



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION - MILIMANI**  
**CIVIL SUIT NO. 619 OF 2015**

**DR. TARA CHAND..... PLAINTIFF**

**VERSUS**

**FAHARI TRADING KENYA (LTD.....1<sup>ST</sup> DEFENDANT**

**SHAHAZAD YOUSUF PIRWANI .....2<sup>ND</sup> DEFENDANT**

**ASHKOK DAS KUMAR .....3<sup>RD</sup> DEFENDANT**

**JAVED ALI .....4<sup>TH</sup> DEFENDANT**

**ANWAR MUHAMMED ..... 5<sup>TH</sup> DEFENDANT**

**BURLY TRADING KENYA L..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Court has before it several applications brought by various of the numerous parties to this suit. The Plaintiff is Dr. Tara Chand on 10<sup>th</sup> December 2015, he filed an application under Certificate for ex-parte Orders to be made in the main suit he sought judgment for the sum of US\$ 136,000 together with Orders freezing the Bank accounts of the Defendants.

2. The First Defendant is a Limited company. The Second Defendant filed an Application on 14<sup>th</sup> December 2015 under Certificate of Urgency. The Certificate and Application is brought on behalf of the First, Second, 4<sup>th</sup> and 7<sup>th</sup> Defendants. They allege that the Plaintiff has lied to the Court in his Application. The Certificate describes the First, Second, Fourth and Seventh Defendants as traders who import goods. The First and Seventh Defendants are Limited Companies and are sued as such. Those Defendants Application seeks Orders for the ex-parte Orders granted on 10<sup>th</sup> December to be set aside for abuse of process and for the Plaintiff to make a payment into Court for security for costs.

3. In his Replying Affidavit the Second Defendant, on behalf of the First Defendant, himself and Jawad Ali the Fourth Defendant opposes the Application and suggests that it is an attempt “to Blackmail” the Defendants. The Fifth and Sixth Defendants also filed an Application Also under Certificate of Urgency. That was filed on 17<sup>th</sup> December 2015. In brief that Application seeks an Order striking out the suit against the Fifth Defendant.

4. The Parties have also filed the following documents.

- (1) On 18<sup>th</sup> December 2015 the Plaintiff's Grounds of Opposition;
- (2) On 21<sup>st</sup> December the Plaintiff's further Affidavit;
- (3) On 2<sup>nd</sup> February 2016 the Fifth Defendant's further Affidavit in response;
- (4) On 4<sup>th</sup> February 2016 the Plaintiff's List of Issues;
- (5) On 18<sup>th</sup> February 2016, the Written Submissions on behalf of the 5<sup>th</sup> and 6<sup>th</sup> Defendants;
- (6) On 18<sup>th</sup> February 2016, the Written Submissions on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants; and
- (7) On 24<sup>th</sup> February 2016 the Written Submissions on behalf of the Applicant.

5. The terms of the various applications are set out below.

6. The First Applications seeks the following Orders:

**(1)** The Application herein be certified as urgent and service thereof be dispensed with in the first instance and be heard on vacation.

(2) That there be judgment in the amount of USD 136,000 in favour of Plaintiff/Applicant herein acknowledged by the Respondents

(3) Pending the hearing and determination of this Application immediate order be issued by this Honourable Court for immediate closure and/or freezing of the following bank accounts belonging to the 1<sup>st</sup> Defendant and 7<sup>th</sup> Defendants to protect the suit amounts:

i. IMPERIAL BANK ACCOUNT NUMBER [Particulars withheld]

ii. HABIB BANK NKURUMAH ROAD USD AND KSHS.ACCOUNT

iii. GULF BANK ACCOUNT [Particulars withheld]

iv. DTB BANK ACCOUNT USD & KSHS A/C MOMBASA

v. BARCLAYS BANK.

(4) Pending the hearing of the suit immediate order be issued by this Honorable Court for immediate closure and/or freezing of the following bank accounts belonging to the 1<sup>st</sup> Defendant and 7<sup>th</sup> Defendants to protect the suit amounts

IMPERIAL BANK ACCOUNT NUMBER [Particulars withheld]

ii. HABIB BANK NKURUMAH ROAD USD AND KSHS.ACCOUNT

iii. GULF BANK ACCOUNT[Particulars withheld]

iv. DTB BANK ACCOUNT USD & KSHS AC MOMBASA

v. BARCLAYS BANK.

(5) Pending the hearing and determination of this Application, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants or either of them their agents, servants or employees be restrained from accessing and/or making any withdrawal from the bank accounts of the 1<sup>st</sup> Defendants above.

