REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

CIVIL CASE NO. 64 OF 2014

TASH GOEL VEDPRAKASH ……..…….PLAINTIFF

Versus

MOSES WAMBUA MUTUA …….....1ST DEFENDANT

RABBIT REPUBLIC LIMITED ……..…..2ND DEFENDANT

RULING

Derivative suit

[1] This application before me is for leave to continue with a derivative suit. It also carries two other significant prayers, namely; 1) an injunction to restrain the 1st Defendant from interfering with account NO ; and 2) the subject matter of the suit to be referred to arbitration. The application is dated 20th February, 2014.

Brief background of application

[2] At one time, the Plaintiff and the 1st Defendant were the only two shareholders and directors of the 2nd Defendant Company. They were also the only signatories to the 2nd Defendant's Account No.0630261686213 held at Equity Bank Limited, Kawangware Branch and Account No. 01148232304100 held at Cooperative Bank Limited, Kawangware Branch. The Plaintiff was the managing Director of the 2nd Defendant. The Plaintiff went to visit his parents in India and when he got back in January, 2014, he was informed by the 1st Defendant that he was no longer the Managing Director of the 2nd Defendant Company. Thereafter, negotiations ensued whereat the 1st Defendant was to buy the Plaintiff's shares but parties did not fasten an agreement.

[3] On 23rd January, 2014, the Plaintiff received a call from the branch manager Cooperative Bank, Kawangware Branch inquiring whether he had ceased being a director of the 2nd Defendant Company as well as a signatory to the 2nd Defendant's account. The call was precipitated by the fact that the 1st Defendant had presented to Co-operative Bank, Kawangware branch a CR 12

dated 21st January, 2014 with instruction to change the signatories of account No.01148232304100 held by the Bank.

[4] The Plaintiff instructed his advocates to carry out a search at the companies registry and obtained a CR12 dated 31st January, 2014 which indicated that the Plaintiff was still a director of the 2nd Defendant. The Plaintiff then wrote to Cooperative Bank Kawangware Branch and Equity Bank Kawangware Branch vide letters dated 25th January, 2 014 communicating the result of the search at the companies registry and asked the banks to immediately stop all transactions in the 2nd defendant's accounts. The Plaintiff's advocates also wrote to the said banks over the unilateral withdrawals by the 1st Defendant from the 2nd Defendant's bank accounts vide letters dated 29th January, 2014.

[5] But when the Plaintiff carried out a physical search at the companies' registry, he found out that annual returns had been filed showing that the Plaintiff had transferred his shares to one Mary Mutua. There was also a transfer of shares signed by the Plaintiff but that has been vigorously denied by the Plaintiff. These events and incidences were not authorized in accordance with the law and the Company's Memorandum and Article of Association, hence this suit and application.

The Plaintiff's case

[6] The Plaintiff filed written submissions. In those submissions, the Plaintiff contended that the purported transfer of shares stamped on 22nd January, 2014 and witnessed by an advocate known as Gregory Mutai was a forgery. The signature on the transfer instrument is not the Plaintiff's. The said purported transfer of shares was contrived to oust the Plaintiff from being a director of the 2nd defendant. That forgery is the crux of these proceedings, and all acts and/or omissions done pursuant to the forgery are ultra vires the objects of the 2nd defendant. It important to note that the said forged transfer has been disowned by the witnessing advocate as shown by a letter dated 25th February, 2014.

[7] According to the defendants, the issues for determination are:

1. **Whether the Plaintiff has locus standi to institute these proceedings**
2. **Whether the Plaintiff is entitled to orders sought in the application dated 20th February, 2014.**
3. **Whether this matter falls under the purview of arbitration.**
4. **Whether there is conflict of interest on representation of the Plaintiff by the firm of M/s Watako Kirui & Company advocates.**

[8] On the first issue on locus standi, the Plaintiff stated he has locus standi to institute these proceedings. The Plaintiff and the 1st defendant were the only two directors and shareholders of the 2nd Defendant as is evidence from CR 12 dated 26th November, 2013. The 1st Defendant fraudulently changed the directorship and shareholding of the 2nd defendant as is evidenced in Form CR 12 dated 21st January, 2014 showing the directors and shareholders of the 2nd defendant are Mary Mukii Mutua and Moses Wambui Mutua and the accompanying forged transfer of shares. Strangely, a search at the companies registry ten days later shows the directors of the 2nd Defendant were Moses Wambua Mutual and Yash Goel Vedprakash. This is evident from CR 12 dated 31st January, 2014. Using the forged transfer of shares, several changes have been made to the 2nd Defendant's management officials, to wit, appointment of a new company secretary and director as evidenced by annexure MWM1. The resolution therein purports to appoint a new director namely Mary Mutua and a new company secretary; yet the newly appointed officials are the same and only ones who signed the same resolution appointing them.

