

**i) The status quo be maintained and the 1<sup>st</sup> Respondent should not undertake any act that would prejudice the interest of the Plaintiff and other directors such as rebranding of the Almond Resort.**

**ii) the 1st defendant to furnish accounts of all income and expenditure of the hotel known as Almond Resort for the period between December 2017 to date, by the date of hearing of suit.**

**iii) Costs in the main cause.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 10<sup>TH</sup> DAY OF MARCH, 2020.**

.....

**C. KARIUKI**

**JUDGE**