REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 29 OF 2018

PETER KASIMBA & 219 0THERS.....PLAINTIFFS

-VERSUS-

KWETU SAVINGS & CREDIT CO-OPERATIVE SOCIETY LIMITED

(Formerly Masaku Teachers Savings Co-operative Society Ltd).....1ST DEFENDANT

MASAKU TEACHERS INVESTMENT LIMITED.....2ND DEFENDNT

REGISTRAR OF COMPANIES.....3RD DEFENDANT

REGISTRAR OF LAND, MACHAKOS COUNTY.....4TH DEFENDANT

NATIONAL LAND COMMISSION.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

JULIUS NZIOKA.....7TH DEFENDANT

JAMES NDUTA.....8TH DEFENDANT

FRANCIS KIOKO.....9TH DEFENDANT

DAVID KIKUMU.....10TH DEFENDANT

MACHAKOS COUNTY.....11TH DEFENDANT

GEDION SOO KAVUU.....12TH DEFENDANT

RULING

1. According to the Plaintiffs, they together with the 1st Defendant are shareholders and members of the 2nd Defendant. The 9th, 10th and 12th Defendants are accused of fraudulently and illegally purporting to act as directors of the 2nd Defendant while the 9th, 10th and 12th Defendants are accused of purporting to fraudulently and illegally act as officials of the 1st Defendant with a view to carrying out activities and purporting to effect fraudulent and falsified resolutions of the 2nd Defendant. It was alleged that the 11th Defendant sanctioned the fraudulent transfer of the 2nd Defendant's assets and lands whilst ignoring the Plaintiffs' interests therein.

2. According to the Plaintiffs the 2nd Defendant was incorporated on 11th August, 1995 with the 1st Defendant being one of its initial shareholders and at different stages the Plaintiffs acquired shares in the 2nd Defendant. It was averred that with a view to generating necessary capital for development by way of increasing its shareholders and share capital, the 1st Defendant resolved to transfer its land to the 2nd Defendant. It was disclosed that the 2nd Defendant's sole assets are Machakos Township Block II/112 and Makueni Nundu Mbutu Plot. No. 908 Kiboko Settlement Scheme, Makindu Town (the suit properties).

3. It was pleaded that the 2nd Defendant consistently from inception till 2003 routinely held Annual General Meetings where all its shareholders were notified to attend with the Agenda and at which resolutions were made.

4. It was averred that the 1st Defendant by virtue of its shares was entitled to appoint and nominate 2 directors to the 2nd Defendant's Board of Directors while the rest of the individual shareholders would nominate and elect 7 shareholders as directors. However, the 1st Defendant together with the 9th and 10th Defendants have illegally, unlawfully and fraudulently purported to act as directors of the 2nd Defendants and to pass resolutions. However, the 1st Defendant together with the 9th and 10th Defendants have illegally, unlawfully and fraudulently purported to act as directors of the 2nd Defendant to pass resolutions intended to defraud the 2nd Defendant's members and shareholders and transferred the 2nd Defendant's land and assets to the 1st the Defendant.

5. The Plaintiffs also accused the 1st, 2nd and 3rd Defendants of having failed to disclose and give information regarding the 2nd Defendant's affairs to the Plaintiffs and that the 1st Defendant together with the 7th, 8th, 9th and 10th Defendants purporting to act as directors of the 2nd Defendant and/or 1st Defendant represented to the 4th Defendant resolutions purporting that they were those of the 2nd Defendant on the basis of which the 4th Defendant effected the said fraudulent transfers of the 2nd Defendant's land. According to the Plaintiffs the 1st Defendant together with the 7th, 8th, 9th and 10th Defendants illegally, unlawfully and fraudulently purported to forcefully seize, compulsorily acquire and buy off their shares and to wilfully but unlawfully wind up the 2nd Defendant in an attempt to defraud the 2nd Defendant's members despite the 3rd Defendant's misgivings on their conduct. The Plaintiffs' case was that the 7th, 8th, 9th, 10th and/or 12th Defendants were never elected and the 2nd Defendant's directors and that they only took advantage of their access and control of the 2nd Defendant's offices, seals, documents, records, title and lease documents offices, seals, documents, records, title and lease documents maintained in the same offices as the 1st Defendant's. In so doing the said Defendants purported to convene Board pf Directors' meeting and an AGM at which they passed and executed fraudulent and illegal resolutions, conveyance and transactions which were neither registered nor sanctioned by the 3rd Defendant which recognised the 2nd Defendant as a public company with more than 2000 members. The said Defendants were further accused of denying the Plaintiffs access to the 2nd Defendant's offices, seals, documents, records, title and lease documents offices, seals, documents, records, title and lease documents.

