



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 389 OF 2007**

**ORCHID PHARMACY LIMITED ..... PLAINTIFF**

**VERSUS**

**SOUTHERN CREDIT BANKING CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**MUGA AUCTIONEERS & GENERAL MERCHANTS ... 2<sup>ND</sup> DEFENDANT**

**HIGH ENERGY SOLUTIONS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. There are 2 Applications before Court, the first is the third Defendant's Notice of Motion dated 3rd June 2010 and the second is the Plaintiff's Notice Motion dated 4th December 2012. This court directed that the two Applications be heard together in order that such may be disposed of leaving the way open for this matter to go to trial or otherwise. The third Defendant's Notice of Motion is brought under the *old Civil Procedure Rules* **Order VI Rule 13 (1) (b), (c) and (d)** as well as **Order XXXV Rule 1 (1) (b) and (2)**. It is also brought under **section 3A** of the *Civil Procedure Act* and **section 69B** of the *Transfer of Property Act, 1882*. The Application seeks that the Plaintiff's suit as against the third Defendant be struck out as well as the Plaintiff's Defence to the third Defendant's Counterclaim. It prays for a further Order that this Court be pleased to grant possession to the third Defendant of the suit property known as L. R. No. 1870/X/116 (hereinafter "the suit property"). The Plaintiff's said Application seeks Orders that pending the hearing of the third Defendant's Notice of Motion dated 3rd June 2010, the Defendants be ordered to comply with the Notice to Produce Documents as served on the First and Fourth Defendants dated 5th July 2010.
2. It is quite clear to this Court that the two Applications are entirely separate in that the Plaintiff's Application, in my view can only addressed to the first and fourth Defendants herein. As a result, the Court is slightly bemused to note that the second Defendant has filed joint Grounds of Opposition together with the first Defendant to the Plaintiff's said Application. Similarly, the third Defendant has filed Grounds of Opposition in relation to the Plaintiff's said Application even though that Application is not addressed to it. In any event, it appears that the determination of the third Defendant's said Notice of Motion dated 3rd June 2010 may well dispose of the whole suit before Court.

