



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 11 OF 2013

GRAVET LTD.....PLAINTIFF/APPLICANT

VERSUS

MOHAMED HASSAN MAALIM 1ST DEFENDANT/RESPONDENT

ADAN ABDI MUSA 2ND DEFENDANT/RESPONDENT

GULED HOUSING CO. LTD. 3RD DEFENDANT/RESPONDENT

RULING

1. Before the Court is a Notice of Motion application filed by the Plaintiff dated 17th January, 2013, and brought pursuant to the provisions of **Section 7(1)** of the *Arbitration Act*, **Sections 1A, 1B and 3A** of the *Civil Procedure Act*, **Order 20 Rules (1) and (3); Order 40 Rules 1 and 2; Order 46 Rules 20(1) & (2); Order 51 Rule 1** of the *Civil Procedure Rules, 2010*, *Article 159(2)(c)* of the *Constitution* and all other enabling provisions of the law. In the application the Plaintiff seeks the following prayers *inter alia*;

“5) **THAT** an injunction be issued restraining the 1st and 2nd Defendants whether by themselves, their agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from selling, disposing, charging, pledging, diluting, dealing, transferring, interfering with and/or intermeddling in any manner whatsoever with the 3rd Defendant’s property known as Tusker House situate and/or located on L.R Number 209/798 and L.R Number. 209/6497, Nairobi, and all the developments thereon pending the intended arbitration and award pursuant to Clause 23 of the Shareholders’ Agreement.

6. **THAT** an injunction be issued restraining the 1st and 2nd Defendants whether by themselves, their agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from selling, disposing, charging, pledging, diluting, dealing, transferring, interfering with and/or intermeddling in any manner whatsoever with the shares and holding in the 3rd Defendant pending the intended arbitration and award pursuant to Clause 23 of the Shareholders’ Agreement.

7. **THAT** an injunction be issued restraining the 1st and 2nd Defendants whether by themselves, their agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from selling, disposing, charging, pledging, diluting, dealing, transferring, interfering with and/or intermeddling in any manner whatsoever with the 3rd Defendant's bank accounts with Barclays Bank of Kenya or any other bank account, or the funds, properties or all other assets belonging to the 3rd Defendant or otherwise disposing of the 3rd Defendant's properties or interests in the properties of any description and wherever situated pending the intended arbitration and award pursuant to Clause 23 of the Shareholders' Agreement.
8. **THAT** the 1st and 2nd Defendants be ordered to give accounts regarding rents, benefits, and any other income from and/or expenditure since July, 2008 on the property known as Tusker House situate and/or located on L.R Number 209/798 and L.R No. 209/6497 Nairobi.
9. **THAT** the Plaintiff/Applicant be at liberty to apply to the Honourable Court for such further directions and orders for purposes of meeting the ends of justice.
10. **THAT** the costs of this application be provided for".

2. The application is predicated upon the grounds set out as follows;

- a. **THAT** by a shareholding agreement dated 1st July, 2008 and entered into between the Plaintiff on the 1st part, the 1st and 2nd Defendants on the 2nd part and the 3rd Defendant (hereinafter called the Company) on the 3rd part, the Plaintiff acquired 450 shares (being 45% of the issued share capital of the Company). The 1st and 2nd Defendants hold 22% and 23% of the shares in the Company.
- b. **THAT** the aforesaid Shareholders Agreement dated 1st July, 2008 outlined duties, rights and benefits to the Shareholders to the Company.
- c. **THAT** the Company has several properties including but not limited to developments on L.R Number 209/798 and 209/6597 which the Company charged to Barclays Bank of Kenya vide a Charge dated 29th November, 2012.
- d. **THAT** pursuant to the aforesaid agreement, the Plaintiff appointed Messrs. Ibrahim Surrow Issack and Abdullahi Maalim Hassan to be the additional directors in the Company in addition to the 1st and 2nd Defendants.
- e. **THAT** the 1st and 2nd Defendants have breached and continue to breach the said Shareholders' Agreement dated 1st July, 2008 thereby depriving the Plaintiff of its rights, benefits and interest accruing from the said agreement.
- f. **THAT** the 1st and 2nd Defendants have since 2008 failed to convene any Annual General Meeting of the Company at the end of each financial year as required by Clause 4.1 of the aforesaid Shareholders' Agreement and Clause 29 of the Articles of Association of the Company.
- g. **THAT** the 1st and 2nd Defendants have refused to convene meetings of the Shareholders of the Company as required by Clause 4.4 of the Shareholders' Agreement, which meetings are required to be called by the Chairman of the Board or the Managing Director and must be held every six months.
- h. **THAT** the 1st and 2nd Defendants have also locked out and ignored the Plaintiff/Applicant's nominee Directors Messrs. Ibrahim Surow Isaack and Abdullahi Maalim Hassan to the

