



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 330 OF 2013**

**SULTAN HASHAM LALJI ..... PLAINTIFF**

**VERSUS**

**DIAMOND HASHAM LALJI ..... 1<sup>ST</sup> DEFENDANT**  
**AZIM VIRJEE t/a SAMVIR REGISTRARS ..... 2<sup>ND</sup> DEFENDANT**  
**TRIO HOLDINGS LIMITED ..... 3<sup>RD</sup> DEFENDANT**  
**PROP INVEST LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING OF THE COURT**

**INTRODUCTION**

1. The suit herein was filed in court vide an Amended Plaint dated 8<sup>th</sup> March 1996 against the Defendants in various capacities as follows;

The 1<sup>st</sup> Defendant is a male adult and a brother to the Plaintiff while the 2<sup>nd</sup> Defendant is a firm carrying out the business of Company Secretaries and Registrars. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants are Limited liability companies. The Plaintiff claims that it owns the 3<sup>rd</sup> Defendant Company 100%, but had allocated 750 shares out of the 1,000 shares of the 3<sup>rd</sup> Defendant Company to a company called Kenwheat Industries Limited. However Kenwheat Industries has not paid for the said 750 share. The only shareholders in the said Kenwheat Industries Ltd are the Plaintiff, Esmail Hasham Lalji, Badoorali Hasham Lalji and the 1<sup>st</sup> Defendant all of whom being brothers of the Plaintiff. The Plaintiff claims that in 1987 his brother shareholders in the Kenwheat Industries Ltd in his absence appointed themselves directors in the 3<sup>rd</sup> Defendant company and subsequently appointed the 2<sup>nd</sup> Defendant the secretary of the 3<sup>rd</sup> Defendant and retired the Plaintiff from directorship of the company. Since then the Defendants have managed and controlled the 3<sup>rd</sup> Defendant to the exclusion of the Plaintiff who has since never received any dividend. Consequently the Plaintiff claims that he cannot obtain the name of the 3<sup>rd</sup> Defendant to enable him bring this suit as a minority shareholder allegedly having 250 shares with Kenwheat Industries having 750 shares.

However, despite the sale of shares of the 3<sup>rd</sup> Defendant to the Plaintiff, the Plaintiff claims that the 1<sup>st</sup> Defendant is still a director of the 3<sup>rd</sup> Defendant and together with the 2<sup>nd</sup> Defendant as secretary, have run and managed the 3<sup>rd</sup> Defendant company to the exclusion of the Plaintiff and have not acted bona fide with regard to the Plaintiff and have abused the trust they owe the Plaintiff in running the affairs of the 3<sup>rd</sup> Defendant and in respect of the assets of the 3<sup>rd</sup> Defendant. The Plaintiff states that the principal business of the 3<sup>rd</sup> Defendant was the ownership of a property known as L. R. No. 37/132 and registered as I. R. 9179/27 situated along Uhuru Highway. On 17<sup>th</sup> March 1993 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants allegedly unlawfully and fraudulently transferred the said property to the 4<sup>th</sup> Defendant company, in which the 1<sup>st</sup> Defendant is a director and shareholder together with Ahmed Hasham Laiji. On 14<sup>th</sup> June 1994 the 4<sup>th</sup> Defendant charged the said property to First America Bank of Kenya and First American Company Limited to secure a sum not exceeding Shs.80,000,000/= granted to Diatim Holdings Limited, Premier Bag and Cordage Limited and Premier Flour Mills Limited, Companies in which the 1<sup>st</sup> Defendant was a director and shareholder. That transfer is alleged to have been effected unlawfully and fraudulently and was intended to benefit the 1<sup>st</sup> and 4<sup>th</sup> Defendants and was done at an undervalue of Shs.45 million of that time. This has allegedly caused the 3<sup>rd</sup> Defendant to lose the said property and the rent thereon. Due to all the above malpractices, the Plaintiff prays for Orders in the Plaint as follows:

