



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 86 OF 2013

GODFREY OTIENO ONYANGO

(Suing on behalf of RONALD ONYANGO)1ST PLAINTIFF

DONALD RABALA.....2ND PLAINTIFF

HARVEY AGUMBAH.....3RD PLAINTIFF

VERSUS

CRISPIN ODUOR OBUDO.....1ST DEFENDANT

GEORGE OMONDI KAGUMBA.....2ND DEFENDANT

GRIFFIN LEGAL KENYA LIMITED.....3RD DEFENDANT

GRIFFIN CLAIMS MANAGEMENT LIMITED.....4TH DEFENDANT

GRIFFIN LEGAL UK.....5TH DEFENDANT

M/s TADEM LAW t/a XJA LIMITED.....6TH DEFENDANT

GRIFFIN LEGAL CLAIMS LIMITED.....7TH DEFENDANT

CRIS BOYD LIMITED.....8TH DEFENDANT

FASHION HEAVEN LIMITED.....9TH DEFENDANT

RULING

1. There are three applications before this Court for consideration as follows:-

1. *Notice of Motion dated 8th March 2013 and filed in Court on 11th March 2013 by the Plaintiffs/Applicant.*
2. *Amended Notice of Motion dated 8th April 2013 filed by the Plaintiffs.*

3. ***Notice of Motion and Notice of Preliminary Objection dated 23rd April 2013, filed by the 1st and 2nd Defendants.***
2. The above applications were dispensed with by way of written submissions as follows:-
 1. ***The 1st Plaintiff's submissions dated 2nd July 2013 and filed in Court on 5th July 2013.***
 2. ***The 2nd Plaintiff's submission dated 12th July 2013 and filed in Court on even date.***
 3. ***The 3rd Plaintiff's submissions dated 11th September 2013 and filed in Court on even date.***
 4. ***The 1st and 2nd Defendants' submissions dated 20th June 2013 and filed in Court on 24th June 2013.***
 5. ***The 3rd, 4th and 5th Defendants' submissions dated 10th September 2013 and filed in Court on 11th September 2013.***
 6. ***The 6th Defendant's submissions dated 5th July 2013 and filed in Court on even date.***

The Preliminary Objection

3. A preliminary objection, as was held in the case of **MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A. 696.**

“... is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

4. It was also held in the same **MUKHISA** case (supra) that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued, may dispose of the suit. For the aforesaid reasons, I find it appropriate in this matter to begin with the Notice of Preliminary Objection filed by the 1st and 2nd Defendants on **23rd April 2013.**
5. It is the Defendants' contention that this Court has no jurisdiction to try the matter against them where both the cause of action wholly arose in the UK and the Defendants reside there. It is further the Defendants' contention that the suit as framed offends the mandatory provisions of Orders 1 and 2 of the **Civil Procedure Rules** and that the suit is contrary to public policy and the tenets of the practice of law in Kenya.
6. In opposition to the Preliminary Objection the 2nd Plaintiff filed a Replying affidavit on **30th April 2013.** It is the 2nd Plaintiff's contention that the said P.O is misconceived and an abuse of the Court Process. He avers that the P.O only raises one point of law, which is jurisdiction. It is his position that this Court is properly seized of the suit for various reasons as stated in paragraph 5 (a) to (i) of his affidavit. Among the said reasons are that all the Plaintiffs and the 2nd Defendant are domiciled in Kenya and that the 3rd, 4th and the intended 7th Defendant (s) are companies registered in Kenya and carrying on their business in Kenya.
7. It is further averred that though the 5th and intended 9th Defendant(s) are registered in the UK they are run and directed by the 1st and 2nd Defendants. It is also averred by the 2nd Plaintiff that the cause of action partly arose in Kenya and partly in the UK.

JURISDICTION

8. The jurisdiction of filing a suit is not limited to where the Defendants domicile. The place where the cause of action arose is also a consideration as envisaged under **section 15** of the **Civil Procedure Act.** It is not disputed that the 5th, 6th, and intended 7th, 8th, and 9th Defendants are all companies registered in the UK. However, what the Plaintiffs herein are seeking to enforce are agreements that were apparently entered into in the Country (Kenya). It is also not a necessity that a Plaintiff files a suit where the Defendant resides. As I have stated earlier, where the cause of

