



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CIVIL SUIT NO. 358 OF 2012**

MANCHESTER OUTFITTER LIMITED.....1<sup>ST</sup> PLAINTIFF

MOHAN GALOT.....2<sup>ND</sup> PLAINTIFF

GALOT LIMITED.....3<sup>RD</sup> PLAINTIFF

**-VERSUS-**

GALOT HOLDING LIMITED.....1<sup>ST</sup> DEFENDANT

MANCHESTER OUTFITTERS (E.A) LIMITED...2<sup>ND</sup> DEFENDANT

PRAVIN GALOT.....3<sup>RD</sup> DEFENDANT

RAJESH GALOT.....4<sup>TH</sup> DEFENDANT

**RULING**

The plaintiffs Notice of Motion dated 19<sup>th</sup> June, 2012 inter alia seeks the following orders:-

- i. An order of injunction to restrain the Respondents by themselves, their agents, officials and servants from transferring, charging, selling or alienating Land Parcel L.R No. 24092 (Grant No. IR 79398) pending the hearing and determination of this suit.
- ii. An order of temporary injunction to restrain the Respondents by themselves, their agents, officials and servants from commencing, commissioning or otherwise undertake operations including manufacture of clothes/garments, ware housing and any other business in the suit property L.R. No. 24092 (Grant No. IR 79398) pending hearing and determination of this suit.

The plaintiff's application is based on the grounds set out

on the face of the application which inter alia include the following:

- a. The 1<sup>st</sup> Applicant is the beneficial owner of the suit property. Up and until February, 2003 the suit property was registered in the 1<sup>st</sup> applicant's name.
- b. The 3<sup>rd</sup> & 4<sup>th</sup> Defendants caused the transfer of the suit property secretly to their company, Galot Holdings Ltd, the 1<sup>st</sup> Defendant, and in patent breach of their fiduciary duties as actual or purported directors of the 1<sup>st</sup> Plaintiff.
- c. The registration of the suit plot in favour of the 1<sup>st</sup> Respondent is fraudulent and illegal.
- d. The plaintiffs are apprehensive that unless the orders sought are granted the Defendants will transfer the suit property in order to defeat this suit.
- e. Commencement of any operations in the suit premises will compound and aggravate the fraudulent and illegal scheme and activities of the Respondents.
- f. The orders of injunction sought are necessary in order to stop the respondents from stealing the machinery and takeover of the 1<sup>st</sup> applicants business.
- g. The applicants are beneficial owners of the suit property and premises therein and therefore its fair and just that the respondents should be restrained from enjoying proprietary rights obtained fraudulently and illegally.

The plaintiff's application is further supported on the grounds contained in the supporting affidavit sworn by Mohan Galot the 2<sup>nd</sup> applicant herein on 19<sup>th</sup> June, 2012 the Plaintiff's further affidavit and sworn by Mohan Galot on 28<sup>th</sup> May, 2013. The plaintiff has further filed written submissions dated 29<sup>th</sup> May, 2013 in support of the application dated 19<sup>th</sup> June, 2012.

The defendants in response to the plaintiffs application dated 19<sup>th</sup> June, 2012 filed the Notice of Motion application dated 2<sup>nd</sup> July, 2012 which inter alia sought to have the exparte order of injunction given by the court on 20<sup>th</sup> June, 2012 reviewed, set aside and discharged and further filed a replying affidavit sworn by Pravin Galot the 3<sup>rd</sup> Defendant on 3<sup>rd</sup> July, 2012 on behalf of the defendants in opposition to the plaintiffs application. The Defendants filed their written submissions dated 30<sup>th</sup> January, 2013. As the court had on 16<sup>th</sup> October, 2012 directed both the plaintiffs application dated 19<sup>th</sup> June, 2012 and the Defendants application dated 2<sup>nd</sup> July, 2012 to be heard together the parties in their submission canvassed both applications and this ruling will dispose both applications.