- a. ***Pending the hearing and determination of this suit the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants jointly and severally by themselves, their servants or agents or otherwise howsoever be restrained from;***
  - i. ***Disposing of, alienating, charging, pledging, leasing, transferring, wasting or in any manner whatsoever and howsoever interfering with property known as L. R. No. 37/132 and registered as Number I. R. 9179/1.***
  - ii. ***Transferring to any party or parties by registration possession or in any manner whatsoever and howsoever the property aforesaid.***
- b. ***A mandatory injunction do issue compelling the 1<sup>st</sup> and 4<sup>th</sup> Defendants to forthwith transfer the property known as L. R. 37/132 and registered as Number I. R. 9179/1 to the 3<sup>rd</sup> Defendant and in this regard to perform all such acts and execute all such documents as are necessary to complete the said transfer.***
  - i. ***A declaration that the Plaintiff is entitled to the ownership of 750 Ordinary Shares in the 3<sup>rd</sup> Defendant.***
  - ii. ***A declaration that the appointment of the 1<sup>st</sup> Defendant as a director of the 3<sup>rd</sup> Defendant is invalid.***
  - iii. ***The 1<sup>st</sup> Defendant be removed as a director of the 3<sup>rd</sup> Defendant.***
  - iv. ***The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants do provide the Annual accounts of the 3<sup>rd</sup> Defendant for the years 1989 to 1995.***
- c. ***General Damages.***
- d. ***An account of the profit made by the 1<sup>st</sup>, 2<sup>nd</sup> and/or 4<sup>th</sup> Defendants on or by reason of sale and on the said property from the date of transfer.***
- e. ***Payment of all sums found due under (c) (d) and (e) to the 3<sup>rd</sup> Defendant on taking the account.***
- f. ***Interest thereon at bank rates.***
- g. ***Costs of this suit.***
- h. ***Any other or further relief as this Honourable Court may deem just.***

2. The Plaintiff's claims are rebutted by all the Defendants. The first Defendant in his Amended Defence dated 27<sup>th</sup> July 2009 denied the allegations contained in the plaint as falsehood stating that Kenwheat Industries Limited is the sole beneficial owner of the entire issued share Capital in

the 3<sup>rd</sup> Defendant and any shares held by the Plaintiff in the 3<sup>rd</sup> Defendants are held by him for and on behalf of and as a Trustee for Kenwheat Industries Limited, pursuant to the Plaintiff's own admission under oath. The 1<sup>st</sup> Defendant states that the entire purchase price for the 3<sup>rd</sup> Defendant's shares was paid to its previous shareholders by Kenwheat who was then registered as a holder of 750 ordinary shares, while the Plaintiff was only registered as a holder of 250 ordinary shares, so as to satisfy the mandatory requirements of the Companies Act (Cap 486), (now repealed).

The 1st Defendant avers that the Plaintiff, **himself, Esmail Hasham Lalji, Bahdur Hasham Lalji and Ahmed Hasham Lalji** were lawfully appointed directors of the 3<sup>rd</sup> Defendant to represent the interest of Kenwheat in the 3<sup>rd</sup> Defendant and the Plaintiff's retirement from the 3<sup>rd</sup> Defendant's directorship was by rotation pursuant to the provisions of the Companies Act (Cap 486) and the 3<sup>rd</sup> Defendant's Articles of Association following his failure to offer himself for re-election at the 3<sup>rd</sup> Defendant's adjourned **Annual General Meeting** held on **29<sup>th</sup> July 1987**.

3. The First defendant states in reply to allegations set out in paragraph 5 (e) of the Amended Plaint that the Second defendant was lawfully appointed as Secretary of the Third defendant by its Board of Directors in conformity with the provisions of the Companies Act.

The First Defendant denies that the First Defendant and or the Second Defendant were trustees of the assets of the Third Defendant and or owed the obligation of trustees in respect of such assets as alleged in paragraph 9 of the Plaint or at all and the Plaintiff is put to strict proof of each and every such allegation. The 1<sup>st</sup> Defendant further states that the 3<sup>rd</sup> Defendant was unable to discharge the Charge in favour of Bank of Credit & Commerce International registered against the title to the said property until 1992, hence the property was transferred by the 3<sup>rd</sup> Defendant to the 4<sup>th</sup> Defendant on or about 17<sup>th</sup> March 1992 and the purchase price has been duly paid to and received by the 3<sup>rd</sup> Defendant. The said property was duly and lawfully sold and transferred to the 4<sup>th</sup> Defendant. The 1<sup>st</sup> and or 2<sup>nd</sup> Defendants have not benefited from this transfer either directly or indirectly. The Defendants therefore all deny the Plaintiffs claim in its entirety.

4. There have been various applications since the suit was filed, among them that seeking to strike out the plaint or dismiss the Plaintiff's suit. One such motion was filed on 22<sup>nd</sup> March 1996 by the 4<sup>th</sup> Defendant (Similar applications were filed on behalf of other three Defendants) for order that the amended Plaint filed by the Plaintiff on 8<sup>th</sup> March 1996 be struck out and this suit be dismissed with costs on the grounds that;

- a. ***The Plaintiff has no locus standi to commence this suit for wrongs allegedly done to 3<sup>rd</sup> Defendant Company.***
- b. ***Samvir Registrar cannot be joined as the 2<sup>nd</sup> Defendant without leave of the court.***
- c. ***The suit is incurably bad for misjoinder of causes of action and or of parties.***
- d. ***Amendments sought to be made are malafide and intended to overreach.***
- e. ***And the plaint is otherwise an abuse of the process of the court.***