[9] The Plaintiff quipped: In those circumstances, does the Plaintiff have locus standi to

institute these proceedings? The law that provides the answer to the Plaintiff's question was stated in the case of **DADAN v MANJI & 3 OTHERS (2004) 1 KLR**, as follows:

> ***"…if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit."***

[10] As a result of the fraudulent change of directorship and shareholding through a forged transfer of shares, the 1st Defendant has been siphoning the 2nd Defendant's bank account and passing ultra vires resolutions to validate his illegal actions. That is an illegality occasioned to the company and which the company cannot sue in its own name because it is now under the control of the 1st Defendant, the offending party. The Plaintiff being the only other legal director and/or shareholder of the 2nd defendant has the locus standi to commence derivatives action on behalf of the 2nd Defendant. The Plaintiff relied further on the decision in the case of **CMC HOLDINGS LIMITED (2012) eKLR** which spelt out the procedure for commencing derivative action to be;

> ***"….. in the circumstances, the long standing practice, and which I find reasonable, has always been that before a derivative action is filed, the applicant brings to court an ex parte application for leave, supported by a detailed affidavit so as to demonstrate that he has locus standi to institute such an action and that he has a prima facie case."***

[11] Such illegal actions by the 1st Defendant entitles the Plaintiff to apply to court for interim orders pending referral to arbitration. The Defendant claims he has established a prima facie case by the fact that as at 20th February, 2014 he was a director and shareholder of the 2nd Defendant and it is through forgery by the 1st Defendant and/or his associates that ousted him from the said position. The said forgery has affected the running of the 2nd Defendant in that soon after the said actions, the 2nd defendant's respondent's account No.01148232304100 held at Equity Bank Kawangware branch was emptied at lightning speed. The 1st Defendant has committed other wrongs on the company and has changed the registered office of the Company without proper resolution. The 'Tenancy Agreement' thereof is not duly executed by the 2nd Defendant as required by law nor is the signature of the landlord witnessed. The documents to indicate such change were never registered. These shady actions by the 2nd Defendant indicate that indeed there is a prima facie case to institute a derivative suit on behalf of the 2nd Defendant. It is, therefore, the Plaintiff's submission that he complied with the procedure for commencing a derivative action and has the locus standi.

[12] On the issue whether the Plaintiff is entitled to orders sought in the application dated 20th February, 2014, the Plaintiff submitted the following: contrary to the submissions by the Defendant, the orders are grantable. An injunction is an interim relief to restrain the 1st defendant from in any manner interfering with or dealing with Account No.0630261686213 held at Equity Bank Limited Kawangware Branch and Account No.01148232304100 held at Co-operative Bank Limited Kawangware Branch is merited. Such relief is permitted under Section 7 of the Arbitration Act 1995 which is one of the provision the application has been brought. The section provides that:-

> ***"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings an interim measure of protection and for the High Court to grant that measure…"***

[13] The Plaintiff stated that he actually intends this matter referred to arbitration as provided in Article 33 of the Articles of Association of Rabbit Republic Limited. He has proceeded under rule 2 of the Arbitration Rules 1997 which provides for the procedure of applying for relief under Section 7 of the Arbitration Act, i.e. Chamber Summons. He submitted that Order 51 of the Civil Procedure Rules (2010) does not, therefore, apply as claimed by the Defendant. On this he

referred the Court to the case of **FRESCO BUSHLANDS (K) LTD v AGRICULTURAL DEVELOPMENT CORPORATION (2014) eKLR** as follows;

> ***"The power to protect the suit property pending the hearing and determination of a dispute by arbitration is donated to the High court by the provisions of the Arbitration Act and not the Civil Procedure Act and Rules."***

[14] In any event, interim measure under section 7 of the Arbitration Act would be granted where there is danger that the property of the company may be dissipated. The 1st Defendant continues to act ultra vires the company and to siphon the company's money and unless the interim orders sought are granted, the subject matter of the arbitral proceedings is in danger of being wasted. On this, see the case of **SEVEN TWENTY INVESTMENTS LIMITED v SANDHOE INVESTMENT KENYA LIMITED [2013] eKLR** where the court stated:

> ***"Perusal of Section 7 of the Arbitration Act clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order for interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same, pending the hearing and determination of the arbitral reference."***

[15] The Plaintiff takes the view that this matter is within the purview of arbitration by virtue of Clause 33 of the 2nd Defendant's memorandum and Articles of Association which provides;

> ***"whenever any dispute or differences arises between the company on the one hand and any of the members… touching the true intent or construction or the incidents or consequences of these Articles or of the Act or touching anything then or thereabout done, executed, omitted or suffered in pursuance of these Articles or any claim on account of such breach or alleged beach, every such dispute or differences shall be referred to and determined by a sole arbitrator…."***