(6) Pending the hearing and determination of the application and suit herein, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents be compelled to deposit a reasonable sum of USD 500,000 as security for the costs in this matter.

(7) The Court be pleased to grant any other orders that it may deem necessary in the interest of justice.

(8) That the costs of this Application be provided for.

7. The Grounds relied upon by the Plaintiff/Applicant are:

(1) THAT the Applicant/Plaintiff is director of the 1<sup>st</sup> Respondent.

(2) THAT Applicant is a signatory to all the bank accounts that belong to the 1<sup>st</sup> Respondent's company.

(3) The Respondents have acknowledged the debt of USD 136000/-.

(4) The Applicant is a Pakistani national with extensive business interests dealing more particularly in importation of rice in Kenya.

(5) The Applicant is owed by the Respondents all the dues amounting to USD 1,000,000 in business dealings total which they have adamantly refused and/or neglected, denied the debt owed.

(6) The 5<sup>th</sup> Defendant/Respondent has confirmed that he has received USD 136,000 from the 1<sup>st</sup> Respondent/Defendant to pay to the Applicant but has refused and/or neglected to pay the Applicant and has conspired with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent to deny the same payment to the Applicant which rightfully belongs to him.

(7) That the Applicant has made a complaint to the Kenya Police, the CID and the Central Police Station but the same has never been acted upon and/or any investigations done warranting this suit.

(8) That the Applicant is apprehensive that the Respondents are likely to run away with what he duly deserves.

(9) The Applicant has no option but to ask this Honourable Court to help him recover what he rightfully deserves since the Kenyan police have failed to start any investigations.

(10) The acts of the Respondents are illegal, uncalled for and therefore should be stopped from denying another director the input he brought to the company.

(11) The actions by the Respondents render the Applicant extreme financial difficulties yet he has worked hard to bring so much in the company.

(12) The denial of payments by the Respondents to the Applicant without any justified explanation and/or reasons is a serious breach of the Companies Act and the Memorandum and Articles of Association of the 1<sup>st</sup> Respondent which all their directors are a party to.

(13) The 5<sup>th</sup> Respondent has made allegations and/or reported complaints to the police and Pakistan authority which is only meant to frustrate the Applicant and/or a tactic used by the Respondents to

deny the payments to the Applicant unjustifiably.

(14) The Applicant is desirous of recovering all the debts owed to him by the Respondents and intends to resign as a director in the 1<sup>st</sup> Respondent's company thereafter.

(15) That the Applicant has not been accorded the due process of law and there was no basis and/or grounds given for such an unlawful action taken by the Respondents and yet there is memorandum and articles which sets the regulations on profits and losses.

(16) That the Applicant is afraid that he may never recover the said amounts if the Court does not compel the Respondents to make the same.

(17) That it is only fair, just and mete for the orders to be issued to the interim, for justice to be well accorded.

8. The Second Application seeks Orders that:

(1) The Application herein be certified as urgent and service be dispensed with in the first instance.

(2) The ex-parte orders granted on 10<sup>th</sup> December, 2015 be set aside and/or vacated for being an abuse of the Court process.

(3) The Plaintiff/Respondent do deposit, as security for costs, a sum of USD 300,000.00 or its equivalent in Kenya Shillings within seven (7) days of the date of this order or within such other period as the Court may deem fit.

(4) The costs of the Application be borne by the Plaintiff/Respondent.

9. The Grounds relied upon in that Application are:

(1) The Plaintiff/Respondent obtained orders from this Honourable Court on 10<sup>th</sup> December, 2015 which required the Defendant/Respondents to inter alia,

(a) The Defendants/Respondents and each one of them shall cause to be made a payment into Court of the Kshs. Amount equivalent to USD 136,000.00 forthwith and in any event not later than 4 p.m. on 11<sup>th</sup> December, 2015.

(b) In the event that paragraph 1 is not complied with all the Bank accounts of the First, Third and Fourth Defendants shall be restricted to the extent that there shall remain USD 500,000.00 or the Kshs. Equivalent in each account that shall not be available for the use of the account holder. In other words only accounts with sums above that amount shall be accessible.

(2) Having obtained the above drastic and draconian orders, the Plaintiff/Respondent did not serve the order on the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> & 7<sup>th</sup> Defendants until 3.00p.m. of 11<sup>th</sup> December, 2015 in a move calculated to ensure that the Defendants/Applicants, even if they wanted, could not comply with Order Number 1 of those orders thereby ensuring that the Defendant/Applicants' bank accounts with Imperial Bank, Habib Bank, Diamond Trust Bank and Barclays Bank were all frozen to the USD. 500,000.00 each.