5. That application (and the other three) was dismissed by justice G. S. Pall who found that the Plaintiff had the locus standi to bring these proceedings, and that it was in the interest of justice that the suit should be allowed to proceed.
6. The parties after complying with pre-trial directions agreed to have the matter heard on 11<sup>th</sup> of November 2015. However, that was not to happen, as the Plaintiff has been unwell and unable to attend the hearing.
7. The above background has been necessary to shed light on the application which the Defendants have brought before the court by way of Preliminary Objection to the suit. It is important because while the proponents of the Preliminary Objection allege that the same is new in the light of the issues which have been framed for determination by this court and in the light of the Plaintiff's

witness statement, the Plaintiff on the other hand, believes that the application is what was determined by Hon Justice Pall in the application dated 22<sup>nd</sup> March 1996 by the 4<sup>th</sup> Defendant and is therefore res judicata, and that this court runs the risk of sitting on appeal on a matter in which a court of concurrent jurisdiction has rendered itself.

## **THE PRELIMINARY OBJECTION**

8. On 18<sup>th</sup> January 2016 this suit was due for hearing but could not proceed because the Plaintiff counsel M/s Nyagah successfully sought an adjournment on the basis that the Plaintiff was unwell. Upon the said adjournment, all the counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants persuaded the court for leave to raise a Preliminary Objection on a point of law to the suit. It is to be noted that the suit against the 2<sup>nd</sup> Defendant had abated. The court allowed the parties to canvass the said Preliminary Objection on 1<sup>st</sup> February 2016.

## **SUBMISSIONS BY THE DEFENDANTS**

9. The said Preliminary Objection is based on Plaintiff's issue No. 1, that is, whether the Plaintiff has the locus standi to commence or continue with this suit. Mr. Esmail, counsel for the 4<sup>th</sup> Defendant submitted that he was not applying that the Plaintiff's suit be struck out, but that the Plaintiff suit against the 4<sup>th</sup> Defendant be dismissed with costs. Counsel submitted that the Plaintiff's suit alleges that the property of the 3<sup>rd</sup> Defendant was transferred to the 4<sup>th</sup> Defendant fraudulently, and so the issue according to counsel, is whether the Plaintiff has the locus standi to sue the 4<sup>th</sup> Defendant or indeed to maintain the suit against any of the Defendants. Counsel submitted that it is trite law that a director or a shareholder of a company cannot complain about what has happened to a company property. If there is any complaint the same must be by the company itself. The Plaintiff in his Plaint alleges that he is a director of the 3<sup>rd</sup> Defendant company and a Sole shareholder thereof. Counsel submitted that the 4<sup>th</sup> Defendant accepts this allegation by the Plaintiff for the purposes of the Plaintiff's issue number 1. Counsel submitted that in paragraph 3, 6, 7, 9, 10, 11 and 24 of the Plaintiff's Witness Statement the Plaintiff states that he is the sole owner of the 3<sup>rd</sup> Defendant Company, and that he owns and controls its shares. The 4<sup>th</sup> Defendant supports that position and submits that it is trite law that a derivative action can only be brought by a minority shareholder and even then, leave must be obtained from the court to do that before the filing, or the said leave must be obtained soon after the filing of the matter in court. In the case at hand there is no such leave. So if the Plaintiff owns the 3<sup>rd</sup> Defendant company all by himself, then this means he cannot bring a derivative action. Since the Plaintiff owns the company he should start the action in the name of the company. The company is the right person to sue, and not the Plaintiff.
10. Alternatively, the Plaintiff at page 1 of his Bundle of Documents filed on 27<sup>th</sup> August 2014 states in a letter dated 2<sup>nd</sup> February 1993, addressed to the 3<sup>rd</sup> Defendant, that he does not own anything in the company, and that everything belongs to the members of his family. Mr. Esmail accepted this position which according to him means that the Plaintiff being a minority shareholder, was required to seek the leave of the court to bring a derivative action. Counsel referred to the overriding objective under the Civil Procedure Act, and submitted that there is no need to waste the time of this court by referring this matter to a full trial, and that a determination of Plaintiff's issue number 1 is adequate to determine this suit by way of a Preliminary Objection. Counsel cited the case of **Pepin V. Taylor (2001) EWCA Civ. 1522** where the court stated that;

**“... The rules allow a judge ... if the judge thinks there is no real prospect of a claim succeeding, he ought, when exercising his case management powers, to dismiss it summarily ...”.**

11. Counsel also cited the case of **Swain v Hillman (2001) I ALLER 91** where the court observed that where a judge thinks that there is not prospect of a case succeeding he should dismiss it even at the case management stage. Counsel also cited the case of **Murri V Murii (1992) E A 212**

where the court stated that Defendants should not be troubled by a case that is bound to fail having regard for the document before the court. Mr. Esmail submitted that it is clear that the Plaintiff's case here will not succeed as a derivative action, citing the case of **Sultan Lalji V Ahmed Lalji Civil Appeal No. 3 of 2003** (Unreported) where the Court of Appeal stated that where one is in the majority one cannot bring a derivative action. The company alone can do that.

