



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 895 OF 2012**

**PIZZA HARVEST LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**FELIX MIDIGO.....DEFENDANT/RESPONDENT**

**RULING**

1. From the outset, it should be noted that there are three applications for determination before Court i.e. the Notice of Motion Application by the Plaintiff dated 21<sup>st</sup> December, 2010, the Notice of Motion Application by the Defendant dated 17<sup>th</sup> January, 2011 and the Chamber Summons Application by the intended Interested Parties dated 28<sup>th</sup> October, 2011. It should also be noted that by the Court record of 19<sup>th</sup> November, 2012, all three Applications are to be determined both contemporaneously and consecutively as each determines the other. That being the case, it would only be logical to deal with the Defendant's Application dated 17<sup>th</sup> January, 2011 first as it sets the tone upon which the two other Applications may be determined.
2. The Application dated 17<sup>th</sup> January, 2011 is brought under the provisions of *Articles 23(1), 25(c), 50 and 165(3)(b)* of the Constitution of Kenya, **Order 2 Rule 15, Order 51 Rules 1, 3 & 4** of the *Civil Procedure Rules, 2010* and **Section 3A** of the *Civil Procedure Act*. The Application seeks for orders inter alia for the stay of the hearing of the Application dated 21<sup>st</sup> December, 2010 by the Plaintiff as well as the suit filed on the same date, pending the hearing and determination of the instant Application. The grounds adduced by the Defendant are that there is a pending criminal suit i.e. ***Criminal Case No. 1197 of 2010 R v Felix Midigo & 2 Others*** in which the evidence tendered is identical to that intended to be presented against the Applicant in the underlying suit. Such evidence that is adduced in this suit may be used against him in the criminal suit and that the concurrent hearing of both criminal and civil proceedings may prejudice, embarrass and/or even delay a fair trial resulting in the miscarriage of justice.
3. The Application is supported by the Affidavit of Felix Midigo, a shareholder and Director of the Plaintiff Company. It is the applicant's contention that the file of the Plaintiff Company at the Companies Registry was altered and unlawfully tampered with, prejudicing the bona fide directors and shareholders of the company. The deponent maintained that the civil suit herein is a nullity and that the criminal proceedings in ***Criminal Case No. 1197 of 2010*** were initiated to vindicate the fundamental assertions made therein. It was further contended that by filing this civil suit against him, the Defendant was constrained from freely tendering evidence in his own Defence thus amounting to a denial of his constitutional rights to a fair trial. Further, the Plaintiff's Application dated 21<sup>st</sup> December, 2010 seeks equitable orders to the extent that the Defendant has not conducted himself in an equitable manner, hence undeserving of the equitable rights sought.

4. In response to the Application, the Plaintiff filed its Replying Affidavit sworn on 4<sup>th</sup> February, 2011 through one of its directors, **Murehwi Witness Chingwena**, in which it was contended that the Defendant's Application is a mere diversionary tactic which seeks to pre-empt the Plaintiff's own Application dated 21<sup>st</sup> December, 2010. The Plaintiff maintained that the Application was a clog to the quick disposition of the matter and an abuse to the court process. It also contended that the institution of the suit and the Application dated 21<sup>st</sup> December, 2010 was authorized by the company. The deponent stated that the criminal proceedings were instituted by the State after independent investigations. Such criminal proceedings are an independent trial instituted under independent criminal jurisdiction. This court cannot interfere with those criminal proceedings and consequently, there is no mischief in the Plaintiff seeking remedies before the court to mitigate damages. Mr. Chingwena further contended that the Defendant in his application seeks to subvert the substantive issues and concentrate on sideshows, irrelevancies and unrelated issues to divert, confuse and delay the court in its expeditious determination of the matter.
5. From the foregoing, the main crux of this matter and the Application dated 17 January 2011, is the Defendant's allegation of breach of his fundamental rights to a fair trial. It is the Defendant's contention that the institution of Criminal proceedings against him violates his Constitutional rights to a fair trial pursuant to Article 25(c) of the Constitution of Kenya, 2010. The Defendant relied on the authority in the case of **Kenya Anti Corruption Commission v Pattni, Civil Suit No. 1111 of 2003** where it was held *inter alia* by Mwera, J and Ojwang, Ag J:

***"...pending the determination of whether there is a violation of fundamental rights and freedoms in any proceedings in the High Court, all other further proceedings shall be stayed..."***

In alleging that his fundamental rights to a fair trial had been compromised, the Defendant in his Supporting Affidavit, contended that he was constrained from freely tendering evidence in this matter by the existence of the parallel criminal proceedings. In terms of the convergence of issues, as in the present circumstances, it is imperative that a complainant elects to participate in one of the proceedings so as not to unfairly expose an accused person or defendant to a multiplicity of proceedings. However, the Defendant admits that there is no bar to facing both criminal and civil proceedings at paragraph 34 (a) of his said Affidavit. This is similar to the position adopted by the Plaintiff at paragraph 10 of its Further Supporting Affidavit sworn on 20<sup>th</sup> January, 2011.

6. In the Complaint, the Plaintiff seeks for injunctive relief against the Defendant from acting by himself, his agents and/or servants from masquerading as the Directors of the company and to yield up possession of the company's records. In *Criminal Case No. 1197 of 2010* the Defendant is charged on two counts: under **Section 357(a)** of the Penal Code for making a document without authority and an alternative count under **Section 349**, Penal Code for forgery. Delving into the merits of both these matters any further would be hearing and determining issues which would be better raised in a different forum. The Plaintiff maintained that the Defendant, in alleging that the institution of the criminal proceedings was to vindicate the civil proceedings, occasioned a travesty and an aspersion that should be frowned upon by this court.
7. As correctly stated by the Plaintiff, there is an independent and competent criminal jurisdiction system in tandem with the civil jurisdiction in our courts. I note that the Defendant admits in his said Affidavit, that there is no bar to instituting both criminal and civil proceedings simultaneously and that both may be heard and determined together. However, he then tries to subvert and further questions the courts' independence in determining civil proceedings by alleging that his fundamental rights to a fair trial will be breached. The Defendant maintains that there is a convergence of issues to which this court should examine. The Defendant therefore requests the court to stay the matter pending the hearing and determination of his alleged denial and breach of right to a fair trial. In my opinion, this devious tactic adopted by the Defendant pre-empts the entire suit as certainly no fundamental right to fair trial has been breached. The assumption of innocence until proven guilty still stands and the court is so mandated under the provisions of *Articles 165 (3)(b)* as read together with *Articles 165 (3)(a)* and *50* of the Constitution of Kenya and **Sections 1A, 1B and 3A** of the *Civil Procedure Act*. In my view, no fundamental right to a fair hearing will be breached when both the civil and criminal cases are heard simultaneously. The courts have a duty to act diligently, fairly and in the interests of justice to ensure that every matter

is justly and expeditiously concluded, without undue interference with the processes of the courts in fairly determining the matters. In **Nairobi H.C.C.C No. 1535 of 2004 James Mutua v The Chief Magistrate, Kibera & 2 Others** (2005) eKLR, Emukule, J with regard to the issue of prosecution of both criminal and civil matters concurrently held *inter alia*:

*“... Having considered the respective parties rival arguments as submitted by their Counsel, I wish to observe that there has arisen a practice among litigants and their Counsel to peg their lives upon some breach of their fundamental rights and the rights of the individual, to defeat any pending prosecution. This is not necessarily a bad thing, in fact, in a sense it is a good thing, it shows Kenyans and litigants in particular are becoming aware of their constitutional rights and will take every available opportunity to secure those rights for it is said eternal vigilance is the price of freedom. It is however important to observe that this freedom is also subject to the strict observance of the law. Indeed Section 72(1) of the Constitution provides-*

*“72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases*

*(a)-(d)*

*(c) Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Kenya.”*

*The Applicant was charged and is being tried for an offence authorized by law, namely obtaining money by false pretences contrary to section 323 of the Penal Code (Cap 63 Laws of Kenya) and by a competent court, namely a Court of the Chief Magistrate. The Applicants rights are preserved by section 77(1) of the Constitution that if a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. The Court of the Chief Magistrate is an independent and impartial court established by the Magistrates Court Act (Cap 10, Laws of Kenya) pursuant to the provisions of Section 65(1) of the Constitution of Kenya. The Applicant did not complain that he was not being given a fair trial. The prosecution says it has the statements of the witnesses and these can be made available to the Applicant if he so applies. What emerges from the Application is that the Applicant is trying to ventilate his defence in this court, but this Court is not the trial court. The proper place to do so is in the trial court. The Applicant’s Counsel urged the court to find that the complaint herein related to a purely civil and not a criminal offence. It may well be so. If there is however no breach of the law or procedure by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in particular, and I could find none, there is no ground for staying the proceedings in the subordinate court. Besides there is no bar in law from bringing a criminal charge for matters which prima facie are civil in nature. Section 193 A of the Criminal Procedure Code (Chapter 75, Laws of Kenya) confers concurrent jurisdiction, on civil and criminal matters which appear to be civil in nature The said Section says-*

*“193. Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”*

I adopt the above reasoning of my learned brother **Emukule** J and in consequence the application of the Defendant dated 17 January 2011 therefore fails.

8. The second application for determination is the Chamber Summons application dated 28<sup>th</sup> October, 2011 and brought under the provisions of **Sections 1A, 1B, 3A, 59 and 63(e)** of the *Civil Procedure Act*, **Order 1 Rules 10(2) and 22** of the *Civil Procedure Rules*, **Section 7** of the *Arbitration Act* and **Rule 2** of the *Arbitration Rules*. The main prayer under the application is for the enjoining of two interested parties to the suit, based on the grounds in the application. The

- applicants, Clement Andere Omollo and Joanes Omondi Mudurie allege to be the bona fide directors and shareholders in the Plaintiff Company and that the suit was instituted without their authority thus rendering it an unlawful and illegal suit, intended to defeat their interests in the said company.
9. The application is supported by the Affidavits of Clement Andere Omollo and Joanes Omondi Mudurie both sworn on 28<sup>th</sup> October, 2011. It is contended that the suit is instituted out of malice and by deceptive persons who will stop at nothing to regain control and ownership of the Plaintiff Company to their irredeemable detriment and prejudice. In consequence, it would only be fair and just for them to be enjoined in the suit to protect their interests.
  10. In opposing the application, the Plaintiff filed a Replying Affidavit again sworn by Murehwi Witness Chingwena on 31<sup>st</sup> October, 2011. The deponent contended that the applicants had never been shareholders or directors of the Company. Further he stated that the 2<sup>nd</sup> applicant, Joanes Omondi Mudurie, was an employee of the said company and that at no point or time did either of the applicants acquire any ownership rights by virtue of employment. In his view, the application had been purposely filed to scuttle and/or engage in diversionary tactics intended to delay the expeditious disposal of the matter, more particularly the Plaintiff's application dated 21 December 2010.
  11. The applicants, in response to these contentions of the deponent of the Replying Affidavit, filed the Further Affidavit of Clement Andere Omollo sworn on 18<sup>th</sup> November, 2011. In it, Mr. Omollo contended that the Assistant Registrar's letters dated 23<sup>rd</sup> March, 2009 and 25<sup>th</sup> November, 2009 annexed to the Affidavit in support of the application, shows that the applicants constituted two out of the three shareholders of the Company. The deponent said that he acquired the ownership of his shares in the Company having being allocated the same by one Felix Midigo, an alleged Director of the Company. He maintained that the changes effected on the Company's file at the Company's Registry were a clear indication of manipulation and blatant abuse of office. As he had a legitimate interest in the matter, it would only be fair for him and Mr. Mudurie to be enjoined in the suit to protect their interests.
  12. According to the Blacks' Law Dictionary, 7<sup>th</sup> Edition, an interested party is defined as;

***“A party who has a recognizable stake (and therefore standing) in a matter.”***

An interested party may be directly or indirectly affected by the issue or matter in contention to qualify as an interested party. An interested party may also be defined as a party who has a recognizable stake in the outcome of a matter before a court, ***but may not be directly involved in the litigation process.*** (Underlining mine). In distinguishing who is an interested party as opposed to a necessary party, two steps may be considered:

- a. *There must be a right to some relief against the party in respect of the matter involved in the proceedings in question; and*
- b. *It should not be possible to pass an effective decree in the absence of that party.* (as per **Deputy Commissioner, Hardoi v Rama Krishna, AIR 1953 SC 521**).

Further, an interested party may not necessarily be bound by the results of the case and also whose presence would not *necessitate* the complete and effectual settlement of the matter. The instant party may, however, given the wide discretion given to the courts in determining '**all questions involved in the cause or matter**', be defined to also include:

***“A party who, being closely connected to a lawsuit, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings.***' (as per Willmer, J in **Miguel Sanchez & Compania S.L v Owners of “The Result” (Nello Simoni Ltd., Third Party) “The Result” (1958) 1 All ER 839** at p. 845).

However, the courts in determining an interested party to a suit will not just add or invite anyone as *amicus curiae* to assist the court but someone who has an interest, or a legal interest in the matter. In allowing an appeal in which the High Court had determined a party as an interested party,

Greene, J observed in Re I. G Farbenindustrie AG Agreement[1] at p. 529 that;

***“While accepting the view that Boot’s interest is merely a commercial interest, Morton, J was very much impressed by the fact that that it was desirable that the court should have before it somebody to argue that point. With all respect to him that did not give him jurisdiction to call in somebody to argue it for him as a sort of amicus curiae and add as a party to the action somebody to the action who has no legal interest in the result of it.”*** (Underlining mine).

Have the applicants shown that they have a legitimate interest in the matter?

13. In the Supporting Affidavit sworn by Mr. Omollo on 28<sup>th</sup> October, 2011 the deponent produced a document marked as “CAO-1” which was a copy of the Memorandum and Articles of Association of Pizza Harvest Ltd, the Plaintiff Company. It is shown that the Company was incorporated on 22<sup>nd</sup> May, 2006 with the shareholders who executed the said Memorandum and Articles of Association as being Miko Nxele, Felix Midigo, Miriam Chikoto and David Zengeza. However, in the Further Affidavit sworn on 18<sup>th</sup> November, 2011, the applicants produced documents marked “CAO-3” which included two letters dated 23<sup>rd</sup> March and 25<sup>th</sup> November, 2009 in which the Assistant Registrar of Companies responds to queries about the shareholding and ownership of the Company. In the letters, Felix Midigo and the applicants are named as the shareholders of the company, each having a shareholding of 600, 200 and 200 shares respectively.
14. The applicants in their Further Affidavit also included a Report marked “CAO-4” by the Document examiner in which he states that there are similarities in the signatures that had been sent for verification. In their application and following the ruling made in Willmer, J in Miguel Sanchez & Compania S.L v Owners on “The Result” (Nello Simoni Ltd., Third Party) “The Result” (supra) it would be for the court to exercise its jurisdiction cautiously, lest it invites an *amicus* who would not have any beneficial interest in the expeditious resolution of the matter. I have also taken cognizance of the case of Amon v Raphael Tuck & Sons Ltd (1956) 1 All ER 273, in which Devlin, J held at p. 286-287:

***“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”***

15. In my opinion the applicants have demonstrated, albeit in an attemptive manner, how their alleged legitimate interests are to be affected and that the court would be unable to come to a well reasoned determination without their presence. The suit challenges the shareholding of the company which as portended by one of the applicants, Clement Andere Omollo, was bestowed upon him by the Defendant in the suit. What neither of the applicants state in their affidavits is the amount that they paid for their shares. At paragraph 9 of the Further Affidavit sworn by Mr. Omollo he states:

**“THAT I acquired my shareholding in the Company having been allocated the same by Felix Midigo as a Director acting on a duly passed resolution of the Company.”**

The allegations for determination would not require the applicants to be included as parties to this suit as it would be justly and expeditiously determined however I consider it *necessary* that the joinder application be allowed nonetheless, in order to determine all the issues or questions in the case. The application in my opinion has merit and I would allow the same.

16. The third application for determination is the Notice of Motion dated 21<sup>st</sup> December, 2010 in which the Plaintiff seeks an injunction against the Defendant, his agents and/or employees from holding himself out as a Director of the Company and passing off or interfering with the operations of the Plaintiff Company pending the hearing and determination of the instant application and the suit. The Plaintiff further seeks orders for the taking of accounts and compelling the Defendant to yield up the accounting and other records of the Plaintiff Company. The application is premised on various grounds which includes the allegation that the Defendant has embezzled and mismanaged funds, committed serious fraudulent activities and has refused to submit and render accounts and official records to the Directors of the Plaintiff Company. It has also been alluded that the Defendant has been employing force, intimidation, threats and coercion against the other directors with a view to intimidating and defrauding the Plaintiff company. Further, that he has been conducting the affairs of the Plaintiff Company without the knowledge, involvement and/or authority of the other directors.
17. The application is supported by the Affidavit of the said Murehwi Witness Chingwena sworn on 21<sup>st</sup> December, 2010. It is contended that in his capacity as operations manager of the Plaintiff company, the Defendant, in unmitigated breach of his duties and obligations (be they contractual, fiduciary, moral or legal), refused to render accounts, submit financial and management reports and or/failed to report or to respond to the other Directors. It was contended that due to the acts and omissions by the Defendant, the Plaintiff had suffered substantial loss, damage, inconvenience, prejudice and injury, rendering the other directors unable to run the Plaintiff Company's affairs. It was further contended that there is a probability and likelihood that the Defendant would so direct and put all the finances of the Plaintiff, together with its assets, beyond reach of the other directors/shareholders.
18. In its submissions dated 10<sup>th</sup> September, 2012 in support of the application, it was detailed by the Plaintiff that the Defendant was both an employee and a shareholder in the Plaintiff Company. By a meeting held on 22<sup>nd</sup> November, 2008, issues concerning the Defendant's conduct were discussed and it had been resolved that the Defendant would be terminated as the Operations Manager and removed as a signatory to the Plaintiff's bank account. It was further submitted that it had been resolved in a meeting held on 29<sup>th</sup> November, 2008 that the Defendant would be removed as a Director of the Plaintiff Company pursuant to **Section 158** of the *Companies Act*. The Defendant therefore, having been terminated as both employee and director of the Plaintiff Company, had no control of the company and should step aside pending the determination of this suit. The Plaintiff relied on the cases of **Nairobi H.C.C.C No. 381 of 2006 Fontana Enterprises Ltd v Mwangi Chomba (2008) eKLR**, **Nyeri H.C.C.C No. 62 of 2004 Ndathi Mugunda Co. Ltd v Patrick Matu & 4 Others (2008) eKLR**, **Nairobi H.C.C.C No. 449 of 2008 Isaac Njenga Kamunge & 9 Others v Stephen Waweru & 8 Others (2008) eKLR**, **Machakos H.C Misc. Application No. 160 of 2004 Wambua Sylvester v Hon. Attorney General & 2 Others (2004) eKLR** and **Nairobi H.C.C.C No. 1535 of 2004 James Mutua v The Chief Magistrate Kibera & 2 Others (2005) eKLR** in support of its application.
19. In its submissions dated 6<sup>th</sup> July, 2011 in response to the Application of the Plaintiff dated 21<sup>st</sup> December, 2010, the Defendant submitted that the prayers sought could not be granted as the Plaintiff's application did not meet the threshold as laid down in **Giella v Cassman Brown (1973) E.A 358**. The Orders sought in the application were mandatory in nature and could not be granted at an interlocutory stage. The Defendant submitted that the said Orders were untenable and contradictory, hence they could not be sustained. He also submitted that given the discrepancies regarding the Plaintiff Company's affairs, the suit is defective and unsustainable and that the Constitutional Rights of the Defendant would be breached if the application (and the suit) is allowed to proceed unabated during the pendency of the criminal suit. In this regard, the Defendant relied on the cases of **Kenya Anti Corruption Commission v Pattni (2003) KLR 655**, **Thomas Patrick Gilbert Cholmondeley v R (2008) eKLR**, **Daimler Co. Ltd v Continental Tyre & Rubber Co. (Great Britain) Ltd [1916] 2 A.C**, **Microsoft Corporation v Mitsumi Computer Garage & Another Civil Case No. 810 (2001) 470** and **Foss v Harbottle (1843) 2 Hare 461**. In fact the Defendant relied on the same submissions that it had done in support of its application dated 17<sup>th</sup> January, 2011.
20. In considering an application for injunction, the celebrated case of **Giella v Cassman Brown**

