REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 118 OF 2009

ACCREDO AG.....PLAINTIFF/1ST APPLICANT

SLAMA BEACH HOTEL LIMITED....1ST DEFENDANT/2ND APPLICANT

HANS JUERGEN LANGER.....2ND DEFENDANT/3RD APPLICANT

ZAHRA LANGER.....3RD DEFENDANT/4TH APPLICANT

VERSUS

STEFANO UCCELLI.....4TH DEFENDANT/1ST RESPONDENT

ISAAC RODROT.....5TH DEFENDANT/2ND RESPONDENT

RULING

[THE 4TH DEFENDANT'S/1ST RESPONDENT'S PRELIMINARY OBJECTION DATED 13TH JANUARY, 2018 AND THE 5TH DEFENDANT'S/2ND RESPONDENT'S PRELIMINARY OBJECTION DATED 9TH JANUARY, 2018]

1. On 8th January, 2018 Accredo AG, the Plaintiff/1st Applicant, Salama Beach Hotel Limited, the 1st Defendant/2nd Applicant, Hans Juergen Langer, the 2nd Defendant/3rd Applicant and Zahra Langer, the 3rd Defendant/4th Applicant filed a Notice of Motion under certificate of urgency seeking orders that:

> **"1.The application be certified urgent, admitted for hearing during the present vacation and service be dispensed within the first instance.**
>
> **2. The Honurable Court be pleased to grant an interim injunction against the 4th and 5th Defendants, their agents, or any other person whatsoever from taking possession of, altering, removing, selling, disposing of, alienating or in any other way dealing with the 1st Defendant's properties or status pending the hearing of this application interparties and further directions.**
>
> **3. The Honurable Court be pleased to grant an injunction against the 4th and 5th Respondents, their servants or agents, or any other person whatsoever from taking possession of, altering, removing, selling, disposing of, alienating or in any other way dealing with the 1st Defendant's properties pending the hearing and determination of this suit.**
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> **4. The honorable court be pleased to grant clear and concise directions as to the execution of the various conflicting orders in this suit.**
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> **5. The Honourable Court be pleased to grant judgement to the Plaintiff on the admission of the 1st Defendant and order and/or direct the Registrar of Companies to ensure that the shareholding of the 1st Defendant shall revert and/or be restored to the status/position that it was in as per the order dated 21st December 2009.**
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> **6. The Honourable Court be pleased to give directions as to the hearing and expeditious determination of this matter.**

7. The Costs of this Application be awarded to the Applicant."

The application which is brought under Order 51 Rule 1, Order 39, Order 40, Order 45 Rule 5 and Order 13 Rule 2 of the Civil Procedure Rules, 2010 and sections 1A, 1B, 3A, 34 and 63(e) of the Civil Procedure Act is supported by grounds on its face and an affidavit sworn by the 3rd Applicant on 8th January, 2018.

2. The 5th Defendant/2nd Respondent answered the application by filing a notice of preliminary objection dated 9th January, 2018 stating that:

"TAKE NOTICE that counsel for the 5th Defendant shall raise a notice of preliminary objection in relation to the plaintiff's application dated 8/1/2018 as far as it relates to stay of execution and or review on the following grounds:

1. The application is *res judicata* on review, appeal and execution in that: -

a) Following the delivery of the ruling on 30/4/2015, a stay was granted by the court for a period of 14 days.

b) The plaintiff, 1st, 2nd and 3rd defendants obtained stay of execution in the Court of Appeal, Civil Application No. 19 of 2015 (Malindi) pending the hearing and the determination of their appeal, Court of Appeal Civil Appeal No. 36 of 2015 (Malindi).

c) The Court of Appeal on 15/12/2017 dismissed Civil Appeal No. 36 of 2015 (Malindi).

d) This court lacks jurisdiction to further stay, amend and or vary the orders of 30/4/2015.

2. The doctrine of finality has set in.

3. The application to stay, amend or vary the order of 30.4.2015 should be struck out with costs."

3. On his part, the 4th Defendant/1st Respondent filed a notice of preliminary objection dated 13th January, 2018. The same does not need reproduction in this ruling as it is a replica of the 2nd Respondent's preliminary objection. The 1st Respondent also swore a replying affidavit dated 18th January, 2018 in opposition to the application.