12. On his part, Mr. Omuga for the 1<sup>st</sup> Defendant adopted Mr. Esmail's submissions. Counsel submitted that a majority shareholder cannot bring a derivative action, and only a minority shareholder can do, but it is mandatory that leave be obtained in a derivative action. Without the said leave the Plaintiff's suit must fail at the preliminary stage of determination of issue No. 1. Counsel also referred the court to Rule 15 of this Court's Case Management Rules which has an overriding principle which include striking out, judgments on admission, and dismissal of suit at the time of case management. Counsel submitted that this suit cannot be maintained and should fail at this preliminary stage.
13. On his part Mr. Wakla for the 3<sup>rd</sup> Defendant referred to the Plaintiff's Witness Statements at paragraphs 1 and 2 where the Plaintiff says that in 1975 he bought the entire 3<sup>rd</sup> Defendant company. Counsel submitted that this would be the testimony of the Plaintiff were he to give evidence in this court. At paragraph 7 the Plaintiff states that he is the sole shareholder. Counsel submitted that parties are bound by their pleadings, and that the Plaintiff being 100% shareholder in the 3<sup>rd</sup> Defendant Company cannot bring a derivative suit.

### **PLAINTIFF'S SUBMISSIONS**

14. On her part M/s Nyagah for the Plaintiff submitted that the issues the Defendants are raising today were canvassed earlier in this case. Counsel attached a ruling delivered on 30<sup>th</sup> September 1996 by Justice Pall. Counsel submitted that Mr. Esmail's submissions are the same as the submissions made in 1996. Counsel submitted that Justice Pall found that the Plaintiff had the locus standi as the Plaintiff could not obtain the name of the 3<sup>rd</sup> Defendant to bring this action. Secondly counsel submitted that the 4<sup>th</sup> Defendant had in their defence denied that the Plaintiff is a sole shareholder of the 3<sup>rd</sup> Defendant Company. In that case the 4<sup>th</sup> defendant must also be held to its pleadings. Counsel submitted that the 1<sup>st</sup> Defendant has also in his amended defence denied allegations in the plaint. Counsel further submitted that there is contention about the share ownership in the 3<sup>rd</sup> Defendant Company. This is a controverted matter which requires hearing in full. As for derivative action, Counsel submitted that it is to be noted that the Plaintiff also claims for his own individual loss, as well as the loss by the 3<sup>rd</sup> Defendant. Counsel submitted that on derivating action, this issue has been canvassed and this court will be sitting on appeal on a matter which has been determined by this court. The issue is res judicata, and it would be a drastic action to strike the suit without hearing the parties. This is so because the suit also raises the issues of fraud. Because of fraud alleged, it would be necessary for this issue to go to full trial, and that submissions cannot take the place of evidence. Counsel distinguished the **Sultan Lalji** case on the ground that in that case the shareholding was not contested. In this case the issue for shareholding is doubted. Counsel cited the case of **Elijah Kipngeno Civil Application, No. 143/2006**, where it was urged that whenever fraud is pleaded, this issue should not be determined summarily but upon consideration of evidence. In this case there are fraud alleged by the Plaintiff both touching on him and on the 3<sup>rd</sup> Defendant. M/s Nyagah submitted that this application is not a Preliminary Objection since it is not based on pure point of law but on hatred issues.
15. In reply to submissions by M/s Nyagah, Mr. Esmail submitted that the court is not dealing with fraud here, but with evidence provided by the Plaintiff in his own statement. Counsel submitted that if the Plaintiff were to be put on the witness box, what would he be saying in his testimony? The result would be that the Plaintiff would be saying that he is the majority shareholder. If that is accepted, the issue is that he cannot bring a derivative action. Counsel submitted that the 4<sup>th</sup> Defendant is not concerned with any other claims. It is only concerned with the claim that it has taken the 4<sup>th</sup> Defendant's property. What the Plaintiff has stated in his statement must be believed. Counsel submitted that Justice Pall did not strike out the Plaint because there was no evidence. But now, there is evidence in the statement of the parties which gives the court the

jurisdiction to act. Counsel submitted that Justice Pall was dealing with striking out application, but this court is dealing with the evidence. Mr. Esmail submitted that there is no contention now since the Defendants do not object to the Plaintiff's evidence in his statement since he states he owns 100% of the 3<sup>rd</sup> Defendant Company. The overriding Objective did not exist at the time justice Pall ruled on the matter. Here the court is dealing with a trial, and any issues coming at the trial can be dealt with, submitted counsel. Indeed, it is the 1<sup>st</sup> issue. Counsel submitted that the first issue should be decided on the evidence placed before the court through witness statement. A resolution on the first issue will determine the suit, according to Mr. Esmail.