[16] The Plaintiff emphasized that the dispute before this honourable court concerns the true intent or construction or incidents or consequences of Article 21 of the 2nd Defendant's Articles of Association which governs vacancy and filling up of position of Directors of the 2nd defendant. Article 33 of the said Articles of Association, therefore, applies. He rebuffed the contention by the 1st Defendant that there are no "known or unknown" differences between the company, its directors and/or its shareholders capable of being referred to arbitration. He relied on the case of **ABDIRAHAMAN AFFI ABDALLA v OSUPUKO SERVICE STATION LTD & ANOTHER [2012] eKLR** where the court while interpreting a clause similar to clause 33 stated:

> ***"With respect, Mr. Chalang'as contention overlooks one fundamental principle of company law. That principle ordains that a company's articles of Association give rise to a contract not only between every member and the company, but also among the members of the company inter se. the logical conclusion to be drawn from that principle is that the members of the 1st plaintiff company are bound by that Company's Articles among themselves, and therefore Article 31 becomes an arbitrating agreement among all the members."***

[17] The only directors and shareholders of the 2nd defendant are the Plaintiff and the 1st defendant but the 1st Defendant fraudulently changed directorship and membership of the 2nd defendant. That is a dispute in itself between the 1st Defendant and the plaintiff and the 1st Defendant. The 1st Defendant has employed a narrow interpretation on Clause 33 of the Articles of Association which excludes this dispute from arbitration. Whether there is conflict of interest

on representation of the Plaintiff by the firm of M/S Watako Kirui & Company Advocates

[18] On the allegations by the 2nd Defendant's alleges that there is conflict of interest on the representation of the Plaintiff by the firm of M/s Watako Kirui and company advocates on grounds that the proprietor of the said firm, Mrs. Watako is the wife of Mr. Mulondo who previously acted for and on behalf of the 2nd defendant; the Plaintiff replied: that marital status is not a ground for objecting to representation of a person by an advocate. Conflict of interest arises only where there was advocate-client relationship with the advocate representing an opposing party and the said advocate is in personal knowledge of information which can be used to the detriment of that person. The defendants quoted the case of **CHARLES GITONGA KARIUKI v AKUISI FARMERS CO. LTD [2007] eKLR** as was stated in the case of **UHURU HIGHWAY DEVELOPMENT LIMITED VS CENTRAL BANK OF KENYA [2002] 2 E.A at page 661.**

[19] The 1st Defendant has not brought any evidence to show that the firm of M/S Watako Kirui &Company advocates has ever acted for any of the parties herein previously in any matter as to be privy to confidential information which could be used to the detriment of the 1st Defendant. Further, the fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest.

[20] The Plaintiff concluded he has established that he was ousted as the director of the 2nd defendant as per the forged transfer of shared. Secondly, due to the said fraudulent transfer of shares the 2nd defendant accounts are now under the sole discretion of the 1st Defendant. A dispute has arisen under clause 33 of the 2nd defendant's Memorandum and Articles of Association which should be referred to arbitration. Further, the Plaintiff has established before this Honourable court a prima facie case and he should be granted interim orders pending arbitration.

Defendants' submissions

[21] The Defendant started off on a high note, that viability of an injunction application must meet the legal threshold set out in **GIELLA v CASSMAN BROWN & COMPANY [1973] EA 358.** The Defendants submitted the Plaintiff came to court with unclean hands for equitable remedies; there is not any known or unknown differences between the 2nd defendant, its directors and/or shareholders; the Plaintiff has never paid any consideration hence his appointment as a director to the said company, if any, lapsed; the Plaintiff has not proved the alleged forgeries of CR -12; in any event and without prejudice to the foregoing, the plaintiff is no longer a Director of the said company and as such he had no locus standi to institute these proceedings camouflaged as "derivative suit; further, the Injunctive order sought cannot be granted as against accounts held in the name of the company, in the interest of a party bend to frustrate the smooth running of its affairs; again, there is no alleged wrong doing on the part of the said company; the Banks upon which the injunctive orders are to be served, have not been enjoined to these proceedings and it will be impractical and/or untenable to imagine compliance of any such orders. The jurisprudence is clear, that the courts will not issue orders in vain or those that it has no teeth to execute.

[22] The Defendant does not dispute part of the monies withdrawn from the Equity Bank Account were used to pay for the new office space, where they effected service of the plaint and the application herein.