Company contrary to the express provisions of the Shareholders' Agreement.

- i. **THAT the 1st and 2nd Defendants have failed and/or neglected to call the Plaintiff's nominee directors for any Board Meetings in blatant disregard of the clear provisions of Clause 5.6 of the Shareholders' Agreement, with a consequence that there has been no quorum for the Board Meetings.**
- j. **THAT the 1st and 2nd Defendants have continued to ignore and/or overlook the Plaintiff concerning the budget of the Company against Clause 7.1.3.2 of the Shareholders' Agreement which requires all the shareholders to agree on a budget for the Company and contribute their respective shares of the amount required to finance the budget of the Company.**
- k. **THAT the 1st and 2nd Defendants have failed to provide management accounts either quarterly or for any period at all regarding the affairs of the Company to all the shareholders including the Plaintiff and have further refused to allow the Plaintiff's nominees to access the accounts of the Company in contravention to the agreement.**
- **THAT the 1st and 2nd Defendants have failed to appoint a property manager to manage the Company's property namely Tusker House on L.R Number 209/798 and L.R No. 209/6497, Nairobi in direct and blatant contravention of the express requirement of Clause 7.5 of the Shareholders' Agreement.**
- m. **THAT the 1st and 2nd Defendants have continued to undertake steps which require unanimous consent of all the shareholders as required by Clause 9 of the Shareholders' Agreement without consulting or indeed seeking the consent of the Plaintiff.**
- **THAT the Plaintiff is apprehensive that the 1st and 2nd Defendants may dispose of some of the assets of the Company being developments on L.R Number 209/798 and L.R No. 209/6497 Nairobi particularly Tusker House without consulting the Plaintiff and/or its nominees as required by the Shareholders' Agreement.**
- **THAT the application herein seeks interim protection to preserve the assets of the Company in order to avoid wastage and/or disposal of the assets, properties, shares and other benefits and incomes to the Company pending the intended arbitration process pursuant to Clause 23 of the Shareholders' Agreement.**
- p. **THAT in the interest of justice that the orders sought are granted so as to assure the Plaintiff/Applicant that the intended arbitration will not be rendered otiose".**
3. The application is supported by the Affidavit of **Ibrahim Surow Issack**, a Director of the Plaintiff Company. The deponent avers that there was an agreement entered into on 1st July, 2008 whereby the Applicant acquired 450 shares of the 3rd Defendant Company, this being a 45% stake in the Company, whilst the 1st and 2nd Defendants retained 330 and 220 shares, being a 33% and 22% stake in the Company respectively. In his averments, the deponent further alleged that the said agreement dated 1st July, 2008 conferred upon the Plaintiff the aforementioned stake holding in the 3rd Defendant, and empowered the Plaintiff to appoint him and **Abdullahi Maalim Hassan** as Directors, which appointment was made on 5th August, 2008. Further the deponent avers that the 1st and 2nd Defendants have worked together in cahoots, in an illegal and unscrupulous manner in managing the Company and have subsequently frustrated, ignored, sidelined and/or blocked him and Abdullahi Maalim Hassan with regards to all aspects of the management of the Company. Consequently, the deponent reiterates that the 1st and 2nd Defendants did not involve the Plaintiff in the preparation of the budget, was not invited to shareholders' meetings or Board meetings and was effectively locked out of the management of the company. The Plaintiff further avers, that by