3. That Application is supported by the Affidavit of **Samuel Gathuki Macharia** dated 3rd June 2010, who details that he is a director of the third Defendant. The deponent noted that he saw an advertisement in the Kenya Times Newspaper on 24 July 2003 placed by auctioneers who claimed to have received instructions from the chargees of the suit property to sell the same, it being situated in Westlands, Nairobi. He said that he attended the auction and his company emerged as the highest bidder offering the sum of Shs. 9 million for the suit property, which was accepted by the auctioneers on behalf of the chargee, the first Defendant. Initially, the third Defendant put down the required deposit sum of 25% of the agreed purchase price, being Shs. 2,250,000/-. Thereafter, the suit property was transferred to the third Defendant by a Transfer dated 8th March 2006 as between the first Defendant, as chargee, and the third Defendant. Mr. Macharia maintained that the third Defendant was an innocent purchaser of the suit property for value without notice. When the third Defendant came to take over possession of the suit property, the Plaintiff refused to give up possession, despite a notice addressed to it dated 5 April 2007, requiring it to vacate the same. The Plaintiff thereafter filed a suit in this Court being HCCC No. 389 of 2007. By 2 Rulings dated 8th June 2004 (Mutungi J.) and 3rd June 2009 (Kimaru J.) it was held that the Plaintiff did not have any case against the third Defendant and that the latter was entitled to possession of the suit property. Not satisfied with those Rulings, the Plaintiff moved to the Court of Appeal by way of *Nairobi Civil Application No. NAI 171 of 2005*. The deponent noted that the Court of Appeal had granted an interim injunction subject to the condition that the Plaintiff do deposit the sum of Shs. 2,500,000/- into an interest-bearing account in the joint names of the advocates of both the Plaintiff and the third Defendant, within 30 days. The deponent noted that the Plaintiff never complied with that condition and consequently the orders of injunction lapsed. In concluding his Supporting Affidavit, Mr. Macharia further noted that the Plaintiff had filed a previous suit being *HCCC No. 561 of 2003* which had been dismissed for *inter-alia*, want of prosecution.
4. The Plaintiff responded to the said Application of the third Defendant through the Replying Affidavit of **Mohammed Iqbal Alibhai** sworn on 5th July 2010. The first paragraph of that Affidavit is interesting in that the deponent stated that he was the Plaintiff/Respondent herein whereas the title of this suit details that the Plaintiff/Respondent is Orchid Pharmacy Ltd. The deponent maintained that the auction of the suit property was fraudulent and that the third Defendant did not exist as a legal entity at the time. Indeed, the deponent maintained that the said Mr. Macharia was not a director of the third Defendant company attaching copies of correspondence as between the Plaintiff's advocates and the Registrar of Companies to prove the point, more specifically a copy of a letter from the Registrar of Companies dated 19th August 2005 in which he recorded that the third Defendant did not appear in his index of registered companies. As a result, Mr. Alibhai maintained that he was legally and lawfully in occupation of the property and was not a trespasser therein. He did not owe the third Defendant any arrears in terms of rent as the suit property was legally his! The deponent stated that he had sought to join the Attorney General to this suit in order to "complete the deal" with the controversial fraudulent matters, without going into any detail as to what such matters involved. He further stated that Mr. Macharia did not attend the alleged auction and attached copies of two Affidavits dated 23rd September 2003 and 7th October 2003 to prove the same. He also maintained that the deposit of 25% was not paid at the fall of the hammer as alleged by Mr. Macharia. He had asked for particulars in this regard of the second and third Defendant's advocates but they had not been supplied. He further attached correspondence which he maintained clearly indicated the issues of fraud in the purported sale of the suit property.
5. The Replying Affidavit of Mr. Alibhai was responded to by a Further Affidavit sworn on behalf on the third Defendant by its Company Secretary one **Julius Ngumbau Mwengei** dated 22nd June 2011. The deponent commenced by reiterating the contents of an earlier affidavit sworn as regards these proceedings on 3<sup>rd</sup> June 2010 by the said Mr. Macharia. He noted that the third Defendant was incorporated on 26th March 2002 and that Mr. Macharia's name on the Company search carried out by the Plaintiff's advocates had been wrongly spelt. He believed that the Plaintiff's allegations concerning the third Defendant's incorporation and directorship as scandalous. The allegations of fraud made by Mr. Alibhai were really matters as between the Plaintiff and the first and second Defendants herein not the third Defendant. The deponent reiterated that the third Defendant's acquisition of the suit property had been upheld by 2 Judges of this Court in separate

- Rulings as above. He believed that the continued occupation by the Plaintiff of the suit property was extremely painful, unfair and oppressive to the third Defendant. Finally, he noted that, as regards the other case brought by the Plaintiff being *HCCC No. 561 of 2003*, the same had been dismissed by a Ruling of **Warsame J.** (as he then was) on 19th July 2007.
6. The submissions of the third Defendant in relation to both the said Applications were filed herein on 25<sup>th</sup> February 2013. After setting out the background, the third Defendant noted that it was the Registered Proprietor of the suit property and noted that the Title to the same was governed by the Registration of Titles Act (now repealed). Section 23 thereof provided that a person registered as the proprietor of a property is the absolute and indefeasible owner thereof. It further provided that the Certificate of Title issued in respect of a property should be taken by all Courts as conclusive evidence of the registered proprietary. However, fraud could be a ground for challenging the title of a registered proprietor but only where it was proved that the registered proprietor was a party to the same (**section 24, Registration of Titles Act**). The third Defendant submitted that the suit property was sold to it by the first Defendant as a result of the Plaintiff's default. The third Defendant was an innocent purchaser for value without notice. The third Defendant then went on to point at the Rulings of both **Mutungu J.** and **Kimaru J.** as well as the Ruling of the Court of Appeal granting the Plaintiff a conditional stay, which it did not fulfill. The third Defendant then referred to the authorities it had filed as regards its Application being **Kanyagia v Wangechi, Central Bank of Kenya v Trust Bank & Ors., Ze Yu Yang v Nova Industrial Products Ltd, Elizabeth Njeri v Housing Finance Company of Kenya Ltd & Ors, Thugi River Estate Ltd & Anor. v WBK & Ors.** The third Defendant concluded its submissions by detailing that the Plaintiff had no right to the suit property as the third Defendant, which is a legal entity, acquired the suit property legally and is consequently entitled to possession thereof. The Plaintiff had full knowledge of the public auction of the suit property but has continued in possession of the same to the detriment of the third Defendant. The Plaintiff was a trespasser and the third Defendant was entitled to the position sought. Finally, the third Defendant submitted as regards the Plaintiff's said application to produce documents. Obviously, the third Defendant had misread the said Application as it was not directed to it. However it maintained that the Application had been made by the Plaintiff with the intention of scuttling the hearing of the third Defendant's said Application dated 3rd June 2010. It referred to its Grounds of Opposition dated 6th February 2012 and sought to adopt the same.
7. The written submissions of the first and second Defendants noted that the third Defendant's Application dated 3rd June 2010 did not affect the first and second Defendants and, as such, they did not propose to make any submissions as regard thereto. As regards the Plaintiff's Application dated 4th December 2012, the first and second Defendants relied upon their grounds of opposition dated 6th February 2013. The first and second Defendants drew to the attention of the Court that they were required to produce and show to the Court the originals of three documents set out thereunder during the hearing of application wrongly identified as dated 7th July 2010. There was no application on record on that date. That was the first point made by the first and second Defendants. The second point that they raised was that it was not really practical that they be ordered to produce the originals of the documents specified in the Notice to Produce when the hearing during which the documents were to be shown to court will have already taken place. The first and second Defendant submitted that the juridical basis of a Notice to Produce is under section 69 of the Evidence Act which reads:

**“Secondary evidence on the contents of the documents referred to in section 68 (1) (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession of the document is, to the order's advocate, such notice to produce as is required by law or such notice as the court considers reasonable in the circumstances of the case.”**

It was the first and second Defendant's position that a Notice to Produce permits the party issuing it to rely on secondary evidence in the event that the original document is not produced during the trial. In this regard they referred the Court to the cases of **Gari & 2 Ors. v R. (1990) KLR 656, Ndegwa v Maina (2009) eKLR** and **Gachiengo v Aviation Assistance International Kenya Ltd (In Liquidation) & 2 Ors (2008) eKLR**. The first and second Defendants maintained that there was no

material placed before the Court, as to any of the documents listed in the Plaintiff's Notice to Produce, to show that they were in the possession of the first or indeed the second Defendant. They noted that if the Plaintiff considered that any of the documents were important for its case, it could rely on the secondary evidence of the same by virtue of having issued the said Notice to Produce. Finally, the first and second Defendants noted that **KImaru J.** in his said Ruling dated 3rd June 2009 had made specific findings as to the Plaintiff's allegations of fraud which it now sought to raise, yet again, before this Court.

8. The Plaintiff's submissions in relation to both applications before Court were filed herein on 9th May 2013. It submitted as follows:

**“a) That the plaintiff had only charged its property number LR No. 1870/X/111 and there was no legal charge at all executed by the plaintiff in respect of LR NO. 1870/X/116 which property the 1<sup>st</sup> defendant purported to exercise a statutory power of sale.**

**b) That a public auction that was conducted by the 2<sup>nd</sup> defendant when the subject property was allegedly auctioned to the 3<sup>rd</sup> defendant was a sham and the same was coloured with immense fraud and misrepresentations.**

**c) The plaintiff's main contention in this suit, as can be discerned from the amended plaint dated 5<sup>th</sup> October, 2009 is the auction as conducted was illegal and fraudulent since; the 3<sup>rd</sup> defendant did not exist at that time, it is acknowledged that even the deposit was not paid at the fall of the hammer, the 3<sup>rd</sup> defendant purported director one J. Misende has never been a director of the 3<sup>rd</sup> defendant and no evidence has been tendered to disprove that, and now it has been discovered that the directors of 3<sup>rd</sup> defendant were employees of the 1<sup>st</sup> defendant.**

**d) The plaintiff has attached evidence from the registrar of companies to the effect that the 3<sup>rd</sup> defendant company did not exist (see letter from registrar of companies dated 18<sup>th</sup> July, 2005), the 3<sup>rd</sup> defendant in their letter dated 13<sup>th</sup> April, 2007 purported to be from the registrar of companies purports to state that the third defendant company exists. Curiously the letter does not state when was the company registered and if specifically one Mr. Misende was ever a director. The plaintiff's contention that the company was not existing in 2003 at the time of auction has not been rebutted by any evidence at all. Save for a unclear copy of the incorporation certificate, whose the original the plaintiff really wants inspect, The 3<sup>rd</sup> defendant has provided no document that confirms it existed at the date of the auction. Not even a copy of memorandum and articles of the company has been produced.**

**Consequently your lordship, it would be critical for the court to investigate these matters by allowing for evidence to be tested in cross examination and for this suit to be heard on merits. This is not a proper case for summary judgment or striking out as prayed by the 3<sup>rd</sup> defendant.**

**e) The plaintiff has filed a defence to the 3<sup>rd</sup> defendant's counterclaim as contained in the amended defence, the said plaintiff's defence raises substantive issue and cannot be said to be frivolous at all. It is our humble submission that this remedy for striking out is not available to the 3<sup>rd</sup> defendants because the plaintiff's defence to the counterclaim filed on 11<sup>th</sup> February, 2010 raises serious issues of fraud. Most of the**

fraud issues were discovered when the 3<sup>rd</sup> defendant filed a replying affidavit in the court of appeal in civil application 171 of 2005. Some more fraud has now been discovered in that the 3<sup>rd</sup> defendants two directors were actually employees of the 1<sup>st</sup> defendant! This gives credence to the fact that there was a lot of collusion between the 1<sup>st</sup> defendant and alleged 3<sup>rd</sup> defendant to defraud the plaintiff of his home.

f) The plaintiff's claim has never been heard on merit and determined with finality and as such the issue of res judicata does not apply to this suit. The plaintiff in its plaint has clearly disclosed the existence of a previous suit but in which suit the parties therein did not include the 4<sup>th</sup> defendant (Attorney General) like in this suit. The fate of that suit was a striking out merely because the summonses were not taken out on time for service upon the defendants. It was a technical point. The new constitution states under Article 159, "(d) justice shall be administered without undue regard to procedural technicalities".

The rulings of Justices Warsame, Mutungi and Kimaru have never validated the auction as submitted by the 3<sup>rd</sup> defendant or validated the 3<sup>rd</sup> defendants claim in any way. If they had, then the current application would be unnecessary. The judges clearly stated that they did not investigate the question of the irregularity of the auction sale. This what the plaintiff wants done in this suit among other issues.

Further the rulings of the judges and some of the comments made in the rulings were merely incidental and collateral to the fundamental decision of refusing the interlocutory applications and did not go to the root of the issues of fraud and collusion directly or indirectly to make any findings with finality as required by Section 7 of the Civil Procedure.

Accordingly, the plaintiffs claim cannot be said to be res judicata. Judges' opinions as to the probability of success of a suit expressed in an interlocutory application cannot be insinuated to mean a final decision on the matter".

Thereafter the Plaintiff referred the Court to a number of authorities including Assanand v Pettitt (No. 3) (1989) KLR 252, Bulhan & Anor. v The Eastern and Southerner Applicant Trade and Development Bank (2004) 1KLR 147, Nguyai v Ngunayu (1985) KLR 606, Waki Holdings Ltd v Jane Karukenya (2005) eKLR and Commercial Advertising and General Agencies Ltd v Qureishi HCCC No. 55 of 1978 (1985) KLR 458.

9. As regards its own application dated 4th December 2012, the Plaintiff noted that the same sought to compel the Defendants to produce documents that would ordinarily be available at public offices like Sheria House or the Lands Registry. There were documents that the first Defendant would ordinarily have provided to the Plaintiff in a normal lending transaction. The Plaintiff maintained that it was not in dispute that it did not have the custody of such documents. It maintained that it had made efforts to seek discovery of such important and critical documents that would assist this Court in arriving at a decision in the matter. The documents sought from the third Defendant were ordinary documents that any incorporated company would have in its possession. The Court found this submission surprising in view of the fact that the Plaintiff's said Application as regards the Notice to Produce dated 5th July 2010, did not seek the discovery of any documents from the third Defendant. As regards the first and fourth Defendants, the document most sought by the Plaintiff was a replacement Charge which it maintained that it did not execute. It required the same to be produced before Court so that it could be aware of the extent of the fraud committed in this matter.
10. As regards the third Defendant's Notice of Motion dated 3rd June 2010, I have spent some time perusing the Rulings of my learned brothers dated 3rd June 2009 (**Kimaru J.**), 8th June 2004 (**Mutungi J.**) and 19<sup>th</sup> July 2007 (**Warsame J.**). In the Chamber Summons dated 11th September 2003, the Plaintiff herein and therein in *HCCC No. 561 of 2003* sought orders to the extent that the

Defendants therein and herein be restrained from transferring, trespassing, evicting or in any way interfering with the Plaintiff's quiet possession of the suit property. That was prayer No. 3 of the said application and it was premised on the grounds that L. R. No. 1870/X/116 was different from L. R. No. 1870/X/111. **Mutungu J.** clearly stated that he had:

**“already exploded the myth and falsity upon which that argument was grounded”.**

The learned Judge went on to say that the suit property having been sold on 8th August 2003, the first Defendant therein and herein has no interest or authority in evicting the Plaintiff therefrom. He found that the suit property effectively belonged to the third Defendant and the only remaining step (at that time) was the transfer of the suit property to the third Defendant. He also found that the right of redemption of the Plaintiff herein and therein was extinguished upon the fall of the hammer on 8th August 2003. Finally, as regards the irregularity of the sale, the learned Judge found that the Plaintiff's remedy lay only in damages which he was sure that the first Defendant herein and therein could afford when and if such irregularity was proved. Moving onto the said Ruling of **Warsame J.** delivered on 19th July 2007 in relation to *HCCC No. 561 of 2003*, such was based on the application of the Defendants herein and therein to dismiss the Plaintiff's suit for want of a valid summons to enter appearance or, in the alternative, for want of prosecution. In his Ruling, the Judge found that no summons had been issued and even if it had been, it had not been served upon the Defendants therein in order to allow them to properly participate in the proceedings. The learned Judge commented:

**“I agree that the plaintiff's conduct is wanting and it is impossible to conduct a fair trial when the party in pursuit of a cause of action is playing dirty tricks on the rules of the law”.**

11. I should briefly refer to the Ruling of the Court of Appeal delivered on 9th February 2007. That was in response to the Plaintiff's herein application seeking a temporary injunction to restrain the Defendants herein from disposing of, transferring, trespassing onto or in any other way interfering with the suit property, pending appeal. As indicated by the submissions of the third Defendant that application was granted as prayed but on the condition that the Plaintiff deposited the sum of Shs. 2,500,000/- in a joint interest-bearing account in the names of the advocates for the Plaintiff and the third Defendant, within 30 days. I accept the position of the third Defendant that the Plaintiff failed to comply with that condition hence the temporary injunction lapsed.
12. Having suffered the setbacks as outlined above in relation to *HCCC No. 561 of 2003*, it seems that the Plaintiff herein decided to try its luck before Court by filing a fresh suit. A similar application was filed under the old **Order XXXIX** seeking to restrain the Defendants herein from interfering with the Plaintiff's quiet possession of the suit property. Reading through the Ruling of my learned brother **Kimaru J.**, exactly the same matters that had been raised before the Judge by the Plaintiff herein and responded to by the Defendants, have been raised again before this Court. Indeed in his Ruling, the Judge referred to the said Ruling of **Mutungu J.** as above and found that he had held as a fact, that the suit property and another property that had been amalgamated with it were one and the same. Further, he found that the mortgage registered over the suit property was valid and therefore that the first Defendant acted within its rights when it sold off the suit property to the third Defendant. He had also found that the sale of the suit property to the third Defendant by public auction was lawful. To this end, **Kimaru J.** held that it was clear to him that the alleged new facts put forward by the Plaintiff were not in fact new and had been conclusively considered by the court in the previous suit (*HCCC No. 561 of 2003*).
13. In his said Ruling, **Kimaru J.** on the point of *res judicata*, quoted extensively from the finding by **Ringera J.** in the case of **Omondi & Anor. National Bank of Kenya & 2Ors (2001) KLR 579** before finding on the same as follows:

**“In the present application, it was clear that the issue as to whether the 1<sup>st</sup> defendant had**

mortgaged the correct property was considered by Mutungi J after which he rendered a decision. The plaintiff at the time had argued that the 1<sup>st</sup> defendant lacked legal capacity to realize the security since the registered mortgage was in respect of a property other than the one which the 1<sup>st</sup> defendant eventually sold to the 3<sup>rd</sup> defendant in exercise of its statutory power of sale. It is the same argument that the plaintiff presented to this court. That issue is *res judicata* and cannot be re-litigated before this court. It seems that the plaintiff is of the mistaken view that if there are nuances in the manner in which an issue is presented to the court, then that issue can be regarded as a new matter which cannot be defeated by the application of the doctrine of *res judicata*. That cannot be. The plaintiff cannot be permitted to litigate issues by installments.

Further, it was clear that the issues that the plaintiff seeks opinion of this court are issues that are pending before the Court of Appeal for determination. I think it is dishonest on the party of the plaintiff to present its case to two separate forums over the same issues. I hold that if the plaintiff discovered a new issue which it thought that it ought to be brought to the attention of the Court, it should have amended its previously pleadings instead of filing a new suit to litigate over the same matters and over substantially the same issues. I therefore hold that the issues that the plaintiff is seeking to litigate in the present application is *res judicata* since a court of competent jurisdiction has already rendered an opinion on the same.

The plaintiff further argued that the 1<sup>st</sup> defendant, in exercising its statutory power of sale, had purported to sell the suit property to the 3<sup>rd</sup> defendant, in its view, a non-existent entity. Having evaluated the facts of this case, it was clear that the 3<sup>rd</sup> defendant is a duly registered company and therefore an entity which can, in law, own property. The 3<sup>rd</sup> defendant satisfied this court that it had lawfully purchased the suit property in a public auction convened by the 1<sup>st</sup> defendant in exercise of its statutory power of sale. I did not find any substance in the claim by the plaintiff that the 1<sup>st</sup> defendant had fraudulently sold the suit property to the 3<sup>rd</sup> defendant. Mutungi J found as a fact that the mortgage over the suit property was valid and therefore the 1<sup>st</sup> defendant had the right to realize the security once the plaintiff was in default in repaying the amount that was advanced to it”.

14. By way of finality, I would respond to the Plaintiff’s submissions as set out above as follows:

- a. L. R. No. 1870/X/111 and L. R. No. 1870/X/116 are one and the same property, properly mortgaged to the first Defendant.
- b. The public auction conducted on 8th August 2003 was not a sham as has already been found by two of my predecessor Judges. The suit property was transferred to the third Defendant on the fall of the hammer.
- c. It is incorrect that the third Defendant did not exist at the time of the public auction held on 8th August 2003. As has already been held, the third Defendant was incorporated on the 26th March 2002.
- d. As has already been found, Mr. Macharia was a shareholder and director of the third Defendant as per the letter from the Assistant Registrar of Companies dated 13th April 2007.
- e. The Plaintiff’s Defence to the third Defendant’s counterclaim has already been adjudged wanting. It does not raise any substantive issues which require this matter to go to trial. The issues of fraud raised therein relate to the conduct of the public auction of the 8th August 2003 which has already been held to have been properly conducted.
- f. Finally, it is quite clear to this Court that this matter is *res judicata* more particularly as regards the Rulings of **Mutungi J.** and **Kimaru J.** **Section 7** of the *Civil Procedure Act* reads:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

1The section clearly applies to the matter before this Court.

15.The outcome to the above is that I allow the third Defendant's Notice of Motion dated 3rd June 2010 and I strike out the Plaintiff's suit as against the third Defendant with costs. Further, I strike out the Plaintiff's Defence to the Counterclaim of the third Defendant also with costs. I order that the Plaintiff will immediately grant possession of the suit premises to the third Defendant and, if necessary, the third Defendant may seek the assistance of the Officer in charge of the Parklands Police Station to enforce this Order. Finally, I strike out the Plaintiff's Notice of Motion dated 4th December 2012, stated to be brought against all the Defendants but more particularly as against the first and fourth Defendants. The Defendants will have the costs of that Application.

**DATED and delivered at Nairobi this 1<sup>st</sup> day of August, 2013.**

**J. B. HAVELOCK**

**JUDGE**