- action arose whether or not partly is also a consideration in determining the jurisdiction where to file the suit.
9. In the current case it is also obvious that the 6th Defendant has legal representation in the Country. In that case, I do not foresee any inconvenience that will be suffered by the 6th Defendant. There is no indication that the said Defendant will have to call a certain number of witnesses, if any, in the said matter and thereby incurring prohibitive costs.
 10. The other point of law raised by the Defendants is that the suit as framed offends the mandatory provisions of Orders 1 and 2 of the Civil Procedure rules. The said Orders deal with parties to suits and pleadings generally. The only submission put forth by the Plaintiff which I can relate with the current point of law is that it was plain wrong for the Plaintiffs to have sued the 1st and 2nd Defendants in their personal capacity for alleged liability of companies in which they are directors. I will deal with this issue shortly.
 11. The third and last point of law raised by the Defendants is that the suit is contrary to public policy and the tenets of the practice of law in Kenya. Other than submitting that “referral of clients” is unlawful in Kenya, the Defendants did not expound on this point of law. The Plaintiffs have disputed the same and therefore the facts as regards this point need to be ascertained. In that case the same cannot qualify for a preliminary objection as it has to be argued.
 12. In my view, the 1st and 2nd Defendants raised other points of law, though not directly in the Notice of Preliminary Objection that can also be appropriately dealt with at this stage.
 13. It is submitted for the Defendants that it is against the legal principles of pleadings for the Plaintiffs to sue the 1st and 2nd Defendants personally for acts they complain they did as directors of limited companies.
 14. In the Complaint, I have noted that the 1st and 2nd Defendants are sued in their capacities as directors for mismanagement of the 3rd and 4th Defendants. However in the said Complaint the 1st and 2nd Defendants have also been sued for breach of trust, breach of contract, fraud and dishonesty among others. From the said paragraphs it is not mentioned that they have been sued in their capacity as directors. It seems to me that some of the acts the 1st and 2nd Defendants are accused of were not done in their capacity as directors but as individuals.
 15. At this stage I am hesitant to strike out the 1st and 2nd Defendants from the pleadings. In any case the Defendants’ attendance or participation in the suit is inevitable as apparently they are directors to some of the companies sued herein. Therefore, I do not see what prejudice they will suffer that cannot be compensated by way of costs.
 16. In relation to summons to enter appearance, there are copies of the same on record issued by this Court on **11th September 2013** with regard to the 1st Plaintiff. It seems that the aforesaid summons were taken out in reaction to the 1st and 2nd Defendants’ contention that the Plaintiffs had failed to pursue and serve summons to enter appearance. It was the Defendants’ position that for the aforesaid reasons the suit was to abate.
 17. However, having established that at the time of raising the said contention there were no summons on record or rather none had been issued then the Defendants’ argument that the suit is to abate was premature. Further, **Order 5 rule 2 (1)** of the **Civil Procedure Rules** provides that summons shall be valid in the first instance for 12 months beginning with the date of its issue. In that case the summons on record are still valid.
 18. I am of the view that no prejudice will be occasioned to the Defendants as they are already on record and therefore aware of the suit against them.
 19. In the upshot the 1st and 2nd Defendants’ Notice of Preliminary Objection filed on **23rd April 2013** is hereby dismissed with costs to the Plaintiffs.
 20. I now turn to the applications herein.

21. The first application is the Plaintiffs' Notice of Motion dated **8th March 2013** and filed in Court on **11th March 2013**. The application is expressed to be brought under Rule 40 of the Civil Procedure rules and is seeking for several orders against the Defendants jointly and severally. The following are the orders pending determination:-

1.
2.
3. *That the 6th Defendant be restrained by an interlocutory order of injunction from transferring monies to the accounts of the 1st, 2nd, 3rd, 4th and 5th Defendants and that any money/monies due to and owing and payable to the said Defendants be deposited in the Court in the first Place pending hearing of the application.*
4. *That an order of interlocutory injunction do issue freezing and or preventing the 1st, 2nd, 3rd, 4th and 5th Defendants from transferring, getting rid of and in anyway transferring any property to third parties and that they do forthwith reveal the whereabouts of any property or money that they may have already disposed to date.*
5. *That an order of specific performance do issue as against 1st and 2nd Defendants to perform their obligation in terms of the agreement in respect of the 25% share of proceeds in respect of the back end of the Mau Mau referral claims between the parties as previously agreed in writing.*
6. *That an interlocutory order of injunction do issue barring and restraining the 1st, 2nd, 3rd, 4th and 5th Defendants from operating/withdrawing funds and/or using any money held for and on behalf of the 3rd and 4th Defendants or any amounts which may be deposited in the Court without the applicants consent.*
7. *That the 1st, 2nd, 3rd, 4th and 5th Defendants be compelled by a mandatory order of injunction directing them to hand over and/or release forthwith to the applicants the original share transfer forms in favour of the applicants duly completed on the part of the Defendants and for the applicants final submission to the registrar of companies for purposes of transfer of 400 shares to the applicant.*

22. The application is supported by the affidavits of the 1st Plaintiff suing in his capacity as the agent of Ronald Ochieng Onyango and that of the 2nd Plaintiff both sworn on **8th March 2013**. It is also supported by the undated affidavit of the 3rd Plaintiff filed in Court on **11th March 2013**.