Briefly the plaintiffs case is that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants purchased title L.R No. 24092 Nairobi, the suit property herein using the funds of Manchester Outfitters Ltd, the 1<sup>st</sup> plaintiff herein and the suit property was transferred to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants vide a transfer dated 11<sup>th</sup> April, 2001. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants transferred the suit property to the 1<sup>st</sup> plaintiff vide a transfer dated 29<sup>th</sup> November, 2001 ostensibly to enable the 1<sup>st</sup> plaintiff to raise finances for its operations with the approval of both the plaintiffs and the 3<sup>rd</sup> and 4<sup>th</sup> defendants. The plaintiffs contend the 3<sup>rd</sup> and 4<sup>th</sup> Defendants secretly and unlawfully registered a limited liability company known as Manchester Outfitters (E.A) Ltd, the 2<sup>nd</sup> Defendant herein in or around October, 2006. The 2<sup>nd</sup> plaintiff Mohan Galot claims that his relationship with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants got strained between October, 2006 and January, 2007 and remains strained to date and that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants taking advantage of the strained relationship on or about 14<sup>th</sup> February, 2007 fraudulently transferred the suit property from the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant. The plaintiffs claim the transfer of the suit property was without their knowledge and/or authority and contend that the sale was not sanctioned by the Board of the 1<sup>st</sup> Plaintiff and that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants caused the suit property to be transferred to the 1<sup>st</sup> Defendant in order to unlawfully and unjustly enrich themselves to the prejudice of the 1<sup>st</sup> plaintiff and its shareholders. The plaintiffs aver that the 1<sup>st</sup> plaintiff is the beneficial owner of the suit property and that the 1<sup>st</sup> defendant holds the suit property upon trust for them. The plaintiffs submit that they have on the basis of the evidence and material tendered vide the affidavits filed and the submission made on their behalf by counsel established a prima facie case that establishes fraud on the part of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the manner they effected the transfer of the suit property from the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant. The plaintiffs contend

the title registered in favour of the 1<sup>st</sup> defendant is impeachable on the ground of fraud pursuant to Section 23(1) of the Registration of Titles Act Cap 281 Laws of Kenya (now repealed) and Section 26 of the Land Registration Act, 2012 and submit that on that basis they deserve an injunction to conserve the suit property pending the hearing and determination of the suit.

The defendants for their part contend that the plaintiffs cannot and do not deserve an order of injunction as sought in their application dated 19<sup>th</sup> June, 2012. The defendants contend that the plaintiffs are guilty of material non disclosure in that at the time of filing the instant suit there was pending before the **Commercial and Admiralty Division of the High Court Civil Case No. 63 of 2009; Manchester Outfitters Ltd vs. Pravin Galot & 4 others (subsequently renumbered HCCC No. 55 of 2012)** in which the issue of shareholding and directorship of the 1<sup>st</sup> plaintiff herein was yet to be determined and that the parties therein who included the 2<sup>nd</sup> plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on 24<sup>th</sup> February, 2012 had signed a consent order of directions in the following terms:-

1. **An inventory detailing all the matters related to this suit be done within 14 days from today.**
2. **The issue of directorship and shareholding of Manchester Outfitters Limited be heard before 3 Judges to be appointed by the Chief Justice. The determination thereof to be applied in all the other cases.**
3. **The matter be mentioned for compliance on 23<sup>rd</sup> March, 2012.**

The plaintiffs did not at the time this instant suit was filed disclose that such suit and/or consent order in the said suit was in existence. As per the signed consent one of the issues for determination by the 3 Judge bench was to determine the question of directorship and shareholding of the 1<sup>st</sup> plaintiff in the present suit. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants have contended in this suit that there was no authority for the commencement of this suit in the name of the 1<sup>st</sup> plaintiff as there was no board resolution and/or authority. The defendants have further contended that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs being directors and shareholders of the 1<sup>st</sup> plaintiff have no proprietary interest on the assets of the 1<sup>st</sup> plaintiff and cannot therefore be enjoined in a suit by the 1<sup>st</sup> plaintiff as they are distinct and separate legal entities. The defendants have relied on the case of **Omondi vs. National Bank of Kenya Ltd (2001) KLR 579** where the court had been called upon to determine on a situation such as in the instant case and Honourable Justice Ringera (as he then was) held as follows:-

***“As regards whether the plaintiffs have locus standi to institute this suit, I am in complete agreement with the submissions made by the defendants Advocates that they do not. It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even when the directors happen to be the sole shareholders (see Salmon vs. Salmon & Co. Ltd (1897) AC 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own. From that basic consequence of incorporation flows another principle; only the company has capacity to take action to enforce its legal rights. The contention by the counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly proper plaintiffs in this action is manifestly without legal foundation....., it was open to the two plaintiffs in the name of the company, but only in the name of the company to institute the present proceedings which relate to alleged wrongs against the company quo company. But they definitely lacked legal competence to institute the suit in their own names in their capacities as directors and shareholders of LVF. I would on this ground alone order the suit struck out with costs to the defendants”.***