[23] The Defendants also identified issue similar to those identified by the Plaintiff and submitted on them as follows: The Plaintiff lacks locus standi to file this suit. The Defendants' reasons were that: One, at the time this application was filed in court, the plaintiff was neither a Director nor a shareholder of the 2nd defendant. He referred the court to Annexure "MWM-B" in the replying affidavit. Two, that as such, the plaintiff has no right of action against the defendant's ostensibly as a Director of the said company. The Defendants cited the case **MAATHAI v KENYA TIME MEDIA TRUST LTD [1989] KLR 267** where the Court of Appeal dismissed an

application for temporary injunction on the basis that the plaintiff had no locus standi to file the suit or the application.

[24] The Defendants proceeded to urge that even if it were to be assumed that the plaintiff was a Director of the 2nd Defendant Company, he would still have no locus standi. The Defendants took the view that this suit is couched as a derivative suit yet it is not. The threshold of bringing such action have not been met by the plaintiff because; 1) he is neither a minority (nor a majority) shareholder (or Director) of the 2nd Defendant; and 2) there is no alleged nor proved wrongs that have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions. No prima facie fraud has been shown or proved against the Defendants so as to amount to wrong doings to the company, in which case it would be for the company and not the individual shareholder to enforce rights and action vested in the company and to sue for the wrongs done to it. They relied on **HCCC NO. 83 OF 2012 DR. JANE WAMBUI WERU v OVERSEAS PRIVATE INV. CORP. & 3 OTHERS** where Hon. Justice. G.V. Odunga held as follows:

> ***"By derivative suits, the minority shareholders (s) feeling that wrongs have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, come to court as agents of the 'wronged' company to seek reliefs or relief for the company itself, all the shareholders including the wrong doers, and not for the personal benefit of the suing minority shareholders (s)….. it is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights and actions vested in the company to sue for the wrongs done to it and in the absence of illegality a shareholder cannot bring these proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters…. However if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such shareholder can bring an action by way of derivative action… mere irregularity in internal running of a company cannot be a basis for one to bring a derivative suit for such can be rectified by a vote/resolution at the company's meetings and if a shareholder contemplates using a personal claim of infringement of his rights then a derivative suit will not avail as the relief must be for the benefit of the company…''***

[25] The 1st Defendant justifies the use of company monies as having been for the benefit of the company. He denied claims of siphoning money from the company's account at M/S Equity Bank Limited. He supported his said position by filing annexure "MWM-H" with a detailed account of how the monies were withdrawn from the said account and used for the benefit of the company. For all those reasons, the 1st Defendant is of the opinion that this suit is not a derivative suit and further that the Applicant has no locus standi to institute the same. What he seems to be alleging, but not proved, are his personal problems.

[26] According to the Defendants, the suit and the application herein are fatally and incurably defective and should be dismissed in limine for:

> (i) The affidavit in support in incurably defective in that it offends the proviso to order 19 Rule 3 Civil procedure Rules, 2010 by failing to distinguish which matters are deposed to on information and belief, from those which are from personal knowledge.
>
> (ii) The application seeks for omnibus reliefs which require different jurisdictions. For example, leave to commence a derivative suit, assuming it was applicable herein, which is denied, cannot be sought within the same application with the other prayers sought therein. See ***HCCC NO. 83 OF 2012*** **DR. JANE WAMBUI WERU v OVERSEAS PRIVATE INV. CORP & 3 OTHERS**

(supra) the court held:

> ***"…. The permission or leave to continue with a derivative action is sought after the suit has been instituted…. The Plaint plus the application for permission to continue with derivative action must be served before the application is heard and the application had to be heard inter partes because the Plaintiff has to demonstrate a prima facie case by the company against the wrong-doing directors and that the plaintiff should bring the case and before permission, the proceedings are virtually stalled."***

(iii) The application as drawn seeks final orders and as such cannot be granted; prayer 1, 2 and 3 having been spent and prayer 4 being inapplicable, it is clear that prayer 5 thereof, which as drawn is a final order, that it cannot be granted.

(iv) The application offends the mandatory provisions of Order 51 Rules 1 and 13(2) of the Civil procedure Rules, 2010.

[27] The Defendants have argued that there is conflict of interest on the representation of the plaintiff by the firm of M/S Watako Kirui & Company Advocates on the following grounds;

a. The proprietor of the said firm, Mrs. Watako is the wife of Mr. Vincent Watako Mulondo Advocate who previously and personally acted for and on behalf of the 2nd defendant, M/S Rabbit Republic Ltd while at M/S Mulondo Oundo Muriuki Advocates.
b. That the said Mulondo Advocate has had and still is in possession of all the documents pertaining to and about the company which he has refused to hand over to the defendants for use in these proceedings despite several reminders and requests. The defendants will in due course apply to compel release of the same.
c. That technically speaking, this matter is being handled by the said firm since I am aware that the advocate now prosecuting this case, Ms Mary Osoro is an associate Advocate in the firm of M/S Mulondo Oundo Muriuki Advocates who is also privy to the documents held on behalf of the 2nd defendant. See the plaintiffs annexures to the application to wit, "YGV2", "YGV3"."YGV6a", "YGV6b", "YGV7" and "YGV7" confirm this fact.