4. A brief statement of the background of this matter is necessary. After the 1st Applicant filed this suit against the 2nd Applicant, a consent decree was issued on 21st January, 2010 in the following terms:

"a) THAT the judgement of the court of Milan given on the 14th December 2001 for Euros 825,000 plus interest thereof at annual commercial rates of 25% and costs of Euros 2470 plus interests at annual court rates of 12% be and is hereby ordered to be enforced against the defendant.

b) THAT a warrant of attachment do issue against the defendant's plot No. 9890 Watamu Grant No. 11576.

c) THAT an injunction do issue restraining the defendant by itself, directors, shareholders, attorneys, servants and/or agents from selling, disposing off, alienating, and/or wasting Grant No. 11576 Plot No. 9890 Watamu or in any other manner howeversoever and whatsoever from dealing with the said plot and the hotel establishment and developments therein standing in a manner prejudicial and/or likely to defeat the execution of the judgement and decree of the court of Milan given on the 14th December 2001 or prejudicial to the judgement and decree of the court issued herein.

d) THAT the plaintiff company by itself, directors and shareholders namely HANS JUERGEN LANGER and ZAHRA LANGER be and are hereby allowed and ordered to take over the shareholding, directorship, ownership, management, running, operation and control of the defendant company and the business carried out on Grant No. 11576 Plot No. 9890 Watamu for such period and time as shall be sufficient to satisfy the judgement and the decree of the court of Milan dated 14th December 2001 and for such a time and period as the plaintiff company shall recover all related and consequential costs and expenses properly incurred while owning and managing the defendant company.

e) THAT the Registrar of Companies be and is hereby mandated to transfer all the shares held by the defendant shareholders to the directors of the plaintiff company, namely HANS JUERGEN LANGER and ZAHRA LANGER on equal number (50% 50%) basis.

f) THAT a one STEPHANO UCCELLI the current resident Director of the Defendant company shall continue to be in the board of directors of the defendant company for the purposes of ensuring that the judgement and decree of this court is fully satisfied and for the interest of the defendant company's previous shareholders and directors without being a shareholder.

g) THAT this suit be and is hereby marked as settled with each party bearing its own costs."

5. Several applications were filed in the matter after the issuance of the decree culminating in the 1st Respondent's notice of motion dated

20th November, 2014 in which he sought a review and setting aside of the said consent decree.

6. After hearing the application, Chitembwe, J delivered a ruling on 30th April, 2015 in which he reviewed and set aside the consent decree. He also issued other orders. It is important to reproduce those orders:

> **"In the end, the application dated 20th November, 2014 is merited and is hereby granted as prayed. I do further make the following orders for purposes of clarity:**
>
> **1. As indicated hereinabove, the application by the 4th defendant dated 20th November, 2014 is granted as prayed.**
>
> **2. The Registrar of Companies shall remove the names of the 2nd and 3rd respondents, that is to say, Hans Jurgen Langer and Zahra Langer, as directors of Salama Beach Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009.**
>
> **3. The 2nd and 3rd defendants to hand over all properties belonging to Salama Beach Hotel Ltd within seven (7) days hereof to the 4th and 5th defendants. Counsel for both parties to participate in the transfer process.**
>
> **4. The 2nd and 3rd respondents' names to be removed as signatories to all bank accounts of Salama Beach Hotel Limited and to be replaced by the original signatories as at 14th December, 2009.**
>
> **5. In view of previous disobedience of court orders by the parties herein, the Officer Commanding Watamu Police Station to ensure that the court order is effected as hereinabove.**
>
> **6. Costs of the Application to the Applicant."**