This holding by Ringera, was cited with approval in the case of **Joyce Akinyi Ochieng vs. Anthony Chinedu Ifedigbo & 2 others HC ELC No. 304 of 2009** where Honourable Justice Mbogholi Msagha in upholding the view that the property of a company is distinct from that of its shareholders and that the shareholders have no proprietary interest to the company’s property apart from the shares they own observed as follows:-

***“Indeed the interest of a shareholder is restricted to that share and does not extend to the property***

**except the right to vote in a meeting called by the company and any dividends that may be declared. It is obvious therefore that the plaintiff in this case lacks legal competence to institute the suit in her own name or even in her capacity as director and shareholder. Only the company has capacity to enforce its legal rights”.**

I approve of the legal principles as enunciated in the above cited authorities and hold that in the circumstances of this matter the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs have not satisfied me that they being directors and/or shareholders of the 1<sup>st</sup> plaintiff they have the legal capacity (locus standi) to institute this suit in their names and in the name of the 1<sup>st</sup> plaintiff to the extent that the 1<sup>st</sup> plaintiff company seeks to enforce its rights to recover the suit property that it claims to have been transferred fraudulently from its name to the 1<sup>st</sup> defendant.

On the question whether or not there was proper authority on the part of the 1<sup>st</sup> plaintiff to commence this suit the defendants referred me to the cases of ***Bugerere coffee Growers ltd vs. Sebaduka & another (1970) IEACA 147 (HCU) and affordable Homes Africa Ltd vs. Ian Henderson & 2 others (204) eKLR*** where in both cases the courts held that a board resolution and/or a resolution of the shareholders at a meeting of the company is a pre requisite before a suit can be initiated on behalf of or by a company. In the ***Bugerere Coffee Growers Ltd case (supra)*** it was held that companies authorise the commencement of legal proceedings by a resolution or resolutions passed either at a company or Board of Directors meeting and recorded in the minutes and as no such resolution had been passed authorising the proceedings that suit/action was dismissed.

In the ***Affordable Homes Africa Ltd case (supra)*** the court held that in the absence of a board resolution sanctioning the commencement of the action by the company, the company was not before the court at all and proceeded to strike out the suit with costs.

In the present suit even though the 2<sup>nd</sup> Plaintiff has sworn a verifying affidavit where he states he is the chairman of board of directors and Governing Director of the 1<sup>st</sup> plaintiff and 3<sup>rd</sup> plaintiff no board resolution has been exhibited to support the commencement of the suit. Besides the 2<sup>nd</sup> plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> defendant by entering the consent in HCC No. 55 of 2012 which referred the issue of directorship and shareholding in the 1<sup>st</sup> plaintiff for determination by a 3 judge bench and agreeing that the determination by the said bench would be applied in all other cases meant that as between the parties there was no agreement as to who were the directors and shareholders of the company. In such circumstances there is doubt as to whether the 2<sup>nd</sup> plaintiff would have the authority to commence this suit by the plaintiff considering that the 3<sup>rd</sup> and 4<sup>th</sup> defendants do in fact claim to hold the controlling shares in the 1<sup>st</sup> plaintiff and are also directors in the 1<sup>st</sup> plaintiff company.

The fact of the parties being in dispute over directorship and shareholding in the 1<sup>st</sup> Plaintiff company and the fact that the parties had consented to the issue being determined by a 3 judge bench in the suit pending before the Commercial and Admiralty Division was material and its nondisclosure before duty Judge at the ex parte stage is not excusable and on that basis alone would entitle the court to vacate the interim order given at that stage.

However, to determine whether the plaintiffs merit to be granted the order of injunction sought the court has to evaluate all the material that has been placed before it to determine whether or not the plaintiffs have demonstrated they have a prima facie case with a probability of success and whether or not the plaintiffs would suffer irreparable damage that cannot be compensated for by an award in damages in the event the injunction is denied and they are successful at the trial.