6. The Plaintiffs were therefore apprehensive that the Defendants would fraudulently run down, ruin and wind up the 2nd Defendant thereby affecting the Plaintiffs' rights without any resolution to justify their actions in breach of the 2nd Defendant's Memorandum and Articles of Association and its legal status as Public Limited Liability Company.

7. The Plaintiffs therefore sought a raft of orders in the plaint in order to protect their interests.

8. Together with the Plaint, and passed on the foregoing averments, the Plaintiffs filed a Motion on Notice dated 3rd December, 2018, seeking the following orders:

> **a. THAT the application be certified as extremely urgent and be heard as a matter of urgency.**
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> **b. THAT pending hearing and determination of this application, the 1st, 2nd, 3rd,7th, 8th, 9th and 10th defendants be restrained from effecting any fraudulent and or unlawful change in the share register and shareholding of the 2nd defendant which will affect, extinguish or usurp the plaintiffs shares and or wind up the 2nd defendant.**
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> **c. THAT pending the hearing and determination of this application the 4th and the 5th defendants to be restrained from effecting any fraudulent and or unlawful conveyance of Land No. Machakos Township Block 11/12 and Makueni Nundu Mbutu plot no 908 Kiboko settlement scheme Makindu Town Kibwezi), property and assets of the 2nd defendant contrary to the plaintiffs shareholding interests.**
>
> **d. THAT pending the hearing and determination of this suit, the 1st, 2nd, 3rd, 7th, 8th, 9th , and 10th defendants be restrained from effecting any fraudulent and or unlawful change in the share register and shareholding of the 2nd defendant which will affect, extinguish or usurp the plaintiffs shares and or wind up the 2nd defendant.**
>
> **e. THAT pending the hearing and determination of this suit, the 4th and the 5th defendants to be restrained from effecting any fraudulent and or unlawful conveyance of the land no. Machakos township block 11/112 and Makueni Nundu Mbutu plot 908 Kiboko settlement scheme Makindu town Kibwezi), property and assets of the 2nd defendant contrary to the plaintiffs shareholding interest.**
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> **f. THAT 2 inspectors be appointed to do investigations as regards the affairs of the 2nd defendant and the internal dealings in shares, properties, assets, land, monies, rental incomes, accounts and liabilities by the 1st to 3rd to include the production of all minutes, resolutions, members and shareholders lists assets and other information relating to the dealing of the 2nd defendant and report to the court within a period of 30 days.**
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> **g. THAT the costs of this application be provided for.**

9. The application was supported by the 2nd Defendant.

10. According to the 2nd Defendant, the applicants herein are members of the second defendant and some of them became between the year

1995-1999 and as such that the certificates they are holding are valid. It was contended that the registrar of companies (the 3rd defendant) has severally indicated that the 2nd defendant is a public company with more than 2000 members and the applicants herein are some of those members.

11. According to the 2nd Defendant, from the annexure marked as **PK4** in the supporting affidavit sworn by Peter Kasimba on the 3rd day of December 2018 and which includes the balance sheet for the company for the year 2007 it is clear that the financing of the company was from the shares that had been purchased by the Sacco and the shares that had been purchased by individual members and this on its own is sufficient proof that there are other members other than the Sacco (the 1st defendant) who were members of the company.

12. Based on legal advice, the 2nd Defendant believed that this matter is not res judicata as the parties are not the same and the issues raised are also different as the gist of **Machakos High Court Civil Application 35 of 2015** was to remove the respondents therein from the register as shareholders of the 2nd defendant but not to determine whether the applicants in this suit were shareholders of the 2nd defendant and as such the applicants herein have a right to be heard. It was further contended that the matters deposed therein are not substantive in nature and do not go to the root of determining this application. The 2nd Defendants also clarified that the applicants herein are not party to the proceedings in **Machakos ELC No.35 of 2014** and therefore the prayer of injunction cannot be termed as res judicata and that this court has the jurisdiction to grant such orders as the properly belongs to a company herein and such orders would ensure preservation of the property.

13. In the 2nd Defendant's view, there is no prejudice any party would suffer if the orders sought are granted as the same would ensure that the register of members of the second defendant and the properties belonging to the 2nd defendant are not interfered with pending the determination of this suit.