7. In reaching his decision, the learned Judge had summarized the Plaintiff's claim as follows:

> **"The plaintiff, Aggrego AG traces its claim to the deed of assignment signed on 8th June, 2005. The claim is for rent arrears accrued in Seychelles and not in Kenya. The supporting affidavit sworn on 15th December, 2009 entirely deals with the issue of a judgement issued in Milan and nothing else. Paragraph four of the plaint introduces the judgement issued in Milan. Paragraph five of the plaint deals with the deed of assignment. Paragraph six indicates that the judgement has not been satisfied. Under paragraph ten of the plaint, it is averred that the judgement against Viaggi is equally enforceable against the defendant. Prayer (a) of paragraph 11 of the plaint is for enforcement of the Milan judgement against the defendant. In essence, therefore, the claim rotates around the alleged judgement of Milan and the contentions that it was a normal plaint cannot arise."**

8. The plaint dated 15th December, 2009 sought judgement against the Defendant in the following terms:

> **"(a) An order that the judgement of the court of Milan given on the 14th December, 2001 for Euros 825,000 plus interest and costs of Euros 2470 be enforced against the defendant.**
>
> **(b) A warrant of attachment before judgement do issue against the defendant's Plot No. 9890 Watamu Grant No. 11576 pending the hearing and determination of this suit.**
>
> **(c) An injunction do issue restraining the defendant by itself, directors, shareholders, attorneys, servants and/or agents from selling, disposing off, alienating and/or wasting plot 9890 Grant No. 11576 Watamu or in any other manner howsoever and whatsoever dealing with the said plot and the developments therein standing in a manner prejudicial or likely to defeat the process of execution of the judgement of the court of Milan given on the 14th December, 2001 pending the hearing and final determination of this suit.**
>
> **(d) An order that the plaintiff be allowed to take over the ownership, management, running, operation and control of the defendant and the business carried on plot Watamu for such period and time as shall be sufficient to satisfy the judgement and decree of the court of Milan dated 14th December 2001.**
>
> **(e) Cost of the suit and interest thereon at court rates."**

9. The applicants herein were aggrieved by the decision of Chitembwe, J and moved to the Court of Appeal sitting in Malindi through Civil Appeal No. 36 of 2015. On 15th December, 2017, the Court of Appeal dismissed the appeal with costs.

10. The applicants herein who were the appellants before the Court of Appeal raised several grounds of appeal which were condensed by the Court of Appeal as follows:

> **"Those orders have in turn led to this appeal; in which the appellants impugn the decision on a prolix of 26 grounds of**

appeal; but which we have endeavored to condense. In a nutshell, the appellants contend that the learned Judge erred; by failing to find that he lacked jurisdiction to grant the review orders; by having a pre-determined mind and considering un-pleaded matters; by ordering the expropriation of private property in a manner contrary to Article 40 of the Constitution and the Companies Act; by failing to appreciate that the consent decree was between the 1st and 2nd appellants, who are both juristic persons capable of suing and being sued in their own names; by finding that the 1st [and 2nd] respondents were at liberty to contest the consent and decree yet they were not parties to the same; by holding that the 3rd and 4th appellants should be removed as shareholders and signatories to the 2nd applicant; in ordering that all the property belonging to Salama Beach Hotel be handed over to the respondents; in finding that there was no judgment issued by the court of Milan on 14th December, 2001; in finding that the plaintiff in Malindi HCCC 118 of 2009 had no claim against the defendant; by exercising his discretion improperly; in finding that the superior court lacked jurisdiction to adopt and enforce the Milan Judgment for lack of reciprocity while also finding, that Common law was inapplicable in the matter; in finding that the consent judgment was based on mistake and misapprehension of the real facts; in finding that there was discovery of new information and that there was no judgment in Italy; in finding that the consent judgment was procured through fraud and mistake and that the 1st appellant knowingly misrepresented the existence of that judgment; in failing to make a finding as to [who] the real/actual owners of Salama Beach Hotel were prior to the filing of the suit; by generally transforming an application for review of decree into a substantive judgment on merit and lastly in awarding costs of the application to the 1st respondent."

11. After hearing the submissions made by the advocates for the parties, the Court of Appeal identified four issues for its determination, namely:

"a) Whether the superior court had the jurisdiction to set aside the consent; and if so;

b) Whether the 1st respondent had the locus standi to seek the orders sought in the application;

c) Whether the review was merited and lastly;

d) Whether the impugned ruling was based on unpleaded issues and if so, the effect thereof."