16. In his relying submissions, Mr. Omuga said that if the court holds that the Plaintiff is a majority shareholder then he cannot bring a derivative action and hence this is a Preliminary Objection which this court must determine. Counsel submitted that this court is through case management, given the power to seive and decide which matters can go for hearing. Where leave is required to be obtained for a derivative action, it must be obtained and there is no shortcut to that process.

## **ANALYSIS**

17. From the submissions of the parties to the said Preliminary Objection, the issues that this court raise for determination are the following;

- i. *Whether the issues raised in the Preliminary Objection are resjudicata.*
- ii. *Whether this court can at Case Management stage, entertain the Preliminary Objection.*
- iii. *Whether the Plaintiff is a majority shareholder or a minority shareholder.*
- iv. *Whether the Plaintiff ought to have sought leave to commence these proceedings.*
- v. *Whether the Preliminary Objection can dispose off this suit.*

## **WHETHER THE ISSUES RAISED IN THE PRELIMINARY OBJECTION ARE RESJUDICATA.**

18. Section 7 of the Civil Procedure Act, in defining what res Judicata is, states as follows:

***“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 before 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”.***

19. Although the said section refers to suit, the word suit may be replaced with the word application, and still achieve the same result. In the particular matter we are dealing with the allegation by the Plaintiff that the Preliminary Objection herein had been raised and dealt with by this court. In this respect the Plaintiff refers to an application by the 4<sup>th</sup> Defendant dated 22<sup>nd</sup> march 1996 for order that the amended plaint filed by the Plaintiff on 8<sup>th</sup> March 1996 be struck out on the grounds inter-a-lia that the Plaintiff has no locus standi to commence this suit for wrongs allegedly done to 3<sup>rd</sup> Defendant Company. That application was dismissed by Justice G. S. Pall who found that the Plaintiff had the locus standi to bring these proceedings and that it was in the best interest of justice that the suit should be allowed to proceed. Since then the suit proceeded and parties complied with pre-trial directions and have filled their Witness Statements and issues which are important in the determination of the suit. It is now after the examination of the issues and the evidence as contained in the Witness Statement, that the Defendants have brought the said Preliminary Objection on the allegation that based on the issues and Witness Statements, it is clear that the Plaintiff's suit is a nullity *ab initio* and is going nowhere hence there is no need to go to full hearing since a determination, for example, of the Plaintiff's issue number one is enough to dispose off this matter. In that sense, the Defendants' position is that Preliminary Objection is not res judicata, as its basis it grounded on the evidence contained in the Witness Statements and on the issues as drawn by the parties, which issues and witness statements were not on record in 1996

when the application by the Defendants to strike out the suit was dismissed.

20. The position to be taken by this court is that a lot has taken place since 1996 up to now and that there have been changes in the Civil Proceedings Act and Rules all geared towards the overriding objective of doing justice. The overriding Objective of S. 1A and 1B of the Civil Procedure Act empowers the court to use the time and other resources to do justice on matters before the court, and at a cost that is affordable to parties, and to hear matters expeditiously and to ensure just determination of cases. The basic idea in the overriding objective is to minimize the application of unnecessary technicalities in Civil litigation and introduces case management under Order 11, but for this division, we have gazetted Pre-trial Directions and case conferencing which are geared to achieve the same objectives of Order 11. During the case management process, the court is empowered to limit the issues for determination, and if possible to assess the strength of the case before certifying the same as ready for trial. The court is clothed with power to consider the pleadings, witness statements and issues raised, and to provide a way forward. At the case management stage, a court can, and is empowered to strike out pleadings or part thereof, which are frivolous. This means that a Preliminary Objection can perfectly be entertained by a court at the case management stage, and the court is empowered to uphold such a Preliminary Objection if it is merited. In regard to the case at hand, it is clear that Justice G. S. Pall ordered this case to proceed. And indeed the case proceeded. That is why several years later the case is still in court. As the case proceeded, the parties were caught up with the amendments to the Civil Procedure Act as aforesaid and also with the introduction of Order 11, or the gazetted pre-trial directions of this Division. Indeed parties submitted themselves to case management, and have filed issues and Witness Statements. These processes, that is, case management, has a meaning in the life of a suit. The Witness Statements also are put forth for a purpose. Indeed even the issues put forth by the parties are there so that the same can guide the court on the merit of suit. It is therefore the right of every party, and in this case, the right of the Defendants, having perused and considered the evidence as contained in the witness statements, and having looked at the issues raised by the parties, to raise a Preliminary Objection based purely on those issues or Witness Statements. This stage of Case Management has no conflict with the orders of Justice Pall in 1996. The judge allowed the Plaintiff's case to proceed, and indeed it proceeded and in the year 2015 after the Case Management, the Defendants are at liberty to seek to raise a Preliminary Objection based on what the case management process has revealed. In my view, this is a process which was not envisaged by Honourable Justice Pall's order of 1996, and the parties having submitted themselves to the Case Management process, are entitled to raise any Preliminary Objection because at this stage, all the parties know the weaknesses and strengths of their case. Indeed, the Case Management process is aimed at enabling the parties to know the strengths and weaknesses of their cases so that they may explore other alternative dispute Resolution mechanisms or narrow down the areas of dispute. This seems to me to be what the Defendants have done, and it is perfectly in order. This view is supported by Buckley J in *Carl – Zeiss Stiftung – v – Reyner (1969) 3 ALL ER 897 at 908*, as quoted in *Murri – v – Murri* above, when he stated as follows in relation to the issue of resjudicata.