[28] The Defendants urge the court to find and hold that Mr. Mulondo has a conflict of interest herein and based their submission on **ELD HCCC NO 22 OF 2006 SIMBA HILLS FARM LIMITED v SULTAN HASHAM LALJI & 5 OTHERS** where the court found that:-

> ***"…it is trite that counsel should never enter into the arena by adducing evidence in matter in which he has acted for their party for that would amount to conflict of interest, and it is for that reason that have I taken time to consider the events leading to this suit. I am of the view that Mr. Birech has a lot of information regarding the alleged transactions."***

ii. ***Whether the Plaintiff has proved any forgeries as against the 1st defendant herein***

[29] They urged that the Plaintiff has not proved that the documents produced by the Defendant are forgeries and has failed to give the particulars of the said forgery as required by law. See **AAT HOLDINGS LIMITED v DIAMOND SHIELDS INTERNATIONAL LTD (2014) eKLR** where it was held:

> ***"That requirement of the law is fashioned that way because an allegation of forgery is serious and imputes a criminal conduct on the part of the plaintiff; it must, therefore, be pleaded with full particulars and details as to bring to the attention of the plaintiff of the kind of defence his case is faced with. Equally, that information is necessary for purposes of filing subsequent pleadings by the Plaintiff, particularly reply to defence.***

In the absence of such particularities of the alleged defence, the proposed defence of forgery is a mere sham and is only contrived to pass for a triable issue."

[30] Despite allegations by the plaintiff that the signatures appearing on annexures YGV-1(a) (b) and (c) is not his, there is absolutely no proof of forgery. The high standard of proof for forgery has not been attained. See the case of **R.G Patel Vs lalji Makani [1957] E.A 314**, which sets out the standard of proof as follows:

"Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

See the Court of appeal case of **ZAKAYO MICHUBU KIBUANGE v LYDIA KAGUNA JAPHETH & 2 OTHERS (2014) eKLR** where the court held:-

"Forgery is a very serious allegation to make and more so, if it involves one's signature on a disputed document. One would have expected that having made such serious allegation and accusation, the appellant would have done the right thing and immediately took remedial steps such as reporting the alleged forgery to the relevant authorities for appropriate action or intervention. Instead what does he do? He sits tight and cheekily invites the 1st respondent to prove that his signature was not a forgery by invoking the assistance of document examiners. It is a cardinal principle of law that he who alleges must prove. The appellant having failed to undertake the necessary inquiry as to the forgery or not of his signature, the allegation was merely self-serving and without any basis at all."

[31] The Defendant avers that the documents for transfer of shares are genuine and were duly executed by the Plaintiff. The allegations of forgery are merely self-servicing and without any basis at all. See also:

1. **RAEL MWONJIA GICHUNGE & ANOTHER v FAUD MOHAMMED ABDULLA [2014] eKLR**
2. **JENNIFER NYAMBURA KAMAU v HUMPHREY MBAKA NANDI [2013] eKLR**

[32] The Defendants argued that the 2nd Defendant has been wrongly enjoined in these proceedings as no reliefs has been sought against it save for costs. Further, no derivative action is tenable herein hence the 2nd defendant should been struck off these proceedings. Again, no cause of action has been proved against the 1st defendant and his name too should be expunged from these proceedings. Prayer 3 of the application is untenable as it seeks to be served upon entities that are not enjoined to the proceedings i.e. Equity Bank Limited. Moreover, change of directorship was properly effected and is supported by official document from the Registrar of companies. The plaintiff has disputed some but he has not joined the Registrar of Companies to these proceedings- that is a fatal error and/or omission and both the application and the suit must fail. In **RE PRIVATE BOARDING HOUSE LIMITED 91967) E.A 143**, the court held that in applications affecting records of Registrar of Companies, the Registrar must be served with notice of, and has a right to appear and be heard on the proceedings. No such notice has been served and neither has the Plaintiff made any attempt to enjoin the said Registrar. On that basis, the court should dismiss the application together with the suit with the costs to the defendants. See the case of **COMMISSIONER OF LANDS v HUSSEIN (1968) E.A 586.**