23. The facts of the case leading to this application are lengthy. However, I will give a brief account of the same as I understand it. It is averred by the 1st Plaintiff that on or about **26th December 2011** his principal became a shareholder of the 3rd Defendant by virtue of a Trust Deed executed by the 1st Defendant and his principal. The 3rd Defendant was to, *inter alia*, collect and refer Mau Mau claims from Kenya to various solicitors within the UK with the 5th Defendant.

24. The 1st Plaintiff accuses the 1st and 2nd Defendants of negligent mismanagement of the 3rd and 4th Defendant Companies, which he states has seriously prejudiced his interests in the said Companies.

25. The 2nd Plaintiff avers that he had a consultancy agreement with the 3rd and 5th Defendants effective from **22/09/2011** that was to run for one year. As per the Consultancy agreement, he was to be paid **Kshs. 1,000,000/=** for his services annually. He however admits that he was never given any signed copies of this agreement for his records.

26. Nevertheless, it is the 2nd Plaintiff's assertion that he continued to provide consultancy services to

- the Defendant companies despite the fact that he had only received a payment of approximately **Kshs. 1,500,000/=** for work done. The 3rd Plaintiff avers that the Defendant has not paid his dues up to date.
27. It is averred by the 3rd Plaintiff (now deceased) that on or around **1st December 2011** he was engaged as a consultant by the 3rd Defendant. To this end they duly executed a written agreement on the same date on the basis of terms and conditions appearing therein. In the said agreement the 3rd Plaintiff was placed on a monthly retainer of **Kshs. 225,000/=** with effect from the date of the said contract.
28. It was the 3rd Plaintiff's position that despite having fulfilled his part of the contract, the 3rd Defendant had not paid the agreed sum in monthly retainer as it was obligated to, under the consultancy agreement. What had been paid was a sum not more than **Kshs. 450,000**, which the 3rd Plaintiff described as out of pocket expenses and partial payment towards the retainer.
29. The Plaintiffs are apprehensive that there may be in place massive instances of fraud and or mismanagement of the 3rd, 4th and 5th Defendants' business ventures in which they have a financial interest and hence the need for intervention by the Court as a matter of urgency.
30. In opposition to the said application, the 1st Defendant filed a Replying affidavit on his behalf and on behalf of the 2nd Defendant sworn on **15th March 2013**. He points out that the Plaintiffs in spite of acknowledging that the 1st and 2nd Defendants are directors of the 3rd, 4th and 5th defendant Companies have chosen to sue them personally yet a director of a limited liability Company cannot be held personally liable unless the Plaintiff first applies to lift the corporate veil.
31. The deponent avers that the 1st Plaintiff has never become a shareholder of the 3rd Defendant and that the trust deed was an improper document as it sought to bind the 3rd Defendant without a resolution of the board. He further avers that the transfer of shares was never effected for want of consideration.
32. The deponent referred to the Consultancy agreement mentioned by the 2nd Plaintiff in his supporting affidavit and attached therein and noted that the same was not signed. He further noted that the Non-disclosure agreement referred to by the 2nd Plaintiff was neither signed by the 2nd Defendant nor himself.
33. In response to the affidavit sworn by the 3rd Plaintiff, it was the deponent's averment that in the said affidavit the deponent addressed grievances he had against the 3rd and 5th Defendants and not against the 2nd Defendant and himself.
34. It is the 1st and 2nd Defendants' case that from the Plaintiffs' pleadings, the purported claim is not against them but against companies in which they are directors.

AMENDED NOTICE OF MOTION DATED 8TH APRIL 2013

35. The second application is the Amended Notice of Motion dated **8th April 2013** and filed in Court on **16th April 2013**. It is taken out under **Order 8 rules 1, 2, 11, 15** and **Order 13 rule 2** of the **Civil Procedure Rules**.
36. The Application is seeking for the following prayers:-
1.
 2. ***That Griffin Legal Claims Ltd, Cris Boyd Ltd, Fashion Heaven Ltd be enjoined in the suit as the 7th, 8th and 9th defendants and pending hearing and determination of the application dated***

8/3/2013 the said companies be compelled by this Honourable Court to deposit into Court Kshs. 6 million each as security for their appearance before Court.

2A. That the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 9th defendants be compelled to deposit further sums of Kshs. 91,000,000/= or any amount commensurate to the monies paid and received by the Respondents as a security for their appearance before this Court in view of the fact that Kshs. 91,000,000/= worth has been paid upfront to the defendants by the 6th Defendant firm of solicitors.

3. **That if prayer 2 herein above is allowed then the Draft amended Plaint be deemed as properly filed and served upon the parties.**
4. **That judgment be entered against the defendants jointly and severally for a claim of Kshs. 3 million by the 2nd Plaintiff.**
5. **That in the alternative and without prejudice to prayer 4 herein above, the Honourable Court be pleased to strike out the entire pleadings contained in the replying affidavit by the 1st and 2nd defendants and enter judgment as prayed in the Plaint.**
6.
7. **Costs of the application.**

37. The application is based on the grounds stated therein and is supported by the affidavit of the 1st Plaintiff sworn on **8th April 2013**. It is the Plaintiffs' case that as soon as they recorded a consent for the deposit of Kshs. 500,000/- in Court by the 1st and 2nd Defendants as a condition for their appearance, the said defendants embarked on transfer of the 3rd and 4th Defendants funds and assets into the 7th, 8th and 9th Defendants companies. It is further the Plaintiff's case that unless the Court compels the appearance of the 7th, 8th and 9th Defendant companies through their directors the Plaintiffs may get a shell company in the 3rd and 4th Defendants and their claims may be rendered nugatory or futile.

38. It is also the Plaintiffs' case that unless the Court restrains any transfer of monies, property or any payment whatsoever to the Companies to be enjoined herein the Plaintiffs' suit will be a nullity or an exercise in futility. It is the Plaintiffs' position that since certain amounts have already been transferred to the 7th, 8th and 9th Defendant Companies it is only fair that each of the said companies are compelled to deposit into Court Kshs. 6 million as security for their appearance.

39. In the supporting affidavit it is averred by the 1st Plaintiff that his principal received information that about 8000 Mau Mau caseload had been referred to the 6th Defendant on the basis of which the 6th Defendant should have paid the Defendants sterling pounds 175 as per the agreement between the parties. He further depones that the agreed sterling pounds 175 payable on referral of the cases for each claim if calculated on the basis of 8000 claims amounted to Kshs. 91 million. On that basis, it is the deponent's averment that the Defendants should deposit the said amount in Court to safeguard against losses by the 1st Plaintiff's principal.

40. The 1st and 2nd Defendants opposed the application vide their Grounds of Opposition dated **20th June 2013**. The 1st and 2nd Defendants confirm that they complied with the consent order entered into on **19th March 2013**. According to the Defendants, the Plaintiffs' application dated **8th April 2013** seeks to unilaterally alter the terms of the said consent and the substratum of the Plaintiffs' entire suit.

41. It is also the Defendants' position that prayer 2A of the said application is absurd as it introduces a new claim not pleaded in the Plaintiff's suit. It is further the Defendants' position that the suit as a whole is fatally defective as the Plaintiffs' have sued the 1st and 2nd Defendant in their personal capacity while simultaneously pleading that their claim is against a Company or Companies.

42. It is also averred for the Defendants that since the suit was filed on **8th March 2013** the Plaintiffs have failed to pursue and serve summons to enter appearance and hence the suit has technically abated. The Defendants referred to **Order 5 rule 1 (5) and (6)** of the **Civil Procedure Rules**. This issue has been dealt with above in the Preliminary Objection.

43. The 3rd Plaintiff is now deceased and as a result has been substituted by Josephine Onyango, suing on behalf of his estate. In this application, the 3rd Plaintiff is seeking for the main order that judgment be entered against the Defendants jointly and severally for a claim of **Kshs. 3,000,000/=**. The application is supported by the affidavit of the 3rd Plaintiff sworn on 11th March 2013.

NOTICE OF MOTION DATED 23RD APRIL 2013

44. The third application is the Notice of Motion dated **23rd April 2013** and filed on even date by the 1st and 2nd Defendants. It is expressed to be brought under **Order 26 rules 1 to 6** of the **Civil Procedure Rules**. The main order sought for in the said application is that the Plaintiffs give security of **Kshs. 50,000,000/=** for the 1st and 2nd Defendants' costs or other amounts to the satisfaction of the Court.

45. The application is based on the grounds stated therein and is supported by the affidavit of the 1st Defendant sworn on **23rd April 2013**.

46. It is deponed by the 1st Defendant that they have reason to believe that the Plaintiffs will be unable to pay the Defendants' costs in the likely event that the defendants are successful. This is in view of the fact that, according to the 1st and 2nd Defendants, the 1st Plaintiff's principal is a non resident within the jurisdiction of Kenya and has no representative or any known assets within Kenya or abroad. In addition, it is the 1st defendant's view that the 1st Plaintiff is an individual and his profession if any is unknown and his assets if any are unknown.

47. Further, it is the 1st Defendant's position that the 2nd Plaintiff operates a law firm and his assets if any are unknown and that the 3rd Plaintiff is deceased and his estate is yet to be administered therefore the value of the same is unknown. It is averred by the 1st defendant that it is prudent and fair for the Plaintiffs to deposit the proposed decretal sum of **Kshs. 91 million** in Court in the event that the Defendants get a judgment in their favour.

48. It is the Defendants' case that the plaintiffs be ordered to provide security in the sum of **Kshs. 50 million** and that pending the provision of such security the action herein be stayed.

49. The application is opposed vide the replying affidavit of the 2nd Plaintiff sworn on **12th June 2013** and filed on even date. It is averred by the 2nd Plaintiff that the plaintiffs are good citizens of good standing, with successful careers; the 1st Plaintiff's principal is working in the UK while the 2nd and 3rd Plaintiff (now deceased) are advocates of the High Court of Kenya. He further avers that the Plaintiffs have assets and the claim that they have no known assets is unfounded. It is also averred that the fact that the 3rd Plaintiff is deceased doesn't mean that his estate cannot foot legal costs, if any, that will be incurred.

50. It is the Plaintiffs' case that the Respondents have not raised any substantive reasons for the Plaintiff to deposit the said amount in Court as security. It is further the Plaintiffs' case that the stay of proceedings as prayed for by the Defendants should not be granted since it will only lead to delay in prosecution of the suit. It is therefore the Plaintiffs' prayer that the Application dated **23rd April 2013** should be dismissed with Costs.

ANALYSIS

51. It is evident that the applications herein have intricate issues. However the general view of the Court as regards the matter is as follows. The agreements on record that the Plaintiffs seek to rely on show that there were intentions of the 1st Plaintiff to be a shareholder of the 3rd Defendant and the process to effect the same was ongoing. However, it seems the said process did not come to its fruition hence the current wrangles between the parties.

52. I have noted that some of the documents the 1st Plaintiff is relying on like the Trust Deed and the Transfer of shares form have not been registered with the relevant authorities. This is apparent on the face of the said documents which have neither been stamped nor executed as appropriate. It is obvious that the Defendants have capitalized on the aforesaid observations. The Defendants' argument is that the same were not executed for want of consideration. However there is no tangible evidence to this effect as the same is disputed by the Plaintiffs. As for the Consultancy agreements, the Defendants aver that they did not execute the same without giving substantial reasons for failure to do so.

53. Nevertheless, as I have earlier stated, the matters at hand are intricate. I will deal with each application.

THE FIRST APPLICATION

54. The first application is the Plaintiffs' Notice of Motion dated **8th March 2013**. I will deal with one prayer at a time. At this juncture, I would like to mention prayer 2 of the said application which although spent, the Plaintiffs have raised some issues concerning it. There was a previous order by the Court requiring the 1st and 2nd Defendants to deposit Kshs. 15 million or their passports in Court as security for appearance. However on **19th March 2013**, the parties by consent settled the issue of security for appearance on the terms that the Defendants would within 14 days deposit **Kshs. 500,000/=** in Court which the Defendants did. There is no application to set aside or vary the said consent and therefore the position as regards security for appearance by the said defendants is as per the said recorded Consent.

55. In prayer 3 of the said application, the Plaintiffs are seeking injunction orders against the 6th Defendant to restrain them from transferring monies to the accounts of the 1st, 2nd, 3rd, 4th and 5th Defendants and that any money/monies due to and owing and payable to the said Defendants be deposited in the Court in the first Place pending hearing of the application.

56. It is submitted for the 6th Defendant that they are not privy to the agreements the Plaintiffs are seeking to enforce. It is the 6th Defendant's case that it is only persons who execute contracts who can subsequently derive rights and obligations thereunder. It is further submitted for the 6th defendant that it has been improperly joined in the suit as a Defendant for the foregoing reasons.

57. It was the Plaintiffs' case (2nd Plaintiff's Replying affidavit sworn on **29th April 2013**) that the 6th Defendant was added in the suit purely for purposes of enforcing any orders in favour of the Plaintiffs and that clients had been referred to them by the 3rd Defendant. This is not disputed.

58. **Order 1, rule 3** of the **Civil Procedure Rules** provides that:-

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise." *Emphasis supplied*

In essence the joining of a Defendant to a suit is not limited to the said Defendant being a party to a contract. The cause of action can arise from acts or transactions related to the said contract. In this case the Plaintiff decided to join the 6th Defendant as it was their case that the 6th Defendant was handling legal and financial components of their alleged agreements with the Defendants.

59. In view of the above, I am not convinced that the 6th Defendant has been improperly enjoined to this suit. In any case **Order 1 rule 9** of the **Civil Procedure Rules** provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and that the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. To my mind, no prejudice will be occasioned to the 6th Defendant herein by a being a party to this suit.

60. Now to the substance, this is whether the Court can grant an order restraining the 6th Defendant from transferring monies to the accounts of the 1st, 2nd, 3rd, 4th and 5th Defendants.

61. It is not in dispute that there are contested issues in the suit as between the parties that are to be determined at full trial. For purposes of preserving status quo and to avoid complicating matters further by subsequent applications it is prudent that the 6th Defendant be henceforth restrained from transferring monies to the said Defendants pending the hearing and determination of this suit. Any money/monies due to and owing and payable to the said Defendants, if any, be deposited in Court pending the hearing and determination of this suit.
62. Prayer 4 seeks an order of interlocutory injunction to issue freezing and or preventing the 1st, 2nd, 3rd, 4th and 5th Defendants from transferring any property to third parties and that they do forthwith reveal the whereabouts of any property or money that they may have already disposed to date. Essentially the orders being sought for herein are freezing and tracing of assets.
63. A Freezing order is an order of the court which is usually issued *in personam* restraining or enjoining a person from dissipating an asset directly or indirectly. In **Goode on Commercial Law, 4th Edition at Page 1287** the learned authors state thus :-

“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions....Before granting a freezing injunction the court will usually require to be satisfied that:-

- a. ***The claimant has ‘a good arguable case’ based on a pre-existing cause of action;***
 - b. ***The claim is one over which the court has jurisdiction;***
 - c. ***The defendant appears to have assets within the jurisdiction;***
 - d. ***There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and***
 - e. ***There is a balance of convenience in favour of granting the injunction;***
 - f. ***The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets”***
64. Tracing of assets which is an equitable remedy is available where there is a relationship of trust.
65. The Plaintiffs and particularly the 1st Plaintiff rely on the Trust Deed dated **26th December 2011** in asserting that there was a trust relationship between himself and the 1st Defendant. However, it is the 1st Defendant’s contention that the said trust deed was never executed for want of consideration and that the same was not registered.
66. From the court records it is apparent that the 1st Defendant appended his signature on the Trust Deed. This *prima facie* shows that the 1st Defendant intended to or at least was in the process of being a trustee for the 1st Plaintiff. The allegation that there was no consideration for the transfer of shares has not been proved. Furthermore, clause c of the said Trust deed indicates that consideration had already been paid. The Court cannot make any conclusive determinations at this point, but the fact that there is a trust deed signed by both parties is *prima facie* evidence that the 1st Plaintiff has an arguable case.
67. In this case the trust property would be the 400 shares held by the 1st Defendant in the 3rd Defendant Company as a trustee for the 1st Plaintiff. Therefore, the Court can only freeze assets in the 3rd Defendant’s company to the proportion of the 1st Plaintiff’s shareholding. From the Memorandum of association of the 3rd Defendant the shareholding is at a ratio of **50:50**.
68. However, there are no audited financial statements of the 3rd Defendant on record to determine to what extent or the exact amount to which the freezing order should apply. Therefore the freezing order will apply to all assets and monies of the said company.
69. There is no legal basis to freeze the assets of the 1st, 2nd, 4th and 5th Defendants’. The 1st Plaintiff’s claim of breach of trust is against the 1st Defendant for his interest in the 3rd Defendant. It is enough to make the said order against the 3rd Defendant.
70. With regard to the 4th and 5th Defendant Companies the best this Court can do is to order disclosure of their audited financial statements to ascertain the assets they hold and the transactions they are involved in.
71. In prayer 5, the Plaintiffs seek an order of specific performance against the 1st and 2nd Defendants.

- An order of specific performance is final in nature and cannot be granted at this interlocutory stage. There needs to be proof whether there were valid agreements in place between the parties herein. In any case the Plaintiffs have not produced sufficient evidence to demonstrate that the Defendants were bound to perform the agreements they intend to enforce.
72. Prayer 6 is an interlocutory order of injunction to issue barring and restraining the 1st, 2nd, 3rd, 4th and 5th Defendants from operating/withdrawing funds and/or using any money held for and on behalf of the 3rd and 4th Defendants or any amounts which may be deposited in the Court without the applicants consent.
73. What I can note with regard to this prayer is that the said order is not necessary as against the 3rd Defendant having given an order of freezing its assets and funds. In addition, to apply for such orders against the 1st and 2nd Defendants is superfluous as I believe the Defendant Companies herein are separate entities and their accounts should be handled in an independent manner. There is nothing to show that the 1st and 2nd Defendants are handling the said funds at an individual level.
74. As for the 4th and 5th Defendant Companies, I cannot find any reason to give such an order of injunction against them. It has not been established that the 5th Defendant holds any monies on behalf of the 3rd and 4th Defendants. The Plaintiffs have also not produced evidence at this stage to demonstrate their interests in the 4th Defendant. In the upshot prayer 6 is not allowed.
75. With regard to prayer No. 7, the Plaintiffs seek that the 1st, 2nd, 3rd, 4th and 5th Defendants be compelled by a mandatory order of injunction directing them to hand over and/or release forthwith to the applicants the original share transfer forms in favour of the applicants duly completed on the part of the Defendants and for the applicants final submission to the registrar of companies for purposes of transfer of 400 shares to the applicant.
76. This again is another order that is final in nature. It is trite law that mandatory injunctions can only be issued where the Plaintiff has established a clear and summary case. See **Kenya Breweries Ltd & 2 Others v Washington Okeyo (2002) eKLR** in which the Court of Appeal declared:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edition paragraph 948 which reads:

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application’.

77. In my view the current matter is not a straight forward one and in the circumstances a mandatory order cannot issue. Further, prayer 7 as framed by the Plaintiff is tantamount to an order for specific performance which I have earlier declined.

THE SECOND APPLICATION

78. The second application is the Plaintiffs’ Amended Notice of Motion dated **8th April 2013**. The prayers are as stated herein above and I shall deal with them as follows. In prayer 2 the Plaintiffs are seeking that the intended 7th, 8th and 9th defendants be enjoined in the suit and that pending hearing and determination of the application dated 8/3/2013 the said companies be compelled by this Honourable Court to deposit into Court Kshs. 6 million each as security for their appearance before Court.
79. There were no submissions as regards the enjoining of the said Defendants. However, in that application, it was the Plaintiffs’ case that the 1st and 2nd Defendants had embarked on

transferring the assets and funds of the 3rd and 4th Defendants into the 7th, 8th and 9th Defendants' Companies to defeat the Plaintiffs' claims. The aforesaid allegation was not barked by any evidence. To my mind the allegation of transfer of assets can be established by investigating the 3rd and 4th Defendants alone. The Plaintiff has not established how the joining of the intended parties to the suit will help their case.

80. In prayer 2A it is the Plaintiffs' prayer that the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 9th defendants be compelled to deposit further sums of **Kshs. 91,000,000/=** or any amount commensurate to the monies paid and received by the Respondents as a security for their appearance.
81. It is submitted for the Plaintiffs that other than the 2nd, 3rd and 4th Defendants the rest are foreigners or are domiciled in the UK. Therefore, according to the Plaintiffs execution may be impossible if they flee and that there is a high risk given the amounts claimed. As regards the 1st Defendant I have already mentioned in this ruling that a consent was entered into by both parties requiring the 1st and 2nd Defendant to deposit Kshs. 500,000/= to secure their attendance. The Defendants complied with the said requirement and I wish to rest the issue there.
82. That leaves us with the 4th and 5th Defendants. The question is whether they should be compelled to deposit further sums of **Kshs. 91,000,000/=** or any amount commensurate to the monies paid and received by the Defendants as a security for their appearance.
83. In my view, the amount of **Kshs. 91,000,000/=** as security for appearance is on the high side. It might be that the Plaintiffs wanted the said amount to be deposited by all the defendants jointly but they did not mention the same. That notwithstanding, the 4th Defendant is a company incorporated in Kenya and there is no evidence to the effect that they will abscond the jurisdiction of the Court. In that case I am not inclined to order them to pay security for appearance. The Plaintiffs are at liberty to apply for the same in future if circumstances change and security for appearance becomes necessary.
84. The 5th Defendant is a foreign Company and although no appearance has been entered by the said Company yet, there are submissions on record on its behalf. This is a sign or rather a step that shows that the 5th Defendant is willing and able to make appearance in this matter. Even then, the Plaintiffs have not given substantial reasons as to why the 5th Defendant should deposit such amounts of money as security for appearance in this Court. In short, I am not persuaded to grant the order of security for appearance.
85. The 4th prayer is that judgment be entered against the defendants jointly and severally for a claim of Kshs. 3 million by the 2nd Plaintiff. In its submissions, counsel for the 3rd Plaintiff clarified that judgment herein was in relation to the 3rd Plaintiff and not the 2nd Plaintiff. Counsel for the 3rd Plaintiff noted that the 3rd Plaintiff was deceased and had since been substituted by the widow for purposes of prosecuting the suit.
86. It was averred by the 3rd plaintiff in his affidavit sworn on 11th March 2013 that he entered into an agreement with the 3rd defendant dated 1st December 2011. On the basis of the said agreement the 3rd plaintiff was placed on a retainer of Kshs. 225,000/= with effect from the date of the agreement. The 3rd Plaintiff's case was that he provided consultancy services for the 3rd defendant but the defendant failed to meet its obligations under the agreement and only Kshs. 450,000/= was paid.
87. It is submitted for the 3rd Plaintiff that no pleadings have been delivered in contravention of the 3rd Plaintiff's case. According to Counsel, all the pleadings delivered in counteracting the claims by the plaintiffs have not specifically controverted the claim by the 3rd Plaintiff. I have noted that

in the submissions filed by the Defendants and in particular submissions filed on behalf of the 3rd Defendant, indeed nowhere has the 3rd Plaintiff's claim been controverted. Therefore, this would be a classic case for entering Judgment as against the 3rd Defendant.

88. However, I have not lost sight of the fact that there was an issue raised with regards to summons to enter appearance. It has been established that the summons were issued on **11th September 2013** the same date when the submissions on behalf of the 3rd Plaintiff was filed. There is no evidence that the Defendants herein including the 3rd Defendant have been served with summons. For that matter there is no Defence on record by the said 3rd Defendant to conclude that they have not controverted the claim against them by the 3rd Plaintiff. Further, there are no admissions on record by the 3rd Defendant as regards the 3rd Plaintiff's claim. In that case I am not persuaded to enter Judgment at this stage in favour of the 3rd Plaintiff. Even if I were to enter judgment, this Court has already issued an order to freeze the assets of the 3rd defendant until determination of the suit. Therefore such judgment may be moot for a while. Therefore, the 4th prayer is not allowed.

89. In summary, the Plaintiff's amended application is dismissed. The Costs of this application shall be in the cause.

THE THIRD APPLICATION

90. The third application is the 1st and 2nd Defendants' Notice of Motion dated **23rd April 2013**. The said application is seeking for orders that the Plaintiffs give security of **Kshs. 50,000,000/=** for the 1st and 2nd Defendants' costs or other amounts to the satisfaction of the Court.

91. It is plain that at this stage the Defendant's costs cannot be ascertained and therefore the figure to be granted as security for costs will depend on the claim in the suit and will also be at the discretion of the Court.

92. It is worthy to note that the application for security of costs herein is by two defendants out of six defendants. I cannot tell at this stage whether the other Defendants will make similar applications. For that reason I will be hesitant to grant the amount of **Kshs. 50 million** as security for costs in favour of the 1st and 2nd Defendants only.

93. Moving forward, the general rule is that security for costs is required for Plaintiffs residing out of jurisdiction. See **Shah vs Shah (1982) KLR 85 at page 98**. However, this does not mean that the Court may not refuse to grant such an order as long as the Court exercises its discretion judiciously. In the current case it is not in dispute that the 1st Plaintiff herein resides in the UK. The 1st Plaintiff has not filed an affidavit of means to dispel the Defendants' fears that he has no known assets.

94. All that was stated for the Plaintiffs was that they are citizens of good standing with successful careers and that they have assets. In my view this is not enough, the Plaintiffs should have done more, for instance they should have filed an affidavit of means. For the foregoing reasons I find the application by the 1st and 2nd Defendants for security of costs *bona fide*.

95. In order not to stifle the Plaintiffs' right of prosecuting the suit, I hereby order that the 2nd and 3rd Plaintiffs deposit Kshs. 300,000/= each while the 1st Plaintiff will deposit Kshs. 500,000/= as security for costs.

96. Therefore the 1st and 2nd Defendants' Notice of Motion dated **23rd April 2013** is allowed as varied herein above in terms of the amount of security. There shall be no order as to costs.

CONCLUSION

97. In a synopsis, the following are the orders granted by this Court in relation to the following applications:-

1. ***The Plaintiffs' Notice of Motion dated 8th March 2013 is allowed in the following terms ;***
 - a. ***That the 6th Defendant be and is henceforth restrained from transferring monies to the said 1st, 2nd, 3rd, 4th, and 5th Defendants pending the hearing and determination of this suit. Any money/monies due to and owing and payable to the said Defendants, if any, shall be deposited in Court pending the hearing and determination of this suit.***
 - b. ***That an order of interlocutory injunction do hereby issue freezing and or preventing the 3rd Defendant from transferring, getting rid of and in anyway transferring any property to third parties and that they do forthwith reveal the whereabouts of any property or money that they may have already disposed to date.***
 - c. ***That the 4th and 5th Defendants are hereby ordered to disclose their audited financial statements to ascertain the assets they hold and the transactions they are involved in.***
 - d. ***The costs for this application shall be in the cause.***
2. **The 1st and 2nd Defendants' Notice of Motion dated 23rd April 2013 is allowed in the following terms;**
 - a. ***That the 2nd and 3rd Plaintiffs deposit Kshs. 300,000/= each while the 1st Plaintiff will deposit Kshs. 500,000/= as security for costs before the suit herein is set down for hearing.***
 - b. ***No order as to costs.***
3. **The Plaintiffs' Amended Notice of Motion dated 8th April 2013 is hereby dismissed. The costs of the application shall be in the cause.**
4. **The 1st and 2nd Defendants' Notice of Preliminary Objection dated 23rd April 2013 is dismissed with costs in the cause.**

98. I further order and direct the parties to comply with Order 11 of the Civil Procedure Rules within 50 days from the date of this ruling. The Plaintiffs shall file and serve all their documents upon the Defendants within 21 days from today. Upon receipt of service the Defendants shall have 21 days to file and serve their documents. Timelines herein shall be of the essence and any defaulting party shall pay a Court fine of Kshs. 100,000/=.

DATED, READ AND DELIVERED AT NAIROBI

THIS 28TH DAY OF MARCH 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Chebi holding brief for Onyango for the 1st Plaintiff

Chebi holding brief for Haega for the 2nd Plaintiff

No appearance for the 3rd Plaintiff

M/s Ontiti for the 1st and 2nd Defendants

Deya holding brief for M/s Githuku for the 3rd, 4th and 5th Defendants

Deya for the 6th Defendant

Teresia – Court Clerk