



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 152 OF 2012**  
**(MULTI-TRACK)**

**CHRISTOPHER MICHAEL LOCKLEY ..... PLAINTIFF**

**V E R S U S**

**1. JULETABI AFRICAN ADVENTURE LIMITED**

**2. DANIEL OJWANG ACHOKA**

**3. NZILANI JOHN KITHOKOI ..... DEFENDANTS**

**RULING**

1. The Plaintiff has brought an application by way of Notice of Motion dated 14<sup>th</sup> August 2012. By that application he seeks to restrain the Defendants from selling or disposing Plot Kwale/Diani S.S/2371 (**the Property**) and motor vehicle registration No. KAM 634J (**the vehicle**). The Plaintiff also seeks mandatory injunction against the 2nd and 3rd Defendants for the said Defendants to release the possession of the Title Deed of the property and the Log Book of the vehicle until determination of this suit.
2. In his affidavit in support of his application, the Plaintiff stated that he together with the 2<sup>nd</sup> Defendant on 28<sup>th</sup> June 2006 incorporated the 1<sup>st</sup> Defendant's Company whereby he was the major shareholder. Subsequently, on 26<sup>th</sup> May 2011 at a board meeting of the 1st Defendant a resolution was made to appoint additional directors of the 1st Defendant namely; Julia Ann Elizabeth Lockley and Nzilani John Kithokoi. Due to the fact that the Plaintiff was ordinarily a non resident and works outside Kenya, it was agreed that the 2nd Defendant was to be incharge of business operations and management of the 1st Defendant. In order to explain the Plaintiff's and the 2nd Defendants hitherto relationship and business dealing the following depositions make it clear-

***“5. That I have over the years, prior to and subsequent to the incorporation of the 1<sup>st</sup> Defendant, dealt with the 2<sup>nd</sup> Defendant in complete trust and with utmost good faith in all transactions that we have agreed upon to undertake and had relied without any reservations whatsoever on the***

*representations made to me by the 2<sup>nd</sup> Defendant in regard to the manner in which transactions are to be carried on within the legal confines of the laws of Kenya.*

*6. That the 2<sup>nd</sup> Defendant did during the period we related closely make me believe that as a foreigner in Kenya it is not at all easy to acquire, own and possess immovable and movable properties of substantive value by myself without attracting undue attention and/or having a run in with the Kenyan Administrative authorities and/or general with the Kenyan Legislative and Municipal legal regime.*

*7. That following the representation made to me by the 2<sup>nd</sup> Defendant and on reliance on such representations that I believed to be true I agreed about over 5 years ago to purchase a Motor Vehicle Registration No. KAM 634J that was registered in the names of the 1<sup>st</sup> Defendant for its business operations on an understanding that the purchase price was a loan advance to the 1<sup>st</sup> Defendant to be repayable on priority basis. I annex hereto and mark as "CML-3" a Photostat copy of the Certificate of Search from the Registrar of Motor Vehicles dated 10<sup>th</sup> August, 2012 to attest to the registered ownership of the said motor vehicle.*

*8. That todate the 1<sup>st</sup> Defendant has not refunded any part of the loan sum I advanced towards the purchase price for the said motor vehicle Registration No. KAM 634J and in complete breach of trust the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have in the recent past used the said Motor Vehicle in the business operations of a tour company separately operated by them without due payment of any hire charges to the 1<sup>st</sup> Defendant.*

*9. That further in pursuant to representations made to me by the 2<sup>nd</sup> Defendant and whilst acting on utmost good faith and the trust I had in the 2<sup>nd</sup> Defendant I had a parcel of land comprised in Plot No. Kwale/Diani S.S./2371 purchased in the month of June, 2011 and the title to the said parcel of land was transferred and registered in the names of the 1<sup>st</sup> Defendant. I annex hereto and mark as "CML-4(a) & (b)" Photostat copies of the Title Deed issued on the 5<sup>th</sup> July, 2011 and the Certificate of Official Search dated 8<sup>th</sup> August, 2012 to attest to the registered ownership of the said parcel of land."*

3. The vehicle and the property were according to the Plaintiff purchased from the funds transfer by the Plaintiff to the 1<sup>st</sup> Defendant.
4. What indeed triggered this action and the interlocutory application is the Plaintiff's contention that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have commenced a parallel Tour & Safari company which business was in direct competition with the 1<sup>st</sup> Defendant's business. The Plaintiff stated that that competition had adversely affected the 1<sup>st</sup> Defendant's business. Further that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have intention to dispose the property and the vehicle without the Plaintiff's knowledge and without a resolution made by the 1<sup>st</sup> Defendant. The Plaintiff was of the opinion that the Defendants may proceed with such sale because they were in possession of the Company's seal of the 1<sup>st</sup> Defendant.
5. The Plaintiff's claim is that the 1<sup>st</sup> Defendant holds the property and the vehicle in trust for the Plaintiff.
6. The 2<sup>nd</sup> Defendant did not file a replying affidavit but relied on grounds of opposition in opposing the Plaintiff's application. Those grounds of opposition relied largely on matters of facts and to

that extent the Court shall not rely on them. It is only the grounds that relate to matters of law that will be considered in this ruling.

7. The 2<sup>nd</sup> Defendant submitted that the 1<sup>st</sup> Defendant's Company being in law a different person to its subscribers the Plaintiff could not lay a claim which he now makes in this suit. In that regard the 2<sup>nd</sup> Defendant referred to the famous case of **Salomon A. Salomon & Co. Ltd (1897)AC 22.**
8. The 2<sup>nd</sup> Defendant also in opposition faulted the Plaintiff's claim on the basis that it went against the rule in **Foss -Vs- Harbottle [1843]67ER189.** This rule provides that where an action alleges wrong doing to the Company the proper claimant is the Company itself.
9. 2<sup>nd</sup> Defendant also submitted that the Plaintiff's prayers are unattainable since the Plaintiff has failed to plead fraud or misrepresentation.
10. The Plaintiff sought to rely on the documents attached to his affidavit which are marked "CML-5" to prove that the Plaintiff had provided the 1<sup>st</sup> Defendant with funds. To this the 2<sup>nd</sup> Defendant submitted that those documents contravene Section 160B of the Evidence Act Cap 80. In the 2<sup>nd</sup> Defendant's submissions those documents did not prove that the Plaintiff had advanced to the 1<sup>st</sup> Defendant a loan.
11. The Plaintiff's claim that the 1<sup>st</sup> Defendant held the property and the vehicle in trust was according to the 2<sup>nd</sup> Defendant contrary to Article 65(3)(b) of the Constitution of Kenya, 2010. This Article provides that the property where it is held in trust the beneficial interest of that trust has to be held by persons who are Kenyan citizens.
12. The 3<sup>rd</sup> Defendant in his short replying affidavit denied that he and the 3<sup>rd</sup> Defendant was intending to sell the 1<sup>st</sup> Defendant's property. The 3<sup>rd</sup> Defendant did not deny that he and the 2<sup>nd</sup> Defendant had formed a competing Tour Company as alleged by the Plaintiff. He however denied that such Company was using the vehicle belonging to the 1<sup>st</sup> Defendant.
13. I have considered the parties affidavits, submissions and their authorities.
14. There is no doubt that the 1<sup>st</sup> Defendant has a separate and distinct personality to its Directors as was held in the case of **SALMON** (supra). That fact however does not detract the Plaintiff's right to sue the 1<sup>st</sup> Defendant's Company. The Plaintiff in my view has that right to make a claim and his claim cannot be defeated on that ground alone.
15. The rule of **Foss Harbottle** (supra) allows a minority shareholder to bring a derivative action on behalf of an incorporated company. The question that arises is whether at this interlocutory stage the Court can determine whether what the Plaintiff has brought is derivative action. The answer to that question in my view will have to wait the full hearing of this suit.
16. The Plaintiff's suit is not defeated by the Plaintiff's failure to specifically plead fraud or misrepresentation. As I understand it the Plaintiff's action is for declaration of trust and or for the release of the Title of the property and the Log Book of the vehicle.
17. Section 160B(4) of Cap 80 requires a party who seeks to rely on electronic record to give a certificate which identifies the documents describing how they were produced and giving particulars of the device involved in its production. Such a Certificate should be signed by a person occupying a responsible position. The documents to which the 2<sup>nd</sup> Defendant raised the objection under Section 160B are the ones showing transfer of funds allegedly made by the Plaintiff to the 1<sup>st</sup> Defendant. It does seem to me that those documents were some form of Bank Statements. If that be so, they would be allowed in evidence by virtue of Section 176 of Cap 80. That Section provides the mode of proof of entries in banker's book. The 2<sup>nd</sup> Defendant's

objection in this regard is rejected.

18. The 2<sup>nd</sup> Defendant's objection to the Plaintiff's application is on the basis that the Plaintiff's claim under trusteeship is defeated by Article 65(3)(b) of the Constitution. That Article is in the following terms-

***“Property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizen.”***

The provisions of that Article defines when a property regarded as being held in trust by a citizen.

19. Firstly I respond by saying that Article does not defeat Plaintiff's claim. Although the Plaintiff claimed that the property is held in trust for him by the 1st Defendant he has not claimed for rectification or transfer of that Title in his name. On the other hand whether at present the Plaintiff is or isn't a Citizen of Kenya is not clear since no documentation in that regard was presented before Court. Citizenship after all can be obtained at any time.