(3) The failure to serve the orders on the Defendant/Applicants was an intentional move by the Plaintiff/Respondent and his advocate to continue the blackmailing that they have been jointly and severally affecting on the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant/Applicants. Indeed the Plaintiff/Respondent's advocate has been profusely calling the 2<sup>nd</sup> and 4<sup>th</sup> Defendant/applicants since 3p.m. on 11<sup>th</sup> December, 2015 to try and push them to budge in and pay the USD 136,000.00 allegedly owed to

his client.

(4) The effect of the aforesaid freezing of accounts, which was a calculated move by the Plaintiff/Respondent, is that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> & 7<sup>th</sup> Defendant/Applicants who are traders importing rice and other commodities from overseas will be unable to access a total sum of USD 2,000,000.00 from the four (4) Bank accounts.

(5) The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendant/Applicants are traders who frequently have to clear imported cargo from the Port of Mombasa. Being unable to access their USD 2,000,000.00 will mean that their cargo will remain uncleared thus incurring demurrage, warehousing and other port charges that continue accruing on a daily basis.

(6) The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendant/Respondents, having been denied access to such a colossal sum of their money will be unable to meet their contractual obligations to other Third parties who are waiting to be supplied with goods during this festive period.

(7) The orders of 10<sup>th</sup> December, 2015 should additionally be discharged for non-disclosure of the following material facts;

(a) The Plaintiff/Respondent has blatantly lied that he is a director of the 1<sup>st</sup> Defendant/Applicant Company and presented a search purportedly done on 21<sup>st</sup> September, 2015. The truth of the matter is that the Plaintiff/Respondent resigned from his position as a director of the 1<sup>st</sup> Defendant/Applicant and transferred all his shares to the 4<sup>th</sup> Defendant/Applicants on 6<sup>th</sup> February, 2015.

(b) The Plaintiff/Respondent has intentionally misled the court to believe that he is owed in excess of USD 1,082,000.00 yet the Plaintiff/Applicant personally visited Kenya in June, 2015 and participated in a reconciliation of accounts that disclosed that he was owed a total sum of USD 136,621.00 only.

(c) The Plaintiff/Respondent has failed to disclose to the Court that after making the complaints to the police, the police actually obtained a Court order in Nairobi Misc. Application No.1956 of 2015 which allowed them to gain access to the 1<sup>st</sup> & 7<sup>th</sup> Defendant/Applicant's accounts with Habib Bank Limited and Imperial Bank Limited. The police also recorded statements from the 2<sup>nd</sup> & 4<sup>th</sup> Defendants/Applicants as directors of the 1<sup>st</sup> & 7<sup>th</sup> Defendants/Applicants.

(d) The Plaintiff/respondent has not disclosed to the Court that as early as August, 2015 his advocate made numerous attempts to extract money from the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, and 7<sup>th</sup> Defendant/applicants on some unclear grounds. When the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/respondent's advocates wrote demanding that the allegations be put into writing, the Plaintiff/Respondent never responded.

(8) The orders of 10<sup>th</sup> December, 2015 were granted on the basis of an application that is alien and totally in contravention of Order 26 rule 1 of the Civil Procedure Rules which provides that only a Defendant can make an application for security for costs but not a Plaintiff.

(9) Even in the strangest of events if it became necessary to issue an order for security for costs, the same could not have been issued ex parte because;

(a) The Plaintiff/Respondent is himself a foreigner who is in the country on a work permit issued on the grounds that he was a director at Fahari Trading Kenya Limited. He is no longer a director and his work permit may be revoked at any time.

(b) The Plaintiff/Respondent has no known businesses or property within the geographical boundaries of Kenya thus making it more likely that he will leave the jurisdiction having already filed a vexatious and frivolous suit and made the Defendants incur huge costs.

(c) The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants on the other hand are people with known assets and business interests within the country and have been doing business diligently since 2013.

(d) The 1<sup>st</sup> Defendant/Applicant has a gross turnover of Kshs.988,411,919.00 (approximately USD 9,413,446.00) which makes it highly unlikely that it will be unable to pay the USD 136,000.00 that is being claimed against it.

(10) The orders of 10<sup>th</sup> December, 2015 are in the circumstances an unnecessary interference with the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendant/Applicants rights to enjoy the use of their property and have now made it extremely onerous for the Defendant/Applicants to defend themselves due to their inability to pay their advocate's legal fees.