14. In opposing the application, the 1st, 7th, 8th and 9th Defendants averred that the 7th, 8th, 9th and 10th Defendants are bone fide members of the 1st Defendant and that the 7th, 8th and 9th Defendants genuinely and in accordance with the 1st Defendant's byelaws hold office therein. According to the said Defendants, there was no evidence that the Plaintiffs were allotted shares in the 2nd Defendant. It was further disclosed that LR No. Machakos Township Block II/112 is the subject of Machakos ELC No. 35 of 2014 – Machakos Teachers Investments Ltd vs. Kwetu and Others wherein the Plaintiff applied for injunction but the application was dismissed hence the issue is res judicata. It was the said Defendants' position that the jurisdiction to issue any order in respect of a parcel of land lies with the ELC hence the prayers sought are incompetent.

15. It was disclosed that **Kemei, J** in Machakos HCMisc. Civil Appl. No. 35 of 205 ordered that that the Register maintained at the Companies Registry be rectified and that the said suit was heard and determined on 26th February, 2018 where the applicant, Kwetu's Application was allowed but the Respondents therein filed a Notice of Appeal and application for stay. However, the register is yet to be rectified due to the foregoing matters. The said Defendants therefore reiterated that the issues before this Court are re judicata.

16. It was averred that the 1st Defendant was never a shareholder in the 2nd defendant and that it was this that provoked the commencement of proceedings in Misc. Application No. 35 of 2015 whose subject matter was that the Respondents had either fraudulently or by honest mistake allocated themselves shares to the prejudice of Kwetu Sacco and a finding thereon has already been made in favour of Kwetu.

17. On its part the 5th Respondent filed grounds of opposition whose gist was that the application against it was premature and that there were no allegations made against it as no acts or omissions are made against it.

Determination

18. I have considered the application, the affidavits both in support and in opposition to the same and the submissions of counsel.

19. The first issue that calls for determination is whether these proceedings are caught up by the doctrine of res judicata.

20. Section 7 of the ***Civil Procedure Act, 2010*** provides as hereunder:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

21. As regards the rationale of the doctrine of *res judicata*, reliance was placed on the decision of the Court of Appeal in **Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR.**

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."***

22. In the **Maina Kiai** case (supra), the Court quoted with approval the Indian Supreme Court in the case of **Lal Chand vs. Radha Kishan, AIR 1977 SC 789** where it was stated;

"The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

23. In **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

"The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

24. In **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** the former East African Court of Appeal stated as follows:

"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

25. In **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA** stated as follows:

"A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments."

26. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the ***Civil Procedure Act***, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

27. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

"However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not

have been discovered with reasonable diligence when he made his first application."

28. In **Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR** the Court quoted the case of **E.T vs. Attorney General & Another (2012) eKLR** wherein the court noted thus:

> **"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of res judicata….."**

29. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

30. In Misc. Application No. 35 of 2015 the parties are indicated as Kwetu Savings & Credit Co-operative Society Limited as Applicants and James Muiya and 12 Others. On the face of the proceedings, the Plaintiffs herein were not the Plaintiffs in the said case. Similarly, the fact that the Plaintiffs herein are 200 in number is a clear indication that not all of them could have been Respondents in the said suit. It has not been contended that the Respondents therein were suing or were sued as representatives of the Plaintiffs herein. Again it has not been alleged that the cause of action herein was the same or substantially the same as in that cause.

31. I have looked the case of action herein and what comes out clearly is that the substance of the case is the alleged unlawful actions on the part of the Respondents in fraudulent management of the 2nd Defendant. The issue of the land is not the substance of the suit but is just a collateral issue since the land is an asset that is claimed to belong to the 2nd Defendant. In other words, the land issue is just a collateral issue.

32. The Court of Appeal in **Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others [2017] eKLR** expressed itself as hereunder:

> **"…the jurisdiction of the ELC to deal with disputes relating to contracts under *Section 13* of the *ELC Act* ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. In Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,**
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> ***"The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately."***
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> **By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.**
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> **While exclusive, the jurisdiction of the ELC is limited to the areas specified under *Article 162* of the *Constitution*, *Section 13* of the *ELC Act* and *Section 150* of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under *Article 165(3)* of the *Constitution* provides *inter alia,* that;**
>
> ***1. subject to clause (5), the High Court shall have-***
>
> ***a. unlimited original jurisdiction in criminal and civil matters.***
>
> **For the above reasons, the appellant's objection on jurisdiction was rightly dismissed."**