***“Finally, on this limb of the appeal, it was said that the power to strike out was one which should be exercised only in plain and obvious cases. In my judgment, the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse on the process of the court or that it is unarguable. It has nothing to do with a case being complex or difficult or that it requires a minute or protracted examination of the documents and the facts of the case. The summary jurisdiction was stated by Lord Greene MR in Cow v Casey (1949) 1 KB 474 at 481 as follow:***

***“... however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable, it will give final judgment”.***

The court further stated that;

***“It has been suggested in this case that, if the question whether the issue is res Judicata***

*is a difficult or complicated one, this in itself is a sufficient ground for refusing to strike out the plea. I cannot think that this is right. If, as will normally be the case, the relevant information is before the court before which the interlocutory application comes, the Judge ought then to decide whether the issue is res judicata or not. However difficult or obscure the point may be, for it will not become less so by waiting for the trial. If, on the other hand the necessary information is not before him, the application will be premature and should fail”.*

It is the finding of this court, therefore, that the issues raised in the said Preliminary Objection are not res judicata. Indeed, the first issue in the statement of issues by the Plaintiff, is whether the Plaintiff has locus standi to commence this suit.

#### **WHETHER THIS COURT CAN AT CASE MANAGEMENT STAGE, ENTERTAIN THE PRELIMINARY OBJECTION**

21. From the foregoing paragraphs of this ruling, it is clear that this court has the jurisdiction to entertain the said Preliminary Objection at any time after or during the Case Management period. In the case of *Pepin V. Taylor 2001 EVCA Civ. 1522* the court stated that;

*“... The rules allows a judge ... if the judge thinks there is no real prospect of a claim succeeding, he ought, when exercising his case management powers, to dismiss it summarily ...”*

22. Similarly, in the case of *Swain v Hillmah (2001) I ALL ER 91*, the court observed that where a judge thinks that there is not prospect of a case succeeding he should dismiss it even at the Case Management stage. In the case of *Murri v Murii (1992) E A 212* the court stated that the Defendants should not be troubled by a case that is bound to fail having regard for the documents before the court. The court observed as follows;

*“Before leaving this part of the appeal I would add that the object of the summary procedure of striking out is to ensure that Defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a Defendant should be called on to pay a large sum of money and a Plaintiff permitted to waste large sums of his own or somebody else’s money in an attempt to pursue a cause of action which must fail. It seems to me that when that situation arises the comments of Lord Blackburn in *Metropolitan Bank v Pooley (1885) 10 AC 210 at 221*, are applicable. He said that “a stay or even dismissal of proceedings may often be required by the very essence of justice to be done”. The object is to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fall to the ground the moment the uncontested facts appear; and that is just this case. It is, I think, convenient now to turn briefly to consider if this is so.”*

It is therefore clear that this court can at this stage entertain the Preliminary Objection.

#### **WHETHER THE PLAINTIFF IS A MAJORITY SHAREHOLDER OR A MINORITY SHAREHOLDER IN THE 3<sup>RD</sup> DEFENDANT COMPANY.**

23. In answer to this issue, I will turn to the Plaintiff’s Witness Statement filed in court on 27<sup>th</sup> August 2014 where he states that he is the company’s sole shareholder and director. He states as follows;

1. *I am the Plaintiff in this suit, fully conversant with the facts leading to this suit and thus competent to make this statement.*