[33] The Defendants submitted that the prayer for referral of the matter to arbitration is untenable and misguided. The wording of Clause 33 of the Memorandum and Articles of Association is clear that what is to be referred to an Arbitral Tribunal is "any dispute or differences between the company on the one hand and any of the members, their executors, administrators or assigns on the other hand. There are no any disputes between M/S RABBIT REPUBLIC LIMITED with any of the parties mentioned in clause 33. There are no orders save

for payment of costs which have been sought against the company. See the decision of the Court of Appeal in **UAP PROVINCIAL INSURANCE COMPANY LIMITED v MICHAEL JOHN BECKETT (2014) eKLR** that:-

> ***"It is clear from this provision that the inquiry that the court undertakes and is required to undertake under Section 6(1) (b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration….."***

[34] In sum, the Principles of granting a temporary injunction in the celebrated case of **GIELLA v CASSMAN BROWN (1973) EA 358** have not been met. See also the case of **MRAO LIMITED v FIRST AMERICAN BANK LIMITED & 2 OTHERS, CIVIL APPEAL NO. 39 OF 2002,** on what prima facie case is that:

> **"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**
>
> **"…. But as I earlier endevoured to show, and I cite ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**

[36] The 2nd defendant is an established institution quite capable of paying damages if the court were so to direct. The Plaintiff did not come to this court with clean hands and he is guilty of material non-disclosures. Accordingly, the balance of convenience tilts in favour of denying the injunction. Thus, the plaintiff should be denied an injunction. See **MUREITHI v CITY COUNCIL OF NAIROBI, COURT OF APPEAL AT NAIROBI CA NO. 5 OF 1979.**

COURT'S RENDITION

[37] The application dated 20th February, 2014 carries three significant prayers: 1) for a temporary injunction; 2) for leave to continue with derivative suit; and 3) for referral of the subject matter of this suit to arbitration. After considering the pleadings, the submissions of the parties and the law applicable, the following are the issues for determination:

i. **Whether the Plaintiff has locus standi to institute these proceedings;**
ii. **Whether there is conflict of interest on the part of the Advocates for the plaintiff;**
iii. **The effect of mis-joinder and non-jointer of parties**
iv. **Whether this matter falls under the purview of Arbitration; and**
v. **Whether the Plaintiff deserves an injunction as against the 1st defendant herein;**

[38] I see two of the issues I have formulated above to be of preliminary significance. The first one is on locus standi of the Plaintiff to file this suit, and it encapsulates the competence of this suit as a derivative suit. The other one issue is the possible conflict of interest on the part of the Plaintiff's advocates. The latter issue is simple and straight forward and I propose to deal with it first.

Alleged conflict of interest

[39] For conflict of interest to arise on the part of an advocate such that the advocate should be stopped from representing a party in a suit, there must be real danger that the said advocate possesses confidential information from the party complaining which information the advocate is likely to use or reveal to the detriment of the party complaining. Mush has been decided on this

matter and I need not multiply the numerous decisions thereto. I am content to cite **CHARLES GITONGA KARIUKI v AKUISI FARMERS CO. LTD [2007] eKLR** as was stated in the case of **UHURU HIGHWAY DEVELOPMENT LIMITED v CENTRAL BANK OF KENYA [2002] 2 E.A** at page 661 as follows:

> ***"An applicant, who is seeking the disqualification of an advocate from acting for the opposing party in the circumstances contemplated above, must establish the existence of such advocate-client relationship that could lead such an advocate to be in possession of confidential information which he could use to the detriment of the client seeking the disqualification of an advocate."***

[40] The Defendant avers that Mrs. Watako, the proprietor of the Watako Kirui & Co Advocates representing the Plaintiff firm, is the wife of Mr. Vincent Watako Mulondo Advocate who previously and personally acted for and on behalf of the 2nd defendant, M/S Rabbit Republic Ltd while at M/S Mulondo Oundo Muriuki Advocates. The said Mulondo Advocate is in possession of all the documents pertaining to and about the company which he has refused to hand over to the defendants for use in these proceedings despite several reminders and requests. The defendants, however, state that they will in due course apply to compel him to release of the said documents. To the Defendants, technically speaking, this matter is being handled by the firm of M/S Mulondo Oundo Muriuki Advocates since they are aware that the advocate now prosecuting this case, Ms Mary Osoro is an associate Advocate in the said firm of M/S Mulondo Oundo Muriuki Advocates. Mary Osoro is also privy to the documents held on behalf of the 2nd defendant.

[41] Other than being professional colleagues, the only other relationship between Mr. and Mrs. Watako is through marriage which is not in law a known medium that would permeate confidential information obtained by one spouse from his or her client to the other. The two advocates belong to and run two different firms and should be respected and treated as such. I do not think it would be right to merge the two firms on the basis of marital relationship of the proprietors in the manner proposed by the Defendants. The law is: allegation of conflict of interest should be based on real evidence of conflict of interest consisting in a possibility of using confidential information by the advocate in question in favour of the party he is representing and to the detriment of the other party. As such, marital status is not a ground for conflict of interest and the objection by the Defendants to representation of the Plaintiff by his advocates on record fails.