12. The Court of Appeal addressed each of the issues identified. At paragraph 32, the Court observed that:

"It is crucial to note that the appellants never controverted these claims as to the existence or validity of the Milan judgment. It is therefore without doubt, that at all material times to the High court proceedings, there was no order or decree from the court of Milan in favour of Viaggi capable of enforcement; given the proceedings pending before the Italian courts and the lack of clarity as to the decretal sum. Equally clear from all this, is that Viaggi could not assign the 1st appellant a nonexistent decree."

13. On the order altering the 2nd Applicant's shareholding the Court at paragraph 35 held that:

"Notably, shareholding was one of the central grounds in the review application. The 1st respondent had, claimed *inter alia,* that the execution of the decree would result in an unlawful divesture of shares in the company and to his deprivation of the property in question, notwithstanding his legitimate title thereto. In addition to this, he also contended that the 3rd and 4th appellants had fraudulently caused changes in shareholding and that the issue of shareholding needed to be determined by the court. It is thus not correct, as the appellants claim, that shareholding was never in issue. If anything, shareholding was at the heart of the review application. It is on account of the alteration of shareholding that the 1st respondent complained of his potential unlawful deprivation of property. Consequently, the reversal of the orders on shareholding which had been made in the decree was well within the ambit of the pleadings."

14. The question to be answered in this ruling is whether all or some of the prayers in the application dated 8th January, 2018 are res judicata.

15. Before I proceed to address the objections raised by the 1st and 2nd respondents, it is important for record purposes to note that when the objections came up for hearing on 1st March, 2018, Mr. Munyithia for the 2nd Respondent brought to the attention of this Court the existence of Mombasa High Court (Mombasa Commercial Court) Civil Case No. 8 of 2018, Salama Beach Hotel Limited v Ventaglio International SA & 5 others in which the 2nd Applicant herein had obtained injunctive orders restraining the defendants therein, who include the 1st and 2nd respondents herein, from interfering with the operations of the hotel. I need not make any comment on that suit since the parties will address the matter before Mombasa High Court.

16. Submitting in support of the 2nd Respondent's preliminary objection, counsel stated that the application dated 8th January, 2018 is crafted in a manner that aims to disturb the decision made by Chitembwe, J. According to counsel, the said orders issued on 30th April, 2015 had three components; physical possession, orders to advocates and shareholding of the 2nd Applicant. Counsel submitted that these issues are *res judicata* and the doctrine of finality has set in. His view is that no further litigation should be entertained on these issues. It was submitted for the 2nd Respondent that allowing the application would be tantamount to setting aside the decision of Chitembwe, J.

17. Counsel for the 1st Respondent supported the position taken by counsel for the 2nd Respondent. He added that the applicants want this court to exercise supervisory jurisdiction over the decision reached by the Court of Appeal on 15th December, 2017 and this would clearly contravene Article 165(6) of the Constitution which bars this court from exercising supervisory jurisdiction over a superior court.

18. According to counsel for the 1st Respondent, this application is brought in bad faith as it is intended to stop the 1st and 2nd respondents from enjoying the fruits of judgement. He submitted that the applicants assume that there can be two decrees in one matter and urged this court to bring this litigation to an end. Pointing to the admission by the applicants that they have filed a similar application before the Court of Appeal, the 1st Respondent wondered why this court should entertain this application. Counsel for the 1st Respondent concluded by stating that the applicants seek review but this court has no jurisdiction to review the decision of the Court of Appeal.

19. In opposing the preliminary objections filed by the 1st and 2nd respondents, the applicants' counsel started by pointing out the provisions under which the application is brought and asserted that none of the prayers sought has ever been asked for in any application before this court by any of the parties. Further, that the prayers sought have never been determined by this court or any other court.

20. Counsel submitted that the only decree in this case is the one dated 20th January, 2010. Further, that any orders issued, but not set aside, remain valid.