2. *On or about June 1975, I was approached by the then shareholders of the 3<sup>rd</sup> Defendant namely Suresh Chander Handa, Tajdin Walli Jiwa, Subash Chander Handa and Somchand Nangpar Shah, who offered to sell all the issued Ordinary shares in the said company to me. The aforesaid shares being 1000 Ordinary Shares of Kshs.100/= each. Each of the aforelisted shareholders held 250 Ordinary Shares of Kshs.100/= each.*
3. *I accepted the offer and on 4<sup>th</sup> June 1975, I paid the full purchase price for all the issued Ordinary Shares in the Company being 1000 Ordinary Shares of Kshs.100/=. Consequently, I became the company's sole shareholder and director.*
4. *I intended to sell 75% of the shares i.e 750 Ordinary Shares that I had held in the Company to Ken-Wheat Industries Limited. Ken-Wheat was a company under which my brother i.e Bahadurali Lalji, Esmail Lalji, Ahmed Lalji, Diamond Lalji (the 1<sup>st</sup> Defendant) and I operated a family business. In the event that Ken-Wheat did not purchase the shares I intended to keep the shares for myself. I therefore endorsed three out of the four Transfer of Share forms by which I purchased the shares with the words "for Sultan Lalji for Ken-Wheat Industries Limited".*
5. *Since I intended to sell 750 Ordinary Shares that I had held in the Company to Ken-Wheat Industries Limited, I registered the 1000 Ordinary Shares of Kshs.100/= that I held in the Company as follows;*
  - a. *250 Ordinary Shares of Kshs.100/= each in my name.*
  - b. *750 Ordinary Shares of Kshs.100/= each in my name but signed for Ken-Wheat Industries Limited.*
6. *On 14<sup>th</sup> April 1978, a family business meeting was called in Mombasa and I recall that at that time, Ken-Wheat had made a profit and was in a position to buy the 750 Ordinary Shares from me. During the aforesaid meeting, I offered to sell 75% of the Ordinary Shares which I held in the company to Ken-Wheat. However, Ken-wheat did not accept my offer as a result of which the 750 Ordinary Shares have never been transferred to Ken-Wheat. The said 750 Ordinary Shares are still held in my name.*
7. *As a matter of fact, rather than buy the shares I had offered, my brothers turned completely hostile towards me and proceeded to eject me from various family businesses, without any cause. However, in as far as the Company is concerned, I remained as the sole shareholder.*

24. The Plaintiff reiterates this position in his Further Witness Statement filed in court on 6<sup>th</sup> November 2015. It is important to note that the Defendants have accepted the facts as stated by the Plaintiff that he is the sole shareholder and director of the 3<sup>rd</sup> Defendant Company. The admission of this fact by the Plaintiff is important because if the Plaintiff is the sole shareholder and director of the 3<sup>rd</sup> Defendant Company, then the Plaintiff cannot bring a derivative action on behalf of the 3<sup>rd</sup> Defendant Company and if he is a minority Shareholder, he still cannot bring a derivative action except with leave of the court. This court has no reason to doubt the Plaintiff on his statement that he is the sole shareholder and director of the 3<sup>rd</sup> Defendant Company. So, it is the finding of this court that indeed the Plaintiff is the Majority Shareholder of the 3<sup>rd</sup> Defendant Company.

#### **WHETHER THE PLAINTIFF OUGHT TO HAVE SOUGHT LEAVE TO COMMENCE THESE PROCEEDINGS**

25. As I have found above, the Plaintiff is the sole shareholder and director of the 3<sup>rd</sup> Defendant Company, at least as far as he is concerned, and none of the Defendants is challenging the Plaintiff on this assertion. If that is correct, then it follows that the Plaintiff cannot bring this matter as a derivative action on the behalf of the 3<sup>rd</sup> Defendant Company. The Company can bring the action on its own name. If however, there is an interpretation or construction of these pleadings which show that contrary to the Plaintiff's assertion that he is the sole shareholder and director of the 3<sup>rd</sup> Defendant Company, the Plaintiff is in fact a Minority Shareholder, the position in law is that the Plaintiff can still commence these proceedings but only pursuant to the leave of court before the

commencement, or soon thereafter. In this suit, the complaint that the property belonging to the 3<sup>rd</sup> Defendant Company was unlawfully sold to the 4<sup>th</sup> Defendant Company is a kind of complaint which only the 3<sup>rd</sup> Defendant can make. In this case, it is not contested that the Plaintiff is the majority shareholder in the company. Also, the thrust of the Plaintiff's complaint is that the 3<sup>rd</sup> Defendant Company's assets were fraudulently transferred by the respondents. It followed that the company alone could bring an action against the Respondents. This position is well settled in law. In the case of **Foss v. Harbottle (1843) 2 Hare 461**, the learned judge concluded in the following words;

*“... it is now clear that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs being majority shareholders in the Plaintiff Company (the 4<sup>th</sup> Plaintiff) could not bring this suit. I should hasten to state that by upholding the preliminary objection that does not mean that the suit had no merit. The three Plaintiffs may have genuine complainants against the Defendants but they have not come in the proper way since the law clearly states that as they are complaining of the injury to the company (4<sup>th</sup> Plaintiff) then it is the company which should bring this suit .... It is a pity that the first three Plaintiffs are shut out but that does not mean that their complaints cannot be entertained since the company has the right to ventilate their grievances in a proper suit.”*