- Clause 23.1 of the Shareholders' Agreement any disputes, controversy or claims arising and/or related to the Shareholders' Agreement would be resolved by referring the same to arbitration.
4. In response and in opposing the application by the Plaintiff, the 1st Defendant **Mohamed Hassan Maalim** filed his replying affidavit sworn on 25th February, 2013. In averring on behalf of the 3rd Defendant, the deponent admitted to the signing of the Shareholders' agreement dated 1st July, 2008 but that the same was not conclusive proof that the Plaintiff had acquired a 45% stake in the 3rd Defendant Company, and that the same was signed in anticipation of the Plaintiff paying for its said shares. It is also averred that the Plaintiff failed to adhere to the prerequisite conditions as set out in the agreement, It is further alleged that there are only five (5) shareholders in the said company, to the exclusion of the Plaintiff, who it is also alleged forged the signatures of the 1st and 2nd Defendants before lodging Share Transfer documents with the Registrar of Companies and illegally and fraudulently registering themselves as shareholders and directors of the 3rd Defendant Company. It is the deponent's averment that the Plaintiff is a stranger who has no locus and therefore no standing in the management of the 3rd Defendant company, has failed to acquire for lawful consideration any shareholding in the company and that any purported shareholding that the Plaintiff may have, which is denied, was taken up by assignment to **Tymco Trading Co. Ltd** following a traditional arbitration resolution of 4th January, 2011. It is further alleged that the nominee company also failed to honour the agreement entered on 3rd February, 2011 and that by failing to lawfully acquire and pay consideration for the 3rd Defendant company shares, the Application is and the suit herein as well, is a fraudulent strategy to acquire the aforementioned company unlawfully.
5. The Applicant's application is predicated upon the Shareholders' agreement dated 1st July, 2008 in which it was ostensibly mandated and obligated as per the agreement, to be a shareholder of the 3rd Respondent Company with a shareholding of a 45% stake in the company being 450 shares. The Applicant cited the case of **Alividza v LZ Engineering Construction Ltd Civil Suit No. 417 of 1998** in its list of authorities to support its claim. The Applicant also relied upon the cases of **Mrao v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, **Santack Enterprises Ltd v Kenya Building Society Ltd (2007) eKLR** and **Kenya Oil Co. v Kenya Pipeline Co. Ltd (2006) eKLR**. On its part, the Defendants in refuting and opposing the Application relied on issue estoppel in that the Plaintiff was estopped from making claims and allegations when it does not have *locus standi* in the first instance. They relied upon the cases of **Central London Property Trust Ltd v High Trees House Ltd [1956] 1 All E.R 256**, **Alghussein Establishment v Eston College [1991] 1 All E.R 267**, **Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd [1914-15] All E.R 333**, **Royal British Bank v Turquand [1843-60] All E.R Rep. 435**, **Lakshmi Ratan Cotton Mills Co. v J.K Jute Mills Co. Ltd (1957) AIR 311**, **Meena Chawla v Prism Entertainment Ltd, Machine Exchange Company v Rustonji Framji (1888) ILR 12 Bom 311**, **Eckerle & 2 Others v Wickedder Westfalenstahl GMBH [2013] EWHC 68 Ch.**, **Balwinder Kaur Sandhu v Noble Builders (U) Ltd HCT-00-CV-CI0008-2005**, **Brinks MAT Ltd v Elcombe & Others (1988) 3 All E.R 188**, **Tiwi Beach Ltd v Stamm [1990-1994] E.A 565 (CA)** and **Dering v Earl of Winchelsea [1775-1802] All E.R Rep 140**. It therefore follows, that the following issues arise from the foregoing for the determination of this Court:
- Whether the Plaintiff is a shareholder of the 3rd Respondent;***
 - Whether the Plaintiff is entitled to the injunction sought; and***
 - Whether the matter may be referred to arbitration.***
6. As regards whether the Plaintiff is a shareholder of the 3rd Respondent Company, the agreement dated 1st July, 2008 sheds light as to whether indeed there was a relationship that subsisted between the parties. At Clause (A) it is expressly stated that;

A. MHM, AAM and GL are as the date hereof the only shareholders of the Company.

In reference to the above, MHM, AAM and GL referred to Mohamed Hassan Maalim, Adan Abdi Musa and Gravet Ltd respectively. Further at Clause (H), it is provided;

H. The parties wish to enter into this agreement for the purpose of recording and regulating their relationship, rights and obligations as, inter alia, shareholders in the company.

Further at Clause 1.1.25 of the Agreement on definitions and interpretation, the term “Shareholders” is deemed to mean;

MHM, AAM, GL and any other person who may from time to time become a shareholder in the company in accordance with the terms in this Agreement and “shareholder” shall be construed accordingly.

At Clause 3 of the said agreement, it sets out the shareholding percentages of the shareholders in the Company. At Clause 3.3 Gravet Ltd, the Applicant herein, is apportioned Four Hundred and Fifty Shares (450) representing Forty Five Percent (45%) of the issued share capital of the Company. At Clause 7.1.2 the Applicant’s obligations and responsibilities as a shareholder in the 3rd Respondent Company are spelt out whilst at Clause 7.1.3, the joint responsibilities of the parties (read shareholders) are also set out. Further, at Clause 27.3, the address and facsimile of each of the shareholders are set out which also included the Applicant’s address. In a letter dated 6th August, 2008 addressed to Barclays Bank of Kenya Ltd, there is included a paragraph highlighting the shareholding of the company as follows:

“In consideration thereof, the existing shareholders have agreed to transfer shares in the company and appoint Messrs. Ibrahim Surrow Isaack and Abdullahi Maalim Hassan to be additional directors in the Company. The proposed change of the shareholding structure is as follows:

1. ***Mohamed Hassan Maalim*** – 330 shares – 33%
2. ***Adan Abdi Musa*** – 220 shares – 22%
3. ***Gravet Ltd*** – 450 shares – 45%”.

On record is a copy of the minutes of an Extra-ordinary General Meeting of the shareholders on 5th August, 2008 whereby it was resolved in the said meeting, that two hundred and seventy (270) shares belonging to Mr. Mohamed Hassan Maalim and one hundred and eighty (180) shares belonging to Mr. Adan Abdi Musa, would be transferred to Gravet Ltd, the Applicant herein, the same changes to be effected at the Registrar of Companies. On 5th August, 2008 following the resolution by the shareholders of the 3rd Defendant company, Certificates of Transfer of Shares were issued, whereby Mr. Mohamed Hassan Maalim transferred two hundred and seventy (270) shares whilst Mr. Adan Abdi Musa transferred one hundred and eighty (180) shares to Gravet Ltd. This was in annexure/attached marked “ISI-2” at pages 3-6. In a letter dated 27th July, 2011 signed by the Senior Deputy Registrar General, Mr. F.S.M Ng’ang’a, Messrs. Ibrahim Surrow Isaack and Abdullahi Maalim Hassan each have been named as a director of the 3rd Defendant Company.

7. From the foregoing, it would appear to have been conclusive that the Applicant was indeed a shareholder in the 3rd Defendant Company. However, the Respondents refuted the same by alleging that the Applicant forged the signatures of the 1st and 2nd Respondents and fraudulently and illegally allocated itself shares in the 3rd Defendant Company. At paragraphs 11-15 of the Replying Affidavit of Mohamed Maalim Hassan, it was reiterated that the Applicant had forged the signatures of the aforesaid Respondents and thereafter lodged share transfer documents, registering themselves as shareholders and directors in the 3rd Respondent Company. By a letter dated 9th November, 2011 and attached as annexure “MHM-3”, to the Replying Affidavit and addressed to the Senior Deputy Registrar General, the Respondent sought clarification on the purported transfer of shares, to which the addressee in a letter dated 2nd November, 2012 replied *inter alia*:

“We wish to confirm that no change of directors has been effected on this file and

that the position on the directorship and shareholding of the company is as contained in the company's Annual Return for the year 2012, filed by yourselves on 30th January, 2012."