21. According to the applicants' counsel, in the ruling delivered on 30th April, 2015, Chitembwe, J identified eleven applications that were yet to be heard and determined. Counsel pointed out that from the time the instant application was filed, another three applications have been filed. According to him, all these applications have not been heard and there is no way that the matter can be said to be *res judicata*.

22. Counsel for the applicants submitted that Order 45 of the Civil Procedure Rules envisages a rehearing where a decree has been set aside. It is his case that after the decree was set aside by Chitembwe, J, a rehearing has to take place and the prayer in the application for directions cannot therefore be said to be *res judicata*. It is also the position of counsel for the applicants that the prayer which seeks judgement on admission is also not *res judicata* as it is based on the fact that the respondents have not filed any defence to the Plaintiff's claim. It is counsel's submission that the application also seeks directions on the conflicting orders issued in the matter and such a prayer has not been determined before.

23. It is the position of counsel for the applicants that there is need to hear the application on merit considering that after the decision of 30 th April, 2015 other orders were issued on 14.5.2015, 26.6.2015, 11.6.2015, 24.6.2015, 14.7.2015 and 24.8.2015 and it is important to clarify the place of these orders vis-à-vis the decision of 30th April, 2015. According to counsel for the applicants, the record of appeal before the Court of Appeal was premised on pleadings, documents and proceedings of this court upto and including 30th April, 2015 and any proceedings thereafter were not subject to the determination by the Court of Appeal. Counsel pointed to the order issued by Chitembwe, J on 24th June, 2015 directing the Deputy Registrar of this court to reissue the order of 21st December, 2009 and submitted that the said order gave ownership, control and management of the 2nd Applicant to the 1st Applicant and superseded the order of 30th April, 2015 which was the subject of the appeal. Counsel also referred to a ruling delivered on 24th August, 2015 by Chitembwe, J in which he observed that the issue of ownership of the 2nd Applicant was not clear and could only be determined through a full hearing. Counsel asserted that the instant application is not *res judicata* and what the applicants are trying to do is simply to sanitise the court record.

24. Concluding his submissions, counsel for the applicants submitted that the preliminary objection herein raises contentious issues of facts thus failing the test set in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696** that a preliminary objection is based on pure points of law argued on the assumption that all the facts pleaded are correct and does not seek the exercise of judicial discretion. Counsel asserted that the respondents have presented their own set of facts and evidence hence disputing the facts the applicants have placed before the court. The applicants' counsel urged the court to dismiss the respondents' preliminary objections asserting that they have never filed any pleadings and they do not have any basis for raising any objection.

25. In a brief reply, counsel for the 2nd Respondent pointed out that their preliminary objection is not based on the fact that the suit is finalized or that the court is *functus officio*. He stated that their argument is that the application is *res judicata* in so far as it raises issues dealt with in the decision of 30th April, 2015.

26. As for the orders issued after 30th April, 2015, counsel submitted that all the orders were issued by the court while exercising powers under Order 42 of the Civil Procedure Rules, 2010. Further, that the order of 24th June, 2015 simply compelled the Deputy Registrar, who had refused to act, to reissue the orders of 21st December, 2009.

27. In conclusion, counsel for the 2nd Respondent conceded that there was indeed need for the court to give directions as to how the matter should proceed.

28. On his part, counsel for the 1st Respondent asserted that Chitembwe, J was alive to all the applications that were pending when he delivered his ruling on 30th April, 2015 and it cannot be said that any of the applications identified in the ruling is still pending determination.

29. The principle of *re judicata* is found in Section 7 of the Civil Procedure Act which provides that:

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

30. The doctrine of *res judicata* as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the recent case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

"Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disinjunctive but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

31. The Court explained the role of the doctrine thus:

"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 commonsensical 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 or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice."

32. My understanding of the *res judicata* principle is that it is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of the courts' valuable time if there was no tool for arresting such mischief.

33. In **E.T. v Attorney General & another [2012] eKLR** Majanja, J correctly warned that:

"The courts must be vigilant to guard against 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 a new cause of action which has been resolved by a court of competent jurisdiction."