26. Similarly, in the **Civil Appeal No. 3 of 2003 SULTAN HASHAM LALJI & Others –V- AHMED HASHAM LALJI & Others**, the court of Appeal in affirming the principle stated in *Foss – V – Harbottle*, stated this;

*“We have set out the foregoing in extension to demonstrate that by their own averments in the pleadings the appellants explicitly conceded that the assets in question belonged to the company; that it is the company that was defrauded as pleaded. It follows therefore that it is the company that would be aggrieved. Not even in a single paragraph of the plaint have the appellants pleaded what loss they have suffered individually or jointly by the alleged fraudulent transfer of the company asset. As a general rule and subject only to specific well established exceptions, due to its separate legal personality, the law does not permit shareholders to bring an action on behalf of the company in which they hold shares. If the duty to be enforced is one owed to the company, then the primary remedy for its enforcement is an action by the company itself against those in default”.*

27. The reverse side of the above rule is that if the Plaintiff is a Minority Shareholder, and he is not able to access the company authority to commence proceedings, then the plaintiff can with the leave of the court had before or soon after commencing suit, bring a derivative action on behalf of the 3<sup>rd</sup> Defendant Company. However, this is not the case here, and in any event there is no leave of court to commence action even if the Plaintiff were a Minority Shareholder. Even to date, the Plaintiff has not sought the leave of this court to continue this action as a derivative suit.

28. It was submitted for the Plaintiff that in addition to the loss suffered by the 3<sup>rd</sup> Defendant Company due to the fraud allegedly occasioned by the Defendants, the Plaintiff also suffered individually on account of the alleged fraud. M/s Nyagah, counsel for the Plaintiff, urged that the suit also raises issues of fraud and so should not be dismissed on account of whether or not the Plaintiff filed a derivative action. Mr. Esmail for the 4<sup>th</sup> Defendant rebutted this submission saying that the 4<sup>th</sup> Defendant is not concerned with issues of fraud or indeed with any other issue. Counsel submitted that the 4<sup>th</sup> Defendant is only concerned with evidence provided by the Plaintiff in his statements, and the same is enough to determine this suit at this stage. The court of Appeal in the above cited case of **Sultan Hashom Lalfi** answered the said question. The court referred to the four exceptions under the case of *Foss – v – Harbottle* where a minority party can bring an action based on fraud on the minority. In all the exceptions, a derivative action could be brought before the court on behalf of the company where the wrong doer is in control of the company or by the individual shareholder whose personal right was violated. In this matter the

Plaintiff has not brought himself within any of those exceptions. The alleged acts of fraud as particularised in the plaint, were if proved, committed against the company. But just like in the above case, in the present case, I have found that Plaintiff has held himself to be the majority shareholder of the company. In the above case the court stated at page 14 that;

**“... It is the minority not the majority shareholder that are availed the protection by the exceptions since generally majority shareholders exercise powers of the company and control its affairs”.**

However the issue is irrelevant to this court as we have found that the Plaintiff, even if he were to be considered a minority shareholder, did not seek the leave for the court either to file this action or to continue with it. From whatever angle one looks at this suit, it is not sustainable against the Defendants.

#### **WHETHER THE PRELIMINARY OBJECTION CAN DISPOSE OFF THIS SUIT.**

29. Arising from the foregoing paragraphs of this ruling, this court is satisfied that the Preliminary Objection raised herein is sufficient to dispose of this suit. The question to ask is this: If the Plaintiff were to be put on the witness box, what kind of testimony or evidence would he give, in the light of his Witness statement and issue number 1 in his statement of issues? It goes without saying that the Plaintiff would confirm the correctness of his witness statement confirming that he is the Majority Shareholder in the 3<sup>rd</sup> Defendant Company. If he were to be asked why then the company did not commence the action on its name he would have no suitable answer to sustain the suit. However if the Plaintiff were to fumble and for some reason change his testimony on the Witness Box and state that he is indeed a minority shareholder, he would be at pain to explain why he did not secure the leave of court to commence a derivative action on behalf of the 3<sup>rd</sup> Defendant Company, or indeed why he has not since commencement of the suit sought to obtain the said leave. It is the finding of this court that the issues raised in the Preliminary Objection are issues of substantive law and not mere technicalities, and that on the face of the record, this suit is totally defective and cannot stand. This court therefore upholds the Preliminary Objection herein and herewith strikes out and/or dismisses, the Plaintiffs suit with costs to the Defendants.

That is the Ruling of the court.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 19<sup>th</sup> DAY OF APRIL 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of**

M/s Nyagah for Plaintiff

Mr. Omuga for 1<sup>st</sup> Defendant

Mr. Karanja for 4<sup>th</sup> Defendant

Teresia – Court Clerk