(11) There are other numerous ways of ensuring the court guarantees a fair trial to both the Plaintiff and Defendants without unnecessarily prejudicing one party to the dispute. For instance the Court can order the deposit of a Bank guarantee or even a deposit of the director's passport to Court as a measure of last resort.

(12) In light of paragraph 9 herein above, it is the Plaintiff/Respondent who should provide security for costs for the reasons stated therein and in consideration that the Defendant/Applicants will be putting forth the following defense at trial:

(a) The Plaintiff is stopped from bringing up a claim for USD 1,082,000.00 having acknowledged that he is only owed USD 136,6211.00 as at 5<sup>th</sup> June, 2015.

(b) The Plaintiff having acknowledged USD 136,000.00 as being what is owed to him and having appointed Anwar Muhammed (5<sup>th</sup> Defendant) to receive payment on his behalf, and having acknowledged that the said 5<sup>th</sup> Defendant has received the USD 136,000.00 on his behalf, the debt has thus been settled as between the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants and the Plaintiff on the other hand.

(c) Assuming the Plaintiff stands by his allegation that he is a director and shareholder of the 1<sup>st</sup> Defendant, then he cannot maintain a suit against the 1<sup>st</sup> Defendant until he resigns as such or unless it is brought pursuant to the provisions of the Companies Act Cap 486.

(13) It is in the interests of Justice, fairness and to prevent the abuse of the Court process to have the orders of 10<sup>th</sup> December, 2015 set aside and to order the Plaintiff to provide security for Costs.

10. The Third Application seeks the following Orders:

- (1) The application herein be certified as urgent.
- (2) The Suit herein filed against the 6<sup>th</sup> Defendant be struck out.
- (3) The costs of this Application be borne by the Plaintiff/Respondent.

11. The Grounds relied upon in that Application are that:

- (1) The suit filed does not disclose any cause of action against the Defendant/Applicant.
- (2) The suit filed against the 6<sup>th</sup> Defendant/Applicant is clear an abuse of the Court process.

(3) The suit as filed against the 6<sup>th</sup> Defendant/Applicant herein is scandalous and frivolous.

(4) The suit filed against the 6<sup>th</sup> Defendant/Applicant herein is to embarrass the Applicant herein.

12. Following the Court's direction for the Parties to file their Lists of Issues for the Determination, the Plaintiff filed his List. The Issues that arise for determination here are:

i. Is there a prima facie case established under the Giella vs. Cassman case?

ii. Is the Bank statement presented by the Plaintiff in Court challenged by the Defendants.

iii. The issue preservative orders- is it lawful and procedural to issue temporary orders to be issued by court at this stage?.

iv. Was Applicant (Tara Chand) at any time, a director at 1<sup>st</sup> Respondent Company (undisputed).

v. Was Tara Chand removed or did he anyway resign from his directorship at the First Respondent Company?

vi. Was the resignation voluntary or conditional to any other terms or not?

vii. Was his work permit part of the terms of the Deed of settlement.

viii. Who is Muhammed Arafat why and how is he in this matter was he mentioned anywhere in the deed of arrangement?

ix. Did Tara Sign exhibit marked SY(C) titled "Account Settlement Authority" or not?

x. Where are the original copies of the document for verification. If not there where are they?

ix. a) original account settlement agreement.

xii. Was the document "Account Settlement Agreement" full and final settlement of the account between the 1<sup>st</sup> defendant/Respondent and the Plaintiff?.

xiii. Is the bank statement attached as exhibit SY(c ) a true reflection of the bank statement of the 1<sup>st</sup> Respondent or not?

xiv. Did Tara authorize the 5<sup>th</sup> Respondent to receive money on his behalf?.

xv. Has the respondents adduced any substantial legal evidence to demonstrate they paid Tara?.

xvi. Whether Tara owes any money in particular to Anwar?

xvii. Whether there is need for Tara to deposit in Court security for cost?.

xviii. Whether the court should vacate its earlier orders or should it reinstate the same orders?

xix. Whether the Court should strike out the Respondents reply under the provision of Order 2 rule 15.

xx. Whether the Applicant should in fact be granted summary judgment?

### **Factual Background**

13. The Plaintiff/Applicant is a Pakistani National who describes himself as having extensive business interests including importation of rice into Kenya. It is the Applicant's case that in his statement to the police dated 28<sup>th</sup> September 2015 the Applicant described himself as having a company called Fahari Trading Company. He says he was dealing in the importation of rice from several Asian Countries. In his work permit. His work permit dated 7<sup>th</sup> March 2014 that he is involved with business with MS Fahari Trading Ltd. The CR.12 dated 21<sup>st</sup> September 2015 records that he was a shareholder as at that date. That document was present by the Applicant as Exhibit TC2. The shareholders as at that date are said to be Ashok Das Kumar, a Pakistani National, the Third Defendant, Shahzad Yousaf Priwani also a Pakistani National, who is the Second Defendant herein. Fahari Trading had Officer in Nairobi and in Mombasa as was to be expected as it was involved in the importation of rice.

14. In his Supporting Affidavit the Plaintiff states that the Defendants owe him monies in the region of US\$1,00,000 I will deal with the specifics below. Given that the Parties, or at least some of them, were directions of a Limited Company, the first question for resolution is how did the alleged claim arise?. It seems that in fact the Parties operated as a quasi-partnership Examples of this are that although shipments are arranged and sent to the First Defendant Company payments are sometimes made by individual directors rather than the Company account, in some instances. The Plaintiff describes these as "irregularities". Examples given are a consignment of 500MT of Bitumen worth 300,000.00 of which the Second and Third Defendants. Of this only US\$165,000 was paid "*though a sister company*". Further shipments of rice were allegedly sent for which payment was guaranteed by the Plaintiff but for which he claims payment was not made. From the Affidavits filed, it seems that it was necessary at some time during 2015 to carry out a reconciliation of sums owed by various Defendants to the Plaintiff. At Exhibit TC 5 there is a table entitled "ACCOUNTS SETTLEMENT BETWEEN DR TARA CHAND, SHAHZAD YOUSAF & JAWAID ALI AS OF 5<sup>TH</sup> JUNE 2015....." It is signed by the Plaintiff and the Second and Fourth Defendants. It is witnessed by Alam Chand and Mohammed Anwar who may or may not be the 5<sup>th</sup> Defendant given the similarity in names. That relates to the sum of US\$136,612.00.

15. The Plaintiff also claims he is owed a further sum of around US\$ 1,000,000. It is stated clearly in the Notice of Motion as Ground 5, that the Defendants have denied the debt and also refused/neglected to pay it. Ground 6 states that the 5<sup>th</sup> Defendant says he received the sum of US\$136,000 but he has failed to pass on those monies to the Plaintiff. It is stated that the 5<sup>th</sup> Defendant has conspired with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to deny him that payment. Ground 8 states the Applicant is apprehensive that the Respondents are likely to run away with what he duly deserves.

16. The Supporting Affidavit is sworn by the Plaintiff. In it he sets out the sums he is claiming at Paragraph 7 he states that the 5<sup>th</sup> Defendant has falsely confirmed that he received US\$136,000 from the 1<sup>st</sup> Defendant. Also that such onward payment alleged has not been made. It is clear the Plaintiff alleges collusion between the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Plaintiff states he brought value to the business and has been prevented from sharing in the profits as was agreed. At Paragraph 12, the Plaintiff states that the actions of the Respondents have put him in financial difficulties. He also states that by making complaints to the police and for immigration authorities of Kenya as well as the Pakistani authorities the Respondents have attempted to have him "kicked out of Kenya" so as to avoid liability. At paragraph 15 the Plaintiff states "I am desirous of recovering all the debts owed to me by the Respondents and I intend to resign as a director in the 1<sup>st</sup> Respondent Company thereafter". These he clearly makes the link between payment of dues and resignation. Paragraph 14 states clearly that the Plaintiff considers that the allegations and/or complaints and/or reports made against him are malicious. He also states that he has reported the matter to the CID. Unfortunately, the Affidavit omits Exhibits TC3 and TC4. The Preparation and filing such Exhibits rests with the Advocate. In Exhibit TC5 there is a copy of a letter dated 12<sup>th</sup> February 2015 sent by the Second Defendant to the Department of Immigration stating that the Plaintiff had resigned from the company from 6<sup>th</sup> February 2015. That is several months before the reconciliation setting out payments due. The Plaintiff in its prayer seeks payment of the sum of US\$ 1,000,000.00, notwithstanding, the Notice of Motion and the Supporting Affidavit seek payment of US\$136,000, Again drafting pleadings are the preserve of the Advocate.

17. The First Application was brought under Certificate on 10<sup>th</sup> December 2015 and heard ex parte.

The Court ordered that:

(1) The Defendants to make a payment into Court of the Kenya Shillings equivalent of US\$ 136,000 not later than 11<sup>th</sup> December 2015 at 4p.m.

(2) A Penal Notice was attached to Paragraph 1.

(3) In the event that paragraph one is not complied with, the Bank accounts of the First, third and Fourth Defendants were frozen to the extent of the first US\$ 500,000.

(4) Leave was given to serve the Banks and

(5) The Applicant was ordered to serve the Respondents.

(6) The matter was listed for a mention on 14<sup>th</sup> December 2015.

18. The Defendants were served with the Order and Application on various days thereafter. According to Counsel for the Plaintiff/Applicant, the 5<sup>th</sup> and 6<sup>th</sup> Defendants, who are father and son attempted to evade service. Between 10<sup>th</sup> & 14<sup>th</sup> December none of the Defendants applied to set aside the ex-parte Order. On 14<sup>th</sup> December the Second Defendant filed his Replying Affidavit on behalf of himself and the 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants. It is noteworthy in that at paragraph 4 he says, on oath

*“That the Notice of Motion is frivolous, vexatious, an abuse of the court process and an illegal scheme by the Plaintiff/Applicant meant to blackmail the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendant/Respondent....”.*

19. The Defendant complains that the Affidavit was not served until 3p.m the following day and attributes a sinister motive to that. It seems the Advocates accepted service at 2.41p.m. At paragraph 7 there is a complaint about service by email. The Deponent also claims that the Plaintiff's Advocate telephoned him to get him to comply with the Court Order. He perceives that as blackmail. Paragraph 6-10 demonstrate a fundamental misunderstanding of the effect of Court Orders that have not been served. No doubt the Second Defendant will be able to explain to the Court, in due course, how a person can be blackmailed by something he does not know exists? Paragraph 10 suggests that paragraph 3 of the Order of 10<sup>th</sup> December 2015 applies to the 7<sup>th</sup> Defendant. That statement is incorrect and therefore in the context of a sworn Affidavit, untrue. That means the mathematical calculation may also be questionable. Continuing the theme, the Second Defendant states that US\$2,000,000 is a *“colossal sum of money”*. In fact, from the documents attached to the Notice of Motion it seems to be less than only one shipment of rice arranged for Fahari Trading Kenya Ltd the First Plaintiff.

20. The Replying Affidavit is said to be sworn by on behalf of the First and Fourth Defendants but the body of the Affidavit purports to speak for the Seventh Defendant/Respondent as well (see paragraph 6 and 8). The version of events put forwards in the Replying Affidavit state, in particular at Paragraph 13 that the Plaintiff resigned as a Director and transferred all his shares to the Fourth Defendant on 6<sup>th</sup> February 2015. It is suggested that he left the Country in Order to return on 5<sup>th</sup> June to conduct a reconciliation . At Paragraph 13C it is said that *“the Plaintiff/Respondent”* entered into an agreement dated 5<sup>th</sup> June 2015 in which he agreed that payment of US\$136,621 would be made to a Mr. Anwan Mohammed, the Fifth Defendant. Exhibits 5Y-5(a)(b) and (c) respectively are said to be a *“confirmation of receipt by the Plaintiff dated 9<sup>th</sup> June 2015 and a confirmation of receipt by the 5<sup>th</sup> Respondent dated 8<sup>th</sup> August 2015.* As stated SY-3(A) is a transfer form for the transfer of 50 (fifty) ordinarily shares in Fahari Trading Ltd from Tara Jasoomal Chand to Jawaid ali for forth sum of Kshs.50,000/- only. Page 14 is a Letter of Resignation by the Plaintiff from the Company. At page 15 of the Exhibit there is an Affidavit said to be sworn by the Plaintiff confirming he ceased to be a shareholder in Fahari Trading Company. Exhibit SY-3(b) at page 16 contains Company registration information. It is apparent that the

information was obtained from an internet search made and/or downloaded on 12<sup>th</sup> April 2015. It shows the secretary as being one Lloyd Mwenda Njenga. That is the same person who is seal appears on the seal of the Letter of Registration addressed to “*the Chairman*” of *Fahari Trading Ltd. Pages 13-15 describe the Plaintiff as Tarachand Jsoomal Chand*”.

21. At SY-5(a) appears a copy of an “acknowledgment of Settlement of Accounts. It is dated 5<sup>th</sup> June 2015 and is signed by the Plaintiff. At pages 17-18 is a document prepared by someone called Ace Secretaries and Registrars who notably have the same P.O. Box number as the First Defendant. The CR 12 which is attached is largely illegible and therefore of little evidential value. They should show the shareholding as at 15<sup>th</sup> October 2015. The Replying Affidavit states that the official search is dated 4<sup>th</sup> December 2015. It is not.

22 At page 22 is a document that is headed “Acknowledgment and Receipt of Payment, dated 8<sup>th</sup> August 2015. In it Muhammad Anwar Haji Abdul Majid confirms that he has received payment of 136,000/- shillings. The symbol denoting shillings is used. Payment is alleged to have been made in cash and cheques but copies of the cheques are not produced. Further it Records payments as actually made in September. The documents is signed by Anwar Muhammad who cannot be deciphered. In addition some of the payments e.g 14<sup>th</sup> July 2015 are said to have the 6<sup>th</sup> Defendant and son of the fifth Defendant. It is the Plaintiff’s case that none of the payments were made to him. The Deposit slips also denote shillings not foreign currency.

23. The Second Defendant quotes legal advice which is privileged and also has produced a statement said to be dated 7<sup>th</sup> October 2015. In it the Second Defendant states that the relationship between the Parties goes back to June 2013 which pre-dates the Plaintiff’s work permit. It also suggests that difficulties began in February 2014 in other words before the Plaintiff’s work permit was issued. The shareholding attributed to the Plaintiff in that statement is 33%. Also exhibited are documents from criminal proceedings and investigations relating to the same dispute.

24. Although the Replying Affidavit takes issue with the made of service however P3 of the statement (p.35 of the Exhibit) states; “our Advocates wrote a letter dated 26<sup>th</sup> August 2015 addressed to Mr. Nyaribo requesting him to serve our advocates with Court documents”. That was in October 2015.

25. Also on the same day (14<sup>th</sup> December 2015) the Defendant filed an Application by second Notice of Motion. Again it is said to be on behalf of the First, Second, Fourth and Seventh Defendants. It is brought under Order 26 rules 1 and 2 of the CPR and SS 1A, 1B, 3& 3A of the CP Act. The application seeks to set aside the ex parte Order and seeks security for costs in the sum of US\$ 300,000 within 7 days. Although the Second Plaintiffs uses in effect the same Affidavit but different exhibits the part that is relevant to the Application is paragraph 9 & 13. That states the first Defendant has a gross turnover of Kshs 988,411,919.00. Which translates to about US\$988,411,919 in just under a million dollars which according to the Tax Return produces a taxable profit of only Kshs.2,322,899/-.

26. Paragraph 16 of the Supporting Affidavit demonstrates clearly that the Defendants on whose behalf it is sworn are fully conversant with the details of the Plaintiff’s claim, whether pleaded or not.

27. The multiplicity of Applications meant the matter was better dealt with by written submissions. Parties filed submissions as follows:

- (1) The Plaintiff on 24<sup>th</sup> February 2016 and a list of issues on 4<sup>th</sup> February 2016;
- (2) The 1<sup>st</sup>, 2<sup>nd</sup> 4<sup>th</sup> and 7<sup>th</sup> Defendants on 18<sup>th</sup> February 2016.
- (3) The 5<sup>th</sup> and 6<sup>th</sup> Defendants on 2016 on 18<sup>th</sup> February.

28. I have considered and taken into account the Written Submissions. Each party has argued its case at

length and in detail. Their respective positions are clear. Further from the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendant's arguments, it is clear that their position is that the Court cannot and should not act for the Applicant on his Application. They also seek security for costs. The submissions do demonstrate some misunderstanding of the law and the Court's jurisdiction.

29. For the 5<sup>th</sup> and 6<sup>th</sup> Defendants, although they do not contradict the other Defendants, they argue that the Application is completely without basis. That is inferred from the application to strike out the application that it is frivolous, scandalous and otherwise an abuse of the process.

### **Reasoning and Decision**

30. The Plaintiff's Application seeks summary Judgment for the sum of UD\$136,621. That Application was made before the Respondents had been given an opportunity to defend. Therefore it is premature. In addition the Application is fundamentally flawed because the Plaintiff does not contain or prayer for that sum. Summary Judgment can only be ordered on the basis of the pleading's before the Court. (***Civil Procedure Rules Order 36***) Therefore that Application is dismissed.

31. As to the Plaintiff's second prayer which in effect is an application to freeze bank accounts pending hearing. The Order was made, not as prayed but in the terms set out above. That was discharged on 14<sup>th</sup> December 2015 due to the Plaintiff's failure to serve the Order in a timely fashion. The court does nevertheless take into account that there was an element of evading service by some of the Defendants.

32. The real question the court has to address is whether such an Order is justified on the facts of this case. It is apparent that the parties who are natural persons are to greater or lesser extent businessmen. The 1<sup>st</sup> and 7<sup>th</sup> Defendants are clearly the driving force behind the companies. There is nothing to suggest that the Defendants will lease their business and abscond the jurisdiction before the proceedings are complete. If that is the Plaintiff's case then it has not been made out properly. Even the identity and status of the Bank accounts is unclear as the Plaintiff's Exhibits filed in Court are incomplete. That prayer is dismissed.

The Third Defendant has not participated.

33. Coming to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and Seventh Defendant's Application. The First point is that there is no evidence on the Record to show that the Second Defendant is duly authorized by the two Limited Companies to conduct these proceedings on their behalf. In particular there is absolutely nothing that explains his connection to the 7<sup>th</sup> Defendant. And in any event the Order does not apply to the 7<sup>th</sup> Defendant.

34. The Application for the Order of 10<sup>th</sup> December 2015 to be set aside was made under a Certificate of Urgency. Surprisingly, that urgency was not felt by their Counsel as he arrived at Court nearly one hour late. In relation to that Application:

(1) Prayer 2 asks for the exparte Order to be set aside. That prayer was superseded by events and so is dismissed.

(2) Prayer 3 seeks security for costs. The 1<sup>st</sup>, second 4<sup>th</sup> and 7<sup>th</sup> Defendants set that quantum of US\$ 300,000 or the Kenya Shillings equivalent. The Supporting Affidavit does not explain nor justify that sum. That prayer is dismissed.

35. What is clear to the court is that the Parties were in an established business relationship. What is also clear is that they fell out over money. It is therefore unsurprising that this dispute relates to money and large sums of it. It is also clear that the dispute arose within and is in the jurisdiction of the Court. Therefore, at the very least the Court has inherent jurisdiction and wide discretion to deal with this dispute.

36. It is also clear that the Defendant's have tried to use the immigration authorities to pull strings although it seems they had little success. The Plaintiff is still here, he has business interests here and he has identified an investment opportunity which is very lucrative. Rice is one of the staples consumed in this county, therefore its importation could be seen as of benefit. The Plaintiff has the same nationality as some of the Defendants. For them to raise nationality as an issue is not only distasteful but goes against the Spirit of the Constitution which ensures equality before the law. It may be they don't understand that, but their lawyers should. As a consequence, the question of clean hands arises.

37. In relation to the fifth and Sixth Defendants they are alleged to be related and also to have tried to evade service. They filed an Application on 17<sup>th</sup> December 2015, that is 3 days after the interim ex parte Order was discharged. They seek an ex parte Order for the suit to be dismissed because it does not disclose any cause of action against the 6<sup>th</sup> Defendant. However, whatever the position of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendant, the 5<sup>th</sup> and 6<sup>th</sup> Defendants were (a) authorized to receive funds on behalf of the Plaintiff/Applicant and (b) that they did receive those funds. That puts them in a position of trustees for those sums. They are therefore liable to account, if not to the Plaintiff then the Court. They shall also be necessary to these proceedings to clarify the question of the correct construction and interpretation in relation to the Exhibits to the Second Defendant's Affidavits. Therefore it is not clear that the suit and Application is an abuse of process, not that it should be struck out.

38. The obvious defects in the plaint can be remedied by amendment subject to the correct procedure being used. Sums received on behalf of the Plaintiff- whether or not with his actual authority are trust property.

39. There is a dispute. The Plaintiff has come to court. Article 50 of the Constitution enshrines the right to a fair hearing. Article 50 provides -

*“Under Article 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court....”.*

40. The Parties have filed various details of their business dealings in Court. They range from incomplete to eligible to irrelevant and misleading. That is not satisfactory for an interlocutory application. In those circumstances the following Orders are made.

1. The Plaintiffs application is dismissed.
2. The Application of 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants is dismissed.
3. The Application of 5<sup>th</sup> and 6<sup>th</sup> Defendants is dismissed.
4. The 5<sup>th</sup> and 6<sup>th</sup> Defendants are ordered to make a payment into Court of US\$ 120,000. That Order is made under CPR Order 40 and the Courts inherent jurisdiction to preserve funds held on trust by admission of the Defendants. **Penal Notice Attached.**
5. Each Party to pay its own costs.
6. List for further directions after 28 days where the Court will hear further submissions on the hearing of the suit.

Order Accordingly,

**FARAH AMIN**

**JUDGE**

Dated 18<sup>th</sup> May 2016.

Signed and Delivered on this 18<sup>th</sup> day of May 2016.

**In the Presence of:**

Isaiah Otieno – Court Clerk

Mr Nyaribo for the Plaintiff

No Attendance for 1<sup>st</sup> to 6<sup>th</sup> Defendants.