Locus standi

[42] A more fundamental issue is the one on the Plaintiff's locus standi to file this suit. The Defendant averred that the plaintiff was neither a Director nor a shareholder of the 2nd defendant at the time of the filing of this suit. And as such, the plaintiff has no right of action against the defendant. According to the Defendants, even if it were to be assumed that the plaintiff was a Director of the 2nd Defendant Company, he would still have no locus standi because, despite couching this suit as a derivative suit, it is not. The threshold of bringing such action have not been met by the plaintiff, for; 1) he is neither a minority (nor a majority) shareholder (or Director) of the 2nd Defendant; and 2) there is no alleged nor proved wrongs that have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions.

[43] I make the following view of the matter. The issue being raised by the plaintiff in the suit is alleged fraud on the part of the 1st Defendant in effecting transfer of shares and uttering and filing false change of directorship of the 2nd Defendant Company. That kind of allegation portends fraud on the Company and the law. Secondly, the Plaintiff further alleges that the 1st Defendant and another ''director'' purportedly appointed through a resolution by of the Company are in control of the Company. The two have prevented the Plaintiff to participate in the affairs of the Company as a shareholder or director. The two are exercising control as well as majority force. Needless to

say; that a company is an artificial person and only acts through its human agents; the members of the Company. Thus, the obtaining state of affairs in this case makes it difficult and impossible for the Company to resolve the issues raised by the Plaintiff through its internal mechanisms. For those reasons, the Plaintiff is entitled to file suit on behalf of the Company to right the wrongs he alleges are being committed upon the Company by the existing directors. At the stage of leave, there is no requirement that full prove of fraud be established by the applicant. What is needed is prima facie evidence of fraud on the company. On the evidence before me, there is prima facie evidence of wrongs being committed by the existing directors on the Company and which may not be resolved by the Company through its internal mechanisms for those internal processes are in the control of the 1st Defendant and the other director complained of. The suit is challenging the membership and directorship of the Company which was allegedly altered by fraud and thus it is a suit for the benefit of the law and the Company. And if any benefit of a corollary nature should accrue to one or more of the members of the Company, should not alter the character of the suit as a derivative suit. For instance, if alteration of register of members or record of directorship is involved in a derivative suit, the fact that one or more of the members of the company will benefit does not alter the character of the derivative suit. I make this statement fully aware of the provisions of section 118 of the Companies Act and the limited scope of the summary procedure under that section. See the case of **PRAB HULAL TEJPA HARIA & ANOTHER v PRAVIN CHANDRA MEGHJI DODHIA & 2 OTHERS [2007] eKLR,** where **Warsarme J** (as he then was) expressed himself that;

> ***"In my view the summary powers of the court can be invoked in plain and clear cases, where there is no need for a trial..... The powers under section 118 of the company's Act cannot be invoked when there is a real and complicated dispute as to the real interests of the parties."***

[44] And also I am aware that, the power of the court is not restricted to the instances provided for in section 118 of the Companies Act. Thus the court may rectify the register on other potent grounds which in the opinion of the court will ***enable the members of a company to have a fair and reasonable exercise of their rights including; where there is no valid allotment of shares; or the allotment is irregular; or where a transfer of shares has been improperly registered*****.** These are real issues which will require investigation or can more satisfactorily be dealt with through viva voce evidence of the parties and witnesses in a substantive suit which could as well be a derivative suit as long as the wrongs could not have possibly been resolved through the internal mechanisms of the company for reason that the controlling majority or minds of the company were unwilling. For better understanding of this jurisprudence, and in addition to the above rendition by Warsame J (as then then was), see the case of **SAIDA KARIMBUX & 2 OTHERS v SUKHWINDER SINGH JUTLEY & ANOTHER [2014] eKLR** and the excerpt below from **Halsbury's Laws of England, (4th Edn.), Vol. 7(1) para 372** on court's jurisdiction to rectify company register:

> ***"372. General jurisdiction to rectify company's register of members***
>
> ***The jurisdiction to rectify a company's register of members is discretionary; and it is not limited by the provisions of the Companies Act 2006. Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights.***
>
> ***When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought.***
>
> ***The power to rectify has been exercised where there has been misrepresentation in the prospectus; where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors; where shares have been illegally allotted at a discount; where the***

application for shares has been made in the name of a person, as, for example, an underwriter, without his authority; <u>where there is no valid allotment of shares; or the allotment is</u> not made within a reasonable time, or is <u>irregular; where a transfer of shares has been improperly registered</u> or registration has been refused; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register in respect of each part in a different order; where the company puts on its register matters which are not required by the statute; in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed; and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required." **[Emphasis supplied]**