34. The learned Judge went ahead and cited the case of **Omondi v National Bank of Kenya Limited & others [2001] EA 177** where it was stated that **"parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit."**

35. In **Gurbacham v Yowani Ekori [1958] EA 450**, the Court of Appeal of Eastern Africa, while considering the doctrine of *res judicata*, cited at page 453 a passage from the Judgement of the Vice-Chancellor in **Henderson v Henderson (1), 67 E.R.313 at page 319** wherein it was stated that:

"In trying this question I believe I state the rule of the court correctly when I say that, 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 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."

36. An issue that has been ventilated before a court of competent jurisdiction between the same parties or their surrogates runs afoul the doctrine of *res-judicata* and once such case is identified, the court has a duty to terminate it without further ado.

37. The ruling of 30th April, 2015 gave specific orders. When the applicants went on appeal, the decision of Chitembwe, J was sustained. The meaning of this is that the 3rd and 4th applicants were supposed to hand over to the 1st and 2nd respondents all the properties belonging to the 2nd Applicant. The Registrar of Companies was also to remove the names of the 3rd and 4th applicants as directors of the 2nd Applicant and ensure that the status of the 2nd Applicant was restored to its position as at 4th December, 2009. Those orders are no longer open to litigate as they were confirmed by the Court of Appeal.

38. Any orders issued prior to 30th April, 2015, whether renewed or reissued after 30th April, 2015 were overtaken by the orders of 30th April, 2015. In any case, my perusal of the court file does not disclose any order that countermanded the orders of 30th April, 2015. Indeed Chitembwe, J in his ruling of 24th August, 2015 appreciated the fact that all issues were in the hands of the Court of Appeal by stating that:

"Since the dispute is now before the Court of Appeal, I do find that all the issues relating to this matter can be handled by the Court of Appeal. ....

I have handled several applications involving the parties herein and I do find that let all what is remaining be handled by the Court of Appeal. The orders granted exparte on 14th April, 2015 are hereby set aside. The status of the company shall be determined by the Court of Appeal when the appeal is fully heard and determined. Should any party be of the view that there is contempt of .... any court orders, such a party is free to approach the relevant court, preferably the Court of Appeal for any remedy unless the breach complained of arises from an order of this court."

39. If indeed there were any orders issued for restoration of the directorship of the 2nd Applicant to the 3rd and 4th applicants, then those orders lapsed the moment the Court of Appeal upheld the decision of 30th April, 2015. In short there is no other order which surpasses or supersedes the order of 30th April, 2015.

40. I agree with the submission by counsel for the 1st Respondent that in seeking to stop the execution of the orders of 30th April, 2015, the applicants are asking this court not only to superintend the decision of a Court (Chitembwe, J) of coordinate jurisdiction but to overturn the decision of the Court of Appeal which is mandated to hear appeals from this Court. Such action would be anathema to Articles 165(6) and 164 of the Constitution. It will amount to an overthrow of the constitutional order.

41. Unless the applicants seek review before the Court of Appeal or move the Supreme Court, the only clear message is that this matter as it relates to the orders of 30th April, 2015 has completed its journeys in the corridors of the High Court. The issues have been determined and what remains is the execution of the decision delivered by Chitembwe, J on 30th April, 2015 as confirmed by the Court of Appeal on 15th December, 2017. There is nothing more to litigate in respect to the decision of 30th April, 2015. Those orders are so clear that there is no need to seek any directions as regards the implementation of the same. Indeed the 1st and 2nd respondents did not need the Deputy Registrar's authority in order to execute those orders.

42. For avoidance of doubt, I direct that the orders issued on 30th April, 2015 be complied with in full before other issues, if any, can be addressed in this matter. I thus uphold the 1st and 2nd respondents' preliminary objections and strike out the application dated 8th January, 2018 in so far as it seeks to interfere with the implementation of the orders of 30th April, 2015. The respondents will have the costs of the objections from the 1st, 3rd and 4th applicants. The directors and shareholders of the 2nd Applicant cannot be saddled with costs considering that the 3rd and 4th applicants are not directors of the 2nd Applicant.

Dated, signed and delivered at Malindi this 20th day of March, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT