REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 627 OF 2012

ANTHONY RAYMOND CORDEIRO …….…..…… 1ST PLAINTIFF

ELAINE DE SA CORDEIRO ……..…….…….. 2ND PLAINTIFF

TECHNOLOGY TODAY LTD ……..…...…..…… 3RD PLAINTIFF

VERSUS

ADRIAN NOEL CARVALHO …….....……..……. 1ST DEFENDANT

ARLET DOMINICA CARVALHO …….....……..…… 2ND DEFENDANT

I & M BANK LTD ……....…...…….……..… 3RD DEFENDANT

JAYANTLAL JIVAJ MEPAL SHAH …..…….....…….... 4TH DEFENDANT

MANSUKHLAL JIVAJ MEPAL SHAH …….....…….... 5TH DEFENDANT

DILIPKUMAR JIVAJ MEPAL SHAH …….....……. 6TH DEFENDANT

RULING

1. By a Notice of Motion dated 29th September, 2012 brought under the provisions of **Order 39 Rule 1, Order 40 Rule 1, Order 51 Rule 1** all of the *Civil Procedure Rules* and **Section 1A, 1B and 3A** of the *Civil Procedure Act*, the Plaintiffs seek the following prayers:

> **"1. THAT this Honourable Court be pleased to certify this application urgent;**
>
> **2. THAT the service of summons and the application herein be dispensed with owing to the urgency of the application;**
>
> **3. THAT this Honourable Court be pleased to order THAT the 1st and 2nd Defendants be arrested and brought to Court to show cause why they should not furnish security for their appearance at the trial;**
>
> **4. THAT this Honourable Court be pleased to restrain the 4th to 6th Defendants whether by themselves, their servants and agents or otherwise howsoever from selling,**

charging or sub-dividing L.R No. 1870/6V1/145 until further order of this Honourable Court;

5. THAT this Honourable Court be pleased to restrain the 4th to 6th Defendants whether by themselves, their servants and agents or otherwise howsoever from selling, charging or sub-dividing L.R No. 1870/6V1/145 until this suit is heard and determined;

6. THAT the 1st and 2nd Defendants and each of them whether by themselves or either/any of them or by their servants or other agents of them or either of them or otherwise howsoever be restrained from serving as purported directors of the 3rd Plaintiff until further orders of this Honourable Court;

7. THAT the 1st and 2nd Defendants and each of them whether by themselves or either/any of them or by their servants or other agents of them or either of them or otherwise howsoever be restrained from serving as purported directors of the 3rd Plaintiff until further orders of this Honourable Court;

8. THAT the costs of this application be provided for."

2. The grounds in support of the application are as follows: the 1st and 2nd Plaintiffs are husband and wife and (respectively) brother and sister-in-law of the1st and 2nd Defendants. The 1st Plaintiff is a Kenyan whilst the 2nd Plaintiff is a British citizen. The Plaintiffs live in Melbourne, Australia where they have resided permanently since January 2010. The 1st and 2nd Defendants hold both Kenyan and Portuguese citizenship, and also (allegedly) U.S.A permanent residency. The 1st and 2nd Plaintiffs were the shareholders and directors of the 3rd Plaintiff, with each having 23,249 and 1,750 shares respectively. By an oral agreement that allegedly took place on or around March, 2011, the 1st and 2nd Plaintiffs agreed to sell their combined shareholding to the 1st and 2nd Defendants for a consideration of 500,000 Australian Dollars. They executed share transfer forms and signed letters of resignation as directors of the 3rd Plaintiff on the understanding that the 1st and 2nd Defendants would not be registered as the shareholders or assume control of the 3rd Plaintiff as directors until the payment of the 500,000 Australian Dollars was made. However, it is alleged that the 1st and 2nd Defendants went ahead and fraudulently registered themselves as the directors and shareholders of the 3rd Plaintiff at the Companies Registry, to the chagrin and consternation of the 1st and 2nd Plaintiffs. The 1st and 2nd Defendants, now acting as the shareholders and directors of the 3rd Plaintiff, went ahead to dispose of the properties of the 3rd Plaintiff, including its substantial property **L.R No. 1870/6V1/145** (hereinafter "the property") which the 1st and 2nd Plaintiffs contend is the most valuable of the 3rd Plaintiff's assets. Despite demands by the 1st and 2nd Plaintiffs (including a purported meeting to stop the sale of the property held in October 2011), the Defendants expedited the sale process of the property for a consideration of Kshs.128,000,000/-, purportedly transferring the same to the 4th, 5th and 6th Defendants. It is from the foregoing unfortunate series of events that the 1st and 2nd Plaintiffs have filed the instant application, seeking to stop the 4th – 6th Defendants from participating in the purchase of the aforementioned property, and further, to prevent the 1st and 2nd Defendants from acting as the supposed shareholders and directors of the 3rd Plaintiff.
3. In support of the application, the 2nd Plaintiff, **Elaine De Sa Cordeiro**, swore an affidavit on 27th September, 2012. The affidavit explicitly reiterates the events as enunciated in the grounds of the application. It is deponed that the 1st Plaintiff and herself were the beneficial shareholders, with a combined stake of 99% in the 3rd Plaintiff Company. She contends that the documents marked **"ED -1(b)"** and **"ED- 1(c)"** annexed to the affidavit show that she and her husband were the shareholders and directors in the 3rd Plaintiff Company. Although she admits that the 1st and 2nd Defendant were involved in the management of the 3rd Plaintiff company, she states that the same

was an assumed and donated authority, which would then have been transferred to the 1st and 2nd Defendants upon the said payment of 500,000 Australian Dollars for the 99% stake in the Company. In spite of the oral agreement (which ostensibly was entered into on 23rd March, 2011), the execution of the share transfer documents and the execution of the (directors') resignation letters, she contends that the 1st and 2nd Defendants fraudulently transferred her and the 1st Plaintiff's shares to themselves, and arrogated themselves as the directors of the 3rd Plaintiff company. This was allegedly achieved by filing false documents with the Registrar of Companies and fraudulently witnessing the documents marked as **"ED-4"** and **"ED-6"** annexed to the Affidavit in support of the Application, respectively. As regards the property, the 2nd Plaintiff contends that the same was where the head office of the 3rd Plaintiff company was situate, and which the 1st and 2nd Defendants had purportedly sold to the 4th – 6th Defendants for Kshs. 128,000,000/-. She contends that the same was valued at over Kshs. 140,000,000/- as at October, 2011 when the alleged sale took place. Further, she contends that the 1st and 2nd Plaintiffs, being apprehensive of the 1st and 2nd Defendants actions with regards to the 3rd Plaintiff, filed the instant application to safeguard their interests in the 3rd Plaintiff, and to curtail the Defendants, especially the 1st and 2nd Defendants and the 4th – 6th Defendants, from purportedly acting as shareholders and directors of the 3rd Plaintiff Company and the disposition of the 3rd Plaintiff's property respectively.

4. The 1st Defendant, **Adrian Noel Carvalho**, in opposing the application by the Plaintiffs, swore an affidavit in reply on 8th October, 2012. It was contended therein that he had never applied for, nor had he been granted permanent residency in the U.S.A and denied such insinuations by the 1st and 2nd Plaintiffs. In reiterating as to his appointment as a director and shareholder in the 3rd Plaintiff, the deponent contended that the same was not conducted fraudulently and was confirmed by the letter from the Registrar of Companies dated 27th June, 2011 annexed to his said Affidavit. The 1st Defendant alluded to the fact that the Plaintiffs, having failed to sustain a criminal suit against him and the 2nd Defendant, resorted, albeit unlawfully and illegally, to seek fresh orders from the Court with an aim to embarrass and coerce him. He further contends that there had never been any agreement between him and the 1st and 2nd Plaintiff as regards the sale of shares in the 3rd Plaintiff for 500,000 Australian Dollars and that the Plaintiffs' claim was baseless and unfounded.
5. The 2nd Defendant also filed a replying affidavit in opposition to the application by the Plaintiffs. In the affidavit of **Arlet Dominica Carvalho** sworn on 8th October, 2012, she reiterated the contents of the affidavit of the 1st Defendant. She further contended that she was lawfully appointed as a director in the 3rd Plaintiff Company and that her shareholding was not fraudulently obtained. She further reiterated that the application by the Plaintiffs was baseless and unfounded in law and relied on the affidavit of the 1st Defendant *mutatis mutandis*.
6. The 3rd Defendant Company, **I & M Bank Ltd**, filed a Replying Affidavit dated 10th October, 2012 and what was termed a Supplementary Affidavit bearing even date therewith. **Gilbert Banda**, its Relationship Manager, swearing on behalf and with the authority of the 3rd Defendant, contended that the 3rd Defendant's interest was limited to ensuring that its advances made to the 3rd Plaintiff Company were secured. He further contended that the 3rd Defendant was not involved, in any way whatsoever, in the change of directorship and/or shareholding of the 3rd Plaintiff. He alluded that the 3rd Defendant had received a notification of change of directors and secretaries as registered with the appointed directors of the 3rd Plaintiff. Further, it was contended that the 3rd Defendant never received a letter from the Plaintiffs dated 19th October, 2011, purportedly informing them of allegations of fraud on the part of the 1st and 2nd Defendant in the transfer of their shares in the 3rd Plaintiff or the sale and transfer of the property to the 4th – 6th Defendants.
7. The Court, on 28th September, 2012, issued orders to the effect of satisfying the first three (3) prayers of the Application dated 27th September, 2012. None of the parties, in their replying affidavits, raised any issues concerning those Orders of the Court. The 1st and 2nd Defendants

however, raised the same in their submissions dated 12th April, 2013. They relied on the cases of **Southern Credit Banking Corporation Ltd v Tulip Apartments Ltd & Another Civil Application No. NAI 64 of 2002** and **M.V Lillian v Caltex Oil (K) Ltd [1989] KLR 1**. as regards the Court exercising its discretion under the overriding objectives as postulated under **Sections 1A and 1B** of the *Civil Procedure Act*. The 1st and 2nd Defendants reiterated that the 1st and 2nd Plaintiffs had not established a factual foundation to warrant the Court to issue the Orders as aforementioned. It should be noted, however, that the 1st and 2nd Defendants have not sought nor filed an appeal against the Ruling of the learned judge. As such the interim Orders as issued still stand, and the 1st and 2nd Defendant should have followed the proper procedure and process to ameliorate any grievances they may have following the Ruling.

8. Having carefully considered the Application, the affidavits filed for as well as those in opposition thereto, as well as the submissions and oral testimonies of the parties, the Court considers that there are three issues of concern to be determined:

    (1) Was there any fraud perpetuated by the 1st and 2nd Defendants in the transfer of shares and their subsequent registration at the Registrar of Companies as the directors and shareholders of the 3rd Plaintiff Company?

    (2) Have the 1st and 2nd Plaintiffs established a *prima facie* case with a probability of success to warrant the Court to issue the orders as prayed for in the application? And

    (3) Has the issue of a constructive trust been established as between the 1st and 2nd Plaintiffs with all 6 Defendants over the transfer of shares and the sale and transfer of the property respectively?

The 1st and 2nd Plaintiffs relied on a number of cases including **Russell Company v Commercial Bank of Africa (1986) KLR 636** on the issue of damages as an adequate remedy in an application for injunction, **Giella v Cassman Brown & Co. [1973] E.A 358**, **Kabansora Millers Ltd v New Salama Wholesalers & 2 Others (2002) 1 KLR 451** with regard to the Courts power to order arrest before judgment under **Order 39 Rule 1** of the *Civil Procedure Rules* and **African Safari Club v Safe Rentals Ltd Civil Application No. 53 of 2010** with regard to the overriding objective.

9. The 1st and 2nd Plaintiffs overall claim is that the 1st and 2nd Defendants fraudulently transferred the shares in the 3rd Plaintiff into their personal names, and registered the same at the Companies' Registry as being the directors and shareholders of the 3rd Plaintiff. The 1st and 2nd Plaintiffs admitted that, on or around April 2011, they had signed share transfer forms transferring their shareholding to the 1st and 2nd Defendants, as well as a resolution dated 15th April, 2011. They also signed letters of resignation, effectually resigning as the directors of the 3rd Plaintiff and Form 203A, as regards the change in directors/secretary. The mandate of managing the 3rd Plaintiff was given over to the 1st and 2nd Defendants, ostensibly on the alleged oral contract entered between them. The 1st and 2nd Plaintiffs allege that the 1st and 2nd Defendants were to transfer 500,000 Australian Dollars as consideration for their newly acquired shareholding in the 3rd Plaintiff. On the other hand, the 1st and 2nd Defendants dispute this, and maintain that the 1st and 2nd Plaintiffs voluntarily resigned as the directors and shareholders of the 3rd Plaintiff which was in dire financial straits and in debt. Indeed, in their submissions the 1st and 2nd Defendants maintained that they took over debts in the region of Shs. 60 million which had been incurred by the 3rd Plaintiff Company. However, they do not state whether the allegations by the 1st and 2nd Plaintiffs are unwarranted, or whether there was any consideration or contract (oral or otherwise) that had been entered between them and the 1st and 2nd Plaintiffs. There is simply a bald statement included in both the 1st and 2nd Defendants' Replying Affidavits to the extent that they never reached an agreement with the 1st and 2nd Plaintiffs to pay them 500,000 Australian Dollars for the shares.

10. The definition of fraud in the Blacks' Law Dictionary, 9th Edition at page 731 is given as:

"A knowing misrepresentation of the truth or a concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases, especially when the conduct is willful, it may be a crime. A misrepresentation made recklessly without belief in its truth to induce another person to act."

According to William R. Anson in ***Principles of the Law of Contract***, the author writes at page 263 as follows:

"The use of the term fraud has been wider and less precise in the chancery than in the common law courts. This followed necessarily from the remedies which they respectively administered. Common law gave damages for a wrong, and was compelled to define with care the wrong which furnished a cause of action. Equity refused specific performance of a contract, or set aside a transaction or gave compensation where one party had acted unfairly by the other. Thus fraud at common law is a false statement…fraud in equity has often been used as meaning unconscientious dealing – although, I think, unfortunately, a great equity lawyer has said."

The fraud perpetuated by the 1st and 2nd Defendant, as was detailed by the 1st and 2nd Plaintiffs in their submissions dated 5th November, 2012 as well as orally before the Court on 10th July, 2013, was the registration of themselves as the shareholders of the 3rd Plaintiff on 18th May, 2012. In their opinion, the 1st and 2nd Defendants had caused themselves to be registered as shareholders as though they had bought the shares of the 3rd Plaintiff from the 1st and 2nd Plaintiffs. The 1st and 2nd Plaintiffs aver that the allegations by the 1st and 2nd Defendants that they were good Samaritans who took over a debt ridden company were unfounded and misplaced. Further, that the sale of the property as of 1st July, 2011 was entered into without the consent of the 1st and 2nd Plaintiffs.

11. On their part, the 1st and 2nd Defendants contend that the change of directors was express and not qualified, and that the 1st and 2nd Plaintiffs had resigned voluntarily, leaving the 1st and 2nd Defendants to take over the management of the 3rd Plaintiff. To buttress their arguments, the 1st and 2nd Defendants relied on the case of **Reliance Bank Ltd v Mack Spares & Others Kisumu High Court Civil Case No. 139 of 1999** where the Court held:

"If a party has acted where fair inference can be drawn from his conduct that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction against the person who, on the face of his conduct, has acted on the view that the transaction was legal; the principle applies even if the party whose conduct is in question was himself acting without the full knowledge or in error."

The question that arises therefore, is whether by any reasonable inference, the conduct by the 1st and 2nd Defendants could be said to have been proper or may have been without full knowledge or in error? The 1st and 2nd Plaintiffs admit that they did indeed sign and send back to the 1st and 2nd Defendants a resolution resigning as directors and transferring their shares to them, but that the same was on condition of them coming to Kenya to have the same witnessed and after the finalizing of the payment of 500,000 Australian Dollars. The 1st and 2nd Defendants without having paid or admitted to having paid the 1st and 2nd Plaintiffs the 500,000 Australian Dollars, presented the documents of transfer and resignation to the Registrar of Companies and had the shareholding and directorship of the 3rd Plaintiff put into in their respective names. It seems therefore, that the 1st and 2nd Plaintiffs' case is that the fraud that the 1st and 2nd Defendants committed, was the concealment of the material fact that the shares had not been paid for as per the agreement between them and the 1st and 2nd Plaintiffs. They went on to contend that the misrepresentation of this fact by the 1st and 2nd Defendants was willful and without belief in its truth, causing the Registrar's office, to believe and

accept their representations, so as to register them as the shareholders and directors of the 3rd Plaintiff.

12. The 1st and 2nd Defendants have failed to expressly countermand such allegation by the 1st and 2nd Plaintiffs. In my view, they have skirted around the issue by alleging that the resignation by the 1st and 2nd Plaintiffs was voluntary, and that they were good Samaritans that had taken over the shareholding and management of the 3rd Plaintiff. They have also failed to show how they came to be the shareholders and directors of the 3rd Plaintiff in their own right. By inference, their case is that the 1st and 2nd Plaintiffs offered their shares in the 3rd Plaintiff as a gift to them, which claim the 1st and 2nd Plaintiffs vehemently deny. In their submissions, the 1st and 2nd Plaintiffs submitted that the acts by the 1st and 2nd Defendants amounted to fraud, in accordance with the reference made in **R.P Meagher, W.M.C. Gummow and J.R.F. Lehane *Equity - Doctrines and Remedies* 2nd Edition (Butterworths, 1984)** in which at page 323-324 the learned authors stated:

"In the view of Story's Equity, art 258, the jurisdiction over fraud dealt with:

…such acts and contracts as, although not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to mislead or deceive other persons, or to violate private or public confidence, or to injure the public interests… prohibited…as within the same reason and mischief as acts and contracts done *malo animo.**"***

Further, the authors made reference to the case of **Nocton v Lord Ashburton [1914] AC 932** at 935 where **Lord Haldane LC** with regard to fraud held inter alia:

"……it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a court of equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such case as a technical fraud on a power. It was thus that the expression 'constructive fraud' came into existence."

13. The conduct of the 1st and 2nd Defendants has been called into question. In my view, they transferred the shares in the 3rd Plaintiff belonging to the 1st and 2nd Plaintiffs into their names, possibly violating the oral agreement that they had come to with the latter. This, as per **Nocton v Lord Ashburton** (supra) may have constituted an act of fraud, to which no other inference can be adduced of their conduct apart from it being fraudulent. The act of presenting the documents signed by the 1st and 2nd Plaintiffs to the Registrar of Companies and having him alter the 3rd Plaintiff's records therein in their favour, to the detriment of the 1st and 2nd Plaintiffs, constituted a fraudulent act, which in the sense in the case of **Reliance Bank Ltd v Mack Spares & Others** (supra), begs the question of the legality of the whole transaction. On the other hand and as submitted by learned counsel for the 1st and 2nd Defendants, they took over the 3rd Plaintiff Company at the behest of the 1st and 2nd Plaintiffs. The latter signed the share transfer forms and letters of resignation as directors. There is no denial as to the execution of those documents in Australia and sending them back to Kenya. The 1st and 2nd Plaintiffs say they are owed 500,000 Australian Dollars. It would seem that the 1st and 2nd Defendants had all the mandate necessary as directors to deal with the property in the way that they did and certainly had not denied the sale of the same to the 4th, 5th and 6th Defendants. However, all these are matters to be brought before Court at the hearing of the suit in due course and are not for this Court to dwell upon.
14. **Order 40 Rules 1, 2, 3 & 10** details the procedure to be followed in an application for an injunction. The case of **Giella v Cassman Brown** (supra) gives the definitive principles which the Court would consider in such an application. Spry, J.A in the aforementioned case reiterated as follows:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East

Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience."

The 1st and 2nd Plaintiffs claim that the loss that they stand to suffer is irreparable. In **Robinson v Pickering (1881) 16 Ch. D. 660** with regard to an application for injunction predicated upon a claim of loss of possession, it was held *inter alia*:

"…irreparable injury does not mean an injury which is not physically capable of being remedied but one which cannot be adequately remedied by damages."

In **Russell Company v Commercial Bank of Africa** (supra), it was held that:

"It was misdirection for the judge to describe the suit premises as a commercial undertaking for which the plaintiff could be compensated in damages. The premises was a property of vital concern to the plaintiff and one of its managing directors and the purpose was to provide either revenue or shelter."

The 1st and 2nd Plaintiffs and the 1st and 2nd Defendants have both submitted that the 3rd Plaintiff was a going concern, with its offices located at the property that the 1st and 2nd Defendants purported to sell/sold to the 4th – 6th Defendants. As reiterated in **Robinson v Pickering** (supra) irreparable loss is more concerned with adequate remedies. As a result, would damages be adequate compensation for a going concern, to which all parties agree, carried on its business at the property? Irreparable loss would not only include the loss of the property, which according to the Appellate Court in **Nyanza Fish Processors Ltd v Barclays Bank of Kenya Ltd Nairobi Civil Application No. 114 of 2009 (UR 73/09)**, is nevertheless ascertainable and thus could be adequately compensated in damages, but also in the business of the 3rd Plaintiff, being that it is the same premises as its offices. The sale would impute a loss that could, nonetheless, be adequately compensated for in damages, thus satisfying the 2nd ambit in **Giella v Cassman Brown** (supra) on an application for injunction.

15. The gist of the 3rd Defendant's submissions was principally, that the Plaintiff's had not sought any conservatory Order as against the 3rd Defendant. Further, the underlying suit did not have any claim for substantive relief as against the 3rd Defendant. It maintained that essentially the suit was a dispute as between siblings which had been expanded to include other parties. As regards the 3rd Plaintiff, the 3rd Defendant's only interest was to obtain repayment of monies advanced to it to the tune of Shs. 61,000,000/-. It brought to the attention of the Court that its sole part played in relation to the sale of the property was to release the Title Deeds and execute a Discharge of its Charges over the property, once having received payment of the loan proceeds in full. As regards any allegation of fraud against it, the 3rd Defendant quoted **section 120** of the *Companies Act* which reads:

"The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein."

As far as it was concerned, the 1st and 2nd Defendants were the shareholders and directors of the 3rd Plaintiff as per the company file at the Registry of Companies. It also acknowledged that it had received a Notice of Change of Directors which it had retained for record purposes. The 3rd Defendant's submissions continued by noting that the Plaintiffs' case herein rested on an oral agreement for the sale and purchase of shares in the 3rd Plaintiff. As such the case was based on contract and the 3rd Defendant submitted to Court as regards the case of **Kanyenje Gakombe v The Automobile Association of Kenya & Anor (2006) eKLR** in which this Court found, quoting from **Halsbury's Laws of England** as follows:

"The Doctrine of privity of contract is that, as a general rule, at common law a contract cannot

confer rights or impose obligations on strangers to it, that is, persons who are not parties to it."

In the 3rd Defendant's view an interlocutory injunction could not hold as against it and it asked this Court to dismiss the Plaintiffs' prayer as against it. This Court concurs with the 3rd Defendant's submissions in this regard. There is the possible reservation that should the Plaintiffs' allegation of fraud and complicity by the 3rd Defendant, together with the other Defendants, as regards the sale of the property be proved at the trial of this matter in due course, then damages may be awarded as against the 3rd Defendant but, certainly, an injunction does not hold against it.

16. Moving onto the submissions of the 4th, 5th and 6th Defendants, they adopted the same position as the 3rd Defendant that this suit was principally a dispute as between siblings and that the 3rd to the 6th Defendants have been unwittingly caught up in the same. The sale of the property to them had been above board and a search of the vendor 3rd Plaintiff Company revealed that the shareholders and directors of the 3rd Plaintiff were the 1st and 2nd Defendants. There was no reason whatsoever expressed that these two Defendants were trustees of the 3rd Plaintiff company. No document by way of trust deed or otherwise had been produced before this Court to indicate that position. There was no evidence put before Court to show that the 4th, 5th and 6th Defendants had any knowledge of the fraud as alleged by the 1st and 2nd Plaintiffs. There was no evidence that any monies paid for the purchase of the suit property had been sent direct to the United States of America again as alleged by the 1st and 2nd Plaintiffs. There was no evidence before Court as alleged that the Transfer in favour of the 4th to 6th Defendants was done in the full knowledge that the 3rd Plaintiff had no capacity to execute the same or sell the property. In their view, the 4th to 6th Defendants submitted that the 1st and 2nd Plaintiffs had not established a prima facie case with a likelihood of success or that they would suffer loss which could not be compensated for in damages. To this end the 4th to 6th Defendants quoted from the **Giella v Cassman Brown** case as well as **Kalyanpur Lime Works Ltd v The State of Bihar (1951) AP 226, Mureithi v City Counsel of Nairobi, Civil Appeal No. 5 of 1979, Baxter v Claydon (1952) W.N. 376, Priscilla Grant v Kenya Commercial Finance Company Ltd & 2 Ors, Civil Appeal No. 227 of 1995** as well as **Robinson v Pickering (supra)**.
17. As indicated above I am satisfied that one part of the three principles as enunciated in **Giella v Cassman Brown** (supra), namely a prima facie case has been established by the 1st and 2nd Plaintiffs as against the 1st and 2nd Defendants. However, I do not consider that the 1st and 2nd Plaintiffs have shown that they cannot be adequately compensated therefore in damages. There is the suggestion that the property was sold at an undervaluation and that at the time of sale it was worth Shs. 140 million as opposed to the sale price of Shs. 128 million but no evidence had been put before this Court by way of valuation or otherwise in that connection. I am guided by the Judgement of **Madan JA** (as he then was) in the **Mureithi** case (supra):

"In order to elucidate the position further from my point of view, I would respectfully borrow the following words from the speech of Lord Diplock in *American Cynamid Co. v Ethicon Ltd* supra (1975) AC 396 at pp 406 and 408 with which I see no cause to differ:

'The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial …. If damages in the matter recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage'."

18. As regards prayer 3 of the application, the 1st and 2nd Plaintiffs rely on **Order 39 Rule 1** of the *Civil Procedure Rules*. The said Rule reads:

"Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise –

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance."

19. In **Kabansora Millers Ltd v New Salama Wholesalers Ltd** (supra) the Court determined that:

> **"The arrest was in execution of a valid court warrant issued in civil proceedings for the purpose of bringing him to Court to show cause why he shouldn't furnish security for his appearance at the trial."**

This Court had, on a previous occasion, and more particularly on 27th September, 2012 issued orders for the arrest of the 1st and 2nd Defendants, and issued the warrants of arrest on 1st October, 2012. On their part, the 1st and 2nd Plaintiffs allege that the 1st and 2nd Defendants are a flight risk, having disposed of the property of the 3rd Plaintiff without any intent to repay them for the losses incurred from their actions. The 1st and 2nd Defendants however, contend that *Article 51* of the *Constitution* provides them a right to fundamental freedoms under the Bill of Rights. They attest that the provisions of **Order 39 Rule 1** are unconstitutional and the authority of **Kabansora Millers Ltd v New Salama Wholesalers Ltd** (supra) is now obsolete after the enactment of the Constitution 2010.

20. To my knowledge, no amendments have been made to the Rules or, in particular, **Order 39 Rule 1** of the *Civil Procedure Act* or any ruling delivered by this Court regarding the said provision as unconstitutional. The said Rule is still operative, and falls within the jurisdiction of this Court to enforce it, as it deems fit in the circumstances. The 1st and 2nd Defendants have submitted that they have surrendered their passports with this Court. They further contend that the application of **Order 39 Rule 1** is with regard to immovable property. This is as provided under **Section 12 (a) – (d)** of the Civil Procedure Act with regard to institution of suits. There is however, the contention by the 1st and 2nd Plaintiffs against the Defendants as to the true ownership of the property. The 4th – 6th Defendants claim to be purchasers of the property free of encumbrance and for value and without prior knowledge of any previous disputes between the 1st and 2nd Plaintiffs and the 1st and 2nd Defendants. These are all matters that will come out at the trial of this suit in due course. For now, the 1st and 2nd Defendants have submitted that the previous arrest warrant was issued by the Court relying on misleading and false information that the 1st and 2nd Defendants had obtained permanent residency status in the United States of America. To my mind, the 1st and 2nd Defendants have adequately explained their position in that regard. The 1st Defendant clearly states at paragraphs 12 and 13 of his Replying Affidavit dated 8th October 2012 that he had never applied for nor been granted a Green Card or permanent residency by the Government of the United States of America. He admits having travelled there to visit his sister-in-law and her family residing in Boston as well as his brother who resides in Ohio. This position is similarly adopted by the 2nd Defendant at paragraphs 11 to 14 of her Replying Affidavit bearing even date therewith. Indeed at paragraph 16 of her said Replying Affidavit, the 2nd Defendant specifically states that she, her husband and her family do not desire to "flee the country".

21. As regards the furnishing of security by the 1st and 2nd Defendants I would bear in mind the **Court of Appeal's** finding in the case of **Potgeiter v Stumberg & Anor (1967) EA 609** as per **Duffus JA** (as he then was) as follows:

"In so far as this is concerned, counsel for the respondent quite rightly conceded that the High Court had an inherent jurisdiction to set aside any ex parte order improperly made. He has also in my view quite rightly conceded the fact that in the application to set aside the ex parte order the High Court should only consider the evidence which was before the judge of the High Court at the time that the order was made and not consider any subsequent evidence which arose. On this question therefore the matter is simple. The plaintiffs/ Respondents founded their application for the ex-parte order on the two affidavits filed. It is clear in my view that the provisions of O. 38 (now O. 39) **only apply to a defendant who is about to leave Kenya or is about to remove any of his property out of jurisdiction of the court, that is, out of Kenya, and in neither the affidavits filed in support of the application for the ex-parte order are there any facts to show that the defendant was about to leave Kenya or for that matter to take any of his property outside Kenya."**

In this suit, the Order for arrest of the 1st and 2nd Defendants was made by my learned brother Mabeya J. on 27th September 2012 when all he had before him was the Supporting Affidavit of the 2nd Plaintiff sworn on even date. Having issued the Orders for arrest, my learned brother lifted the same on 3rd October 2012 when the 1st and 2nd Defendants deposited their 3 passports in Court. The Judge then directed that the issue of security would be considered at a later date. Now that this Court has had the opportunity of perusing the Replying Affidavits of the 1st and 2nd Defendants as above, I consider that there is no real fear of them leaving the jurisdiction of this Court and, as a consequence, I make no order as to the provision of security by them.

22. As a result, I find that the 1st and 2nd Plaintiffs have failed to satisfy this Court in relation to the 3 principles laid down in the **Giella v Cassman Brown** case as above. Accordingly, I dismiss the Notice of Motion dated 27th September 2012 in its entirety with costs to the Defendants.

DATED and delivered at Nairobi this 28th day of January, 2014.

J. B. HAVELOCK

JUDGE