[1973] E.A 385 sets out the grounds upon which the court will rely upon in rendering its ruling. Spry, V.P. (as he then was) held *inter alia*;

**“...(iii) the court’s discretion to grant an injunction will not be interfered with unless it has not been exercised judicially. (Sargent v Patel) followed;**

**(iv) an applicant must show a prima facie case with a probability of success;**

**(v) an injunction will not normally be granted unless the applicant might otherwise suffer irreversible damage;**

**(vi) when the court is in doubt, it will decide the application on the balance of convenience.”**

For an applicant to be successful, he has to show that he stands to suffer irreparable loss that cannot be compensated for in damages or otherwise but first that he has established a prima facie case with a probability of success. In determining whether the Applicant has a probable chance of success, the court in **Barclays Bank of Kenya v Christant Mutisya Maingi & Another (2006) eKLR**, Ochieng, J in allowing an application for an injunction, relied on the case of **Standard Chartered Bank Ltd v Samuel Nkonge Kibera & 2 Others H.C.C.C No. 1729 of 1997** in which Ole Keiuwa, J (as he was then) held *inter alia*:

**“...I am, in view of these elucidations from the English Court of Appeal, satisfied that a Mareva injunction lies in the circumstances of the case presently before this court. I am also of the view that by saying that an applicant has made out a prima facie case with a probability of success is not the same as saying that an accused is guilty before trial and conviction. That finding of a prima facie case is not even in civil law sufficient to conclude that the Respondent is liable on a balance of probability.”**

From the foregoing, the applicant has only to establish that it has a prima facie case as against the Defendant. Whether or not it stands to be successful is upon the court’s discretion and the application of each set of facts or circumstances in each case.