[45] I, therefore, think and hold this case is apt for derivative suit, and accordingly grant the Plaintiff leave to continue with this suit as a derivative suit. See what the court said in **HCCC NO. 83 OF 2012 DR. JANE WAMBUI WERU v OVERSEAS PRIVATE INV. CORP. & 3 OTHERS (**Hon. Justice. G.V. Odunga) that:

"By derivative suits, the minority shareholders (s) feeling that wrongs have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, come to court as agents of the 'wronged' company to seek reliefs or relief for the company itself, all the shareholders including the wrong doers, and not for the personal benefit of the suing minority shareholders (s)…''

Consider also what a derivative action is. According to the **Black's Law Dictionary, 9th Edition,** derivative suit or action is:

> ''**A suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary; especially, a suit asserted by a shareholder on the corporation's behalf against a third party (usually a corporate officer) because of the corporation's failure to take some action''.**

Thus, it bears repeating, a derivative action is filed by a shareholder or director on behalf of a company where there has been a dereliction on the part of the company to file the suit to enforce a right or remedy due to the company. Derivative action is the exercise of the exception to the rule in **FOSS V HERBOTTLE (1843) 2 HARNE 461.**

Omni-bus application

[46] Once a derivative suit is given permission to be so prosecuted, the parties may apply for, and the court may issue any relief permitted in law within the derivative suit including temporary injunction, or referral of the dispute to arbitration where the Memorandum and Articles of Association of the company so provides. The application herein is, therefore, competent. Except, the court shall weigh the prayers sought to see whether they are merited.

Whether subject matter of suit falls within arbitration

[47] After considering all the rival arguments, and my observation in paragraph 46 above, I take the view that this matter is within the purview of arbitration by virtue of Clause 33 of the 2nd Defendant's Memorandum and Articles of Association which provides;

"whenever any dispute or differences arises between the company on the one hand and any of the members… touching the true intent or construction or the incidents or consequences of these Articles or of the Act or touching anything then or thereabout done, executed, omitted or suffered in pursuance of these Articles or any claim on account of such breach or alleged breach, every such dispute or differences shall be referred to and determined by a sole arbitrator…."

[48] The nature of the dispute before this honourable relates to matters which were ***done, executed, omitted or suffered in pursuance of the Articles*** of the Company and in particular under clause 21 of the Memorandum and Article of Association of the Company dealing with vacancy and filling up of position of Directors of the 2nd defendant. Transfer of shares is also a matter of the Articles. And in accordance with clause 33 of the Memorandum and Article of Association of the Company, ***every such dispute or differences shall be referred to and determined by a sole arbitrator….”*** The thinking that Articles of Association constitute a ***contract not only between every member and the company, but also among the members of the company inter se*** ordains that the disputes herein are disputes which are amenable to the arbitration agreement in the Articles; in this case clause 33 above stated. I find support in the passage in the case of **ABDIRAHAMAN AFFI ABDALLA v OSUPUKO SERVICE STATION LTD & ANOTHER [2012] eKLR** where the court while interpreting a clause similar to clause 33 stated:

> ***“With respect, Mr. Chalang’as contention overlooks one fundamental principle of company law. That principle ordains that a company’s articles of Association give rise to a contract not only between every member and the company, but also among the members of the company inter se. the logical conclusion to be drawn from that principle is that the members of the 1st plaintiff company are bound by that Company’s Articles among themselves, and therefore Article 31 becomes an arbitrating agreement among all the members.”***

[49] Accordingly, there is in fact a dispute in accordance with clause 33 of the Articles of Association which is hereby referred to arbitration for resolution in accordance with the said clause 33. Other than the directors of, the 2nd Defendant Company shall be a party to the arbitral proceedings to be undertaken pursuant to clause 33 of the Articles of Association and this order of the court. By the pronouncements of the court in these proceedings, it is clear there is no mis-joinder of the company to these proceedings.

Injunction

[50] Following the order that this matter be referred to arbitration, and the fact that I made the order that the company be run in accordance with a resolution by the company, which resolution was passed, I will hesitate to restrain that arrangement for now. However, the 1st Defendant is still under restraint not to do anything that may prejudice the rights of the Plaintiff in this suit or the company before these proceedings is finally determined. He should also continue to file appropriate monthly accounts on all necessary expenditures of, and which are directly connected to the ordinary operations of the company. But should any need arise for an intermediate relief under section 7 of the Arbitration Act, any party herein may apply to the court for such relief. Costs of the application dated 20th February, 2014 shall be in the cause.

Dated, signed and delivered in open court at Nairobi the 31st July, 2014

F. GIKONYO

JUDGE