33. In other words, a court where the High Court is confronted with an issue of jurisdiction between it and the specialised court, the issue that has to be determined is what is the predominant issue that falls for determination. There fact that a party cites a land reference does not ipso facto take away the jurisdiction of the High Court if what is to be determined is an issue that does not require the court to make a determination as regards disputes—

> ***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents,***

valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

34. It may well be that the Court may in the course of its decision touch on an issue revolving around a parcel of land but is that issue is simply collateral to the main issue, it cannot the substratum of the suit. Similarly, where after determining the substance of the suit, the Court is called upon to make orders relating to land, that does not take away the jurisdiction of the court. For example, in cases where the sale of a charged property is under challenge for failure to repay the sum advanced. The substance of the suit is repayment of the said sum. However, upon determination of that issue the court may have to make orders restraining the sale of the collateral which is usually land. Such an order cannot be deemed to be outside the Court's jurisdiction since it is a collateral decision made in the course of determining the substance of the suit which falls within the court's jurisdiction.

35. In this case, I find that since the substance of the suit is the management of the 2nd Defendant the issues relating to the properties owned by the 2nd Defendant do not take away this Court's jurisdiction.

36. The law on the grant of injunction in this country is fairly well settled. Conditions for grant of interlocutory injunction as laid down in **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** are as follows:

(i). *prima facie* case with a probability of success;

(ii). the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

(iii). if the Court is in doubt on the existence or otherwise of a *prima facie* case it will decide the application on the balance of convenience.

37. The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties. In the case of **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002, Ringera, J** (as he then was) reiterated the conditions for grant of interlocutory injunctions and stated that whereas in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

38. With respect to what constitutes a *prima facie* case, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, it was held by the Court of Appeal (**Bosire, JA**) that:

> **"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**

39. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Where the contract is frustrated by the intervening actions of a third party, it cannot be said that a *prima facie* has been made. It is for the supplicant to injunctive relief to demonstrate that he would suffer loss, which cannot be adequately compensated in damages.

40. The applicants herein contend that the Respondent have unlawfully and fraudulently purported to make resolutions whose effect is to deprive them of their proprietary interest in the 2nd Defendant. It would seem that their position has the support of the 2nd Defendant itself and that of the 3rd Defendant, the Registrar of Companies.

41. In this case it is my view and I hold that the Plaintiffs have passed the first hurdle. They have established a prima facie case with probability of success.

42. The next issue is whether they have proved that they stand to suffer irreparable injury, which would not adequately be compensated by an award of damages. The general position is that an injunction ought not to be granted if the applicants may be compensated by an award of damages. However, as was held in **Muigai vs. Housing Finance Co. Ltd & Another HCCC No. 1678 of 2001**, it is not an inexorable rule of law that where damages may be an appropriate remedy, an interlocutory injunction should never issue. That was the position adopted in **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** in which the Court considered the ***Halsbury's laws of England*** on what irreparable loss is and stated that:

> ***"first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."***

43. In this case the plaintiffs are apprehensive that the effect of the actions of the Respondents is that the 2nd Defendant may be wound up. If that were to happen, it is clear that the success of the Plaintiffs may well be merely academic considering the process of reinstating a company back to the register of companies and by then the assets of the 2nd Defendant in which the Plaintiffs claim shares could as well have been dissipated.

44. Even if I was in doubt as regards the foregoing it is my view that the balance of convenience tilts in favour of preserving the 2nd Defendant during the pendency of this suit.

45. In the premises I find merit in the Motion dated 3rd December, 2018, and I grant the following orders:

> **a. THAT pending the hearing and determination of this suit, the 1st, 2nd, 3rd, 7th, 8th, 9th, and 10th defendants be restrained from effecting any fraudulent and or unlawful change in the share register and shareholding of the 2nd defendant which will affect, extinguish or usurp the plaintiffs shares and or wind up the 2nd defendant.**
>
> **b. THAT pending the hearing and determination of this suit, the 4th and the 5th defendants to be restrained from effecting any fraudulent and or unlawful conveyance of the land no. Machakos township block 11/112 and Makueni Nundu Mbutu plot 908 Kiboko settlement scheme Makindu town Kibwezi), property and assets of the 2nd defendant contrary to the plaintiffs shareholding interest.**
>
> **c. THAT the costs of this application be in the cause.**

46. It is so ordered.

Read, signed and delivered in open Court at Machakos this

29th day of April, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Geoffrey