21. In the present case, the Plaintiff alleges that the Defendant was in its employ and a shareholder before being relieved of the position following a resolution by the Board of Directors. According to the Plaintiff, in its meeting held on 22<sup>nd</sup> November, 2008 the Board of Directors resolved to terminate the Defendant’s services both as the Operations Manager and as a signatory of the Plaintiff Company’s bank account. This was vide Resolutions No. 1 and No. 5 of that meeting, respectively. A year later on 29<sup>th</sup> November, 2009, the members/shareholders further resolved and agreed at an Extraordinary General Meeting on the removal of the Defendant as a Director and Shareholder respectively. This resolution was taken after the Defendant was alleged to have acted in breach of the terms of his contract and in abdication of his duties and obligations as the Operations Manager. It had also been alleged that the Defendant had failed to account for Kshs. 217,000/- in relation to which he could not produce records or accounts from 1<sup>st</sup> February to 19<sup>th</sup> February, 2008. The minutes relate that despite questions put to the Defendant by the Directors and a subsequent warning letter dated 30<sup>th</sup> May, 2008 being issued to him, the Defendant did not make any attempt to reply to or refute the claims against him. These allegations are denied by the Defendant. However, a mere denial cannot be said to be a substantial defence and the Plaintiff has raised pertinent issues that need to be deliberated upon. The Defendant kept insisting in his defence that the concurrent and consecutive hearing of both this Civil case and the Criminal Case lodged against him is in breach of his constitutional rights. In his Replying Affidavit he does not answer the allegations made against him by both the State and the Plaintiff. From the minutes of various meetings contained in the Plaintiff’s bundle of documents it was clear to me that the Defendant, in his capacity as Operations Manager, failed to render accounts and/or submit financial and managerial reports as part of his duties and obligations to the Plaintiff Company. This being the case, the Plaintiff was not aware of its financial state of affairs and could not

determine its financial position. The Plaintiff alleged that during the period between 1<sup>st</sup> February and 19<sup>th</sup> February, 2008, the Defendant did not do any banking and thus an amount of Kshs. 217,000/- which it alleges was generated by the business could not be accounted for. Obviously, the Defendant's refusal and/or failure to submit accounts left the Plaintiff in a precarious position as it was the Defendant's managerial duty to ensure that such information was available to the Directors. It seems to me that this highlighted incident was one of the many that the Plaintiff alleges involved the Defendant, who despite various demands, some in writing, did not aptly respond thereto. As a result, his actions or inaction culminated in his termination as the Operations Manager, which decision seems to have been taken at the Annual General Meeting of the Plaintiff Company held on 22 November 2008. Thereafter, on 29 November 2009, (over a year later), at a meeting of shareholders, a resolution was passed to remove the Defendant as a director of the Plaintiff Company pursuant to **section 185** of the *Companies Act*. I noted that the Defendant was marked as being "*absent with apologies*". So he had notice of the said meeting. Thereafter, it seems that the Shareholders of the Plaintiff Company took the decision to file this suit as against the Defendant. I have also noted that in the correspondence being letters dated 10<sup>th</sup> April, 2008, 27<sup>th</sup> April, 2008, 16<sup>th</sup> May, 2008 the gist of the issues raised with the Defendant regarded malpractice, managerial indiscretions, irregularities in keeping books and financial performance. I also noted that at the said Shareholders' meeting held on the 29 November 2009 it was resolved that the Plaintiff Company do sell its business and buyers were being looked for. While laying the blame for the failure of the company at the door of the Defendant, the Plaintiff has not directly admitted that the mismanagement of the Plaintiff's business alluded to the decision to sell the same. However it seems to me that the damage occasioned upon the Plaintiff Company as a result of the purported actions or inaction of the Defendant are adverse and cannot be sufficiently be compensated for in damages. Overall, I am satisfied that the Plaintiff has established a prima facie case as against the Defendant with a real chance of success sufficient for this court not to have to consider the granting of an injunction on a balance of probabilities.

22. The upshot of this is that the Plaintiff has, in my opinion, satisfied the conditions as set out in **Giella v Cassman Brown** (supra) for the granting of an injunction. Consequently, I allow the Plaintiff's Notice of Motion dated 21 of December 2010 and grant prayers 3, 4 and 5 of the same. The Plaintiff will also have the costs of its application as against the Defendant.

**DATED and delivered at Nairobi this 12<sup>th</sup> day of February 2013.**

**J. B.HAVELOCK**

**JUDGE**

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(1943) 2 All ER 525