The plaintiff's principal complaint against the defendants is that the 3<sup>rd</sup> and 4<sup>th</sup> defendants fraudulently procured the transfer of the suit property from the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant. Both the plaintiffs and the defendants do not dispute that the 3<sup>rd</sup> and 4<sup>th</sup> defendants acquired the suit property in their name from Chemchemi Holdings Ltd for a sum of Kshs. 8,000,000/= in April, 2001. Following a resolution by the

1<sup>st</sup> plaintiff the suit property was on 2<sup>nd</sup> December, 2001 transferred from the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the 1<sup>st</sup> plaintiff to facilitate the 1<sup>st</sup> plaintiff to obtain financing from Barclays Bank of Kenya Ltd for its operations and a charge for Kshs. 10 Million in favour of the Bank was registered against the title on 4<sup>th</sup> December, 2001 which charge was subsequently discharged on 22<sup>nd</sup> January, 2004 as per the entries endorsed on the title.

The Defendants deny there was any fraud at all in all their dealings which they contend was consensual. The 3<sup>rd</sup> and 4<sup>th</sup> defendants aver that the 2<sup>nd</sup> plaintiff ceased to be involved in the running and operations of the 1<sup>st</sup> plaintiff but was kept aware of the day to day activities of the 1<sup>st</sup> plaintiff and that he even participated in the appointment of Mr. Meshack Odero who was working for him as the secretary of the 1<sup>st</sup> Plaintiff and that the said Meshack Odero subsequently kept him fully informed of the activities of the 1<sup>st</sup> Plaintiff.

The suit property once the charge was discharged was retransferred by the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> Defendant as a Nominee of the 3<sup>rd</sup> and 4<sup>th</sup> Defendant as per resolution taken earlier by the 1<sup>st</sup> Plaintiff. The 2<sup>nd</sup> plaintiff has contended that he was not involved in the transfer of the suit property to the 1<sup>st</sup> defendant and that the transfer was secretly and fraudulently done with the objective of unjustly enriching the 3<sup>rd</sup> and 4<sup>th</sup> Defendants at the expense of the plaintiffs and therefore the transfer ought to be revoked.

I have noted from the material placed before the court that the process of the acquisition of the suit property right from 2001 April when it was registered in the names of the 3<sup>rd</sup> and 4<sup>th</sup> defendants upto the time it was retransferred from the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant is well documented and on the face of it there is no evidence of fraud discernable. The initial transfer from the 3<sup>rd</sup> and 4<sup>th</sup> defendants to the 1<sup>st</sup> plaintiff did not elicit any objections and the objective of that transfer was so that the 1<sup>st</sup> plaintiff could access finances for operations. It has not been demonstrated to me that the transfer from the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant was fraudulent and it is my view that the plaintiffs' have not discharged the burden of proof required of them to establish there was fraud in the transaction. It is not enough for the 2<sup>nd</sup> plaintiff to merely state there was fraud without showing enough evidence that indeed fraud was perpetrated. The defendants referred me to the cases of *Koinange & 13 others vs. Koinange (1986) KLR 23* and *Peter Kimani Njunguna vs. Pius Karuri Kigani & another (2009) eKLR* on the standard of proof in cases where fraud is alleged. The two decisions illustrate the level of proof that a party who alleges fraud need to go to prove it and states that though it is not proof beyond any reasonable doubt it is proof higher than a balance of probabilities. Given all the circumstances and material tendered in this matter I am unable to hold that the plaintiffs have established fraud on the part of the defendants and it is therefore my holding and finding that the plaintiffs have not established and/or demonstrated that they have a prima facie case with a probability of success.

The 1<sup>st</sup> defendant is the registered owner of the suit property against which a charge has been taken and is being serviced by the 1<sup>st</sup> defendant who is in the process of further developing the property. A grant of the injunction as sought by the plaintiff would stall the further development and could impact the servicing of the mortgage and would in all probability occasion irreparable damage to the 1<sup>st</sup> defendant and in those circumstances the balance of convenience would be against the grant of the injunction sought by the plaintiffs.

In the premises and for all the reasons given above I disallow the plaintiffs Notice of Motion dated 19<sup>th</sup> June, 2012 and I order the same to be dismissed with costs. The ex parte interim order of injunction given by the court on 20<sup>th</sup> June, 2012 is hereby vacated and discharged.

Costs of the application are awarded to the Defendants.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... **for the Plaintiffs**

..... **for the Defendants**