20. Having considered those oppositions I need to state that on the affidavits before me the Plaintiff's allegation that the Defendants have formed a Company in direct competition with the 1st Defendant has not been denied. On the affidavit evidence before the Court the Defendants do not deny the Plaintiff's claim that the Defendant's are intending to sell the property and the vehicle.

21. The Plaintiff has to satisfy the principles of granting an injunction as set out in the case **Giella - Vs- Cassman Brown [1973]EA 358**. Those principles are that an applicant must show a prima facie case with a probability of success; that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages, and finally if the Court is in doubt of the two principles it will decide the case on a balance of convenience.

22. The Plaintiff on the evidence before Court has shown a prima facie case with probability of success. The Plaintiff annexed documents 'CML-5' which shows money transfers into the 1<sup>st</sup> Defendant's Account. It is this money that the Plaintiff alleges was used to purchase the property and the vehicle. Further as stated above the Plaintiff's allegation that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are intending to sell the property and the vehicle has not been controverted. As stated before the Court has only the replying affidavit of the 3<sup>rd</sup> Defendant which affidavits fail to controvert that allegation. That being so I find that the Plaintiff has shown a prima facie case. I make that finding exercising the caution set out in the case of **Mrao -Vs- First American Bank Ltd & 2 Others (2003)eKLR** where the Court stated-

***“In considering whether the Plaintiff has established a prima facie case with a probability of success the Court must exercise caution to avoid making definite finding of either fact or law as doing so would encroach into the province of the trial Court. The Court at this interlocutory stage is only investigating if the Applicant has, by his pleadings, made out a prima facie case.”***

23. The 2<sup>nd</sup> Defendant submitted that the Plaintiff has not shown that damages would not adequately compensate him. On that basis he argued that the injunction should not be granted as sought. I would state that it is correct that the Plaintiff has not shown whether the damages would compensate him because both the property and the vehicle have their value which can be ascertained. Since there is therefore doubt whether the Plaintiff has satisfied the second principle of granting an injunction, I will proceed to consider where the balance of convenience lies. As stated the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have allegedly attempted to sell the property and the vehicle. If they were not stopped from carrying out such sale not only would the 1<sup>st</sup> Defendant suffer but also possibly the Plaintiff. The balance of convenience therefore in my view is to have the Defendants surrender the Title and the Log Book and also to surrender the possession of the motor vehicle.

24. Is the Plaintiff entitled to a mandatory injunction. The jurisprudence relating to the granting of mandatory injunction is that it may only be granted in exceptional circumstances. Megarry, J as quoted in the case **Stephen Kipkebut T/A River Lodge and Rooms -Vs- Naftali Ogola Civil App. No. Nai 146 of 2008 (UR. 93/08)** had this to say on granting of mandatory injunction-

*“... although it may not be possible to state in any comprehensive way the grounds upon which the Court will refuse to grant a mandatory injunction in such cases at the trial they at least include the triviality of the damage to and the existence of a disproportion between the detriment that the injunction would inflict on the Defendant and the benefit that it would confer on the Plaintiff. The basic concept is that of producing a fair result and this involved the exercise of judicial discretion.”*

25. That case shows that a Court in granting mandatory injunction should consider fair result. Bearing the above holding in mind I ask myself a rhetorical question- What detriment would the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants suffer if the Title of property and the Log Book of the vehicle were surrendered to the Plaintiff to retain them until the final determination of this suit? I can see none. It is for that reason that I hold that this is a fit and proper case for the Court to exercise its discretion in favour of the Plaintiff.

26. I grant the following orders-

- a. **Pending determination of this suit an injunction is hereby issued restraining the Defendants from selling or disposing Plot Kwale/Diani S. S./2371 and motor vehicle Reg. No. KAM 634J.**
- b. **Pending determination of this suit a mandatory injunction is hereby issued directing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to immediately release the Title document of Kwale/Diani S.S./2371 and the Log Book of motor vehicle Reg. KAM 634J to the Plaintiff.**
- c. **Pending determination of this suit a mandatory injunction is hereby issued directing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to release the possession of motor vehicle Reg. No. KAM 634J to the Plaintiff.**
- d. **The Plaintiff shall retain the Title to Plot Kwale/Diani S.S./2371 and the Log Book No. KAM 634J until further orders of this Court or until determination of this suit whichever occurs first. For the avoidance of doubt the Plaintiff shall not dispose or sell the parcel of land and the motor vehicle.**
- e. **The cost of the Notice of Motion dated 14<sup>th</sup> August 2013 are awarded to the Plaintiff to be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.**

Dated and delivered at Mombasa this 20<sup>th</sup> day of September, 2013.

MARY KASANGO

JUDGE