At the conclusion of the letter, it is stated that the search by the Respondents was obtained from a temporary file, which in any event had been consolidated with the original file that was then in the possession of Mr. Ng'ang'a, the Senior Deputy Registrar General. What happened to the consolidated file has not been averred by any of the parties to this application.

8. From the foregoing, what can be ascertained is that there was a Shareholders' Agreement dated 1st July, 2008, which all parties do not deny. It is also ascertainable that the parties to the Shareholders Agreement included the Applicant, as well as the 1st and 2nd Respondents on behalf of the 3rd Respondent. From a perusal of the clauses therein, more particularly Clauses (A), (H), 1.1.25, 3.3, 7.1.2 and 7.1.3 it is manifestly and evidently clear that the parties to the Agreement had for all intents and purposes, agreed to each take a shareholding in the 3rd Respondent Company. The 1st and 2nd Respondents have not been able to adduce evidence as averred in the affidavit of Mohamed Maalim Hassan that the Agreement was subject to the fulfillment of certain conditions, including the payment for the four hundred and fifty (450) shares that had been allocated to the Applicant. They have not shown that the Applicant did not pay for the shares or point out any particular clause in the shareholders' agreement to buttress their argument in that connection. The Respondents allege that the Applicant did not comply with certain conditions as well cited in the case of **Royal British Bank v Turquand** (supra). The internal working processes of the 3rd Respondent are deemed to have been in order and that any inference deduced from their relationship was that everything was done in accordance with the shareholders' agreement. The most logical conclusion, therefore, would be to follow the provisions of the Shareholders' Agreement, to which all parties were signatories and which was executed in the presence of their respective advocates. It would certainly thereby follow and I find that the Applicant was a shareholder of the 3rd Respondent Company, in terms of the provisions as set out in the Shareholders' Agreement dated 1st July, 2008.
9. That being said, the next issue for determination would be whether the matter may be referred to arbitration. The Applicant's application, as has already been reiterated, is predicated upon the Shareholders Agreement dated 1st July, 2008. In the Agreement, and more particularly at Clause 23.1, any dispute as regards the agreement would be referred to arbitration. The aforementioned Clause in full reads;

"Any dispute, controversy or claim arising out of or in relating to this agreement or termination hereof, or the interpretation, breach or validity hereof, shall be resolved by way of consultation held in good faith between the shareholders. Such consultation shall begin immediately after one shareholder has delivered to the others written request for such consultation. If within fifteen (15) days following the date on which such notice is given the dispute cannot be resolved, the dispute, controversy or claim shall be submitted to arbitration upon request of any of the shareholders by written notice to the other shareholders".

The Application before Court is predicated upon the grounds that the 1st and 2nd Respondents willfully denied the Applicant an opportunity to engage in the business of the 3rd Respondent company, by failing to call Board Meetings, failing to inform it of the Company's financial developments, in contravention and in breach of the Shareholders Agreement, particularly Clauses 3, 4, 5, 7 and 8 thereof. It is however, contended by the Respondents, that the Applicant, not being a shareholder as per the agreement for failing to acquire its stake in the shares offered, was therefore not eligible and not a constituent party to the running and operations of the 3rd Defendant Company. As has been discussed hereinabove, the Shareholders' agreement did not indicate, expressly or otherwise, that the shareholding was conditional on the consideration of the offer of shares by the 1st and 2nd Respondents. What however can be discerned was that there was an agreement, to which each of the

parties had a percentage of shares allocated to it, and that being the case, they were all shareholders, as per Clause 1.1.25. Indeed, and in respect of consideration, the Court notes paragraph 10 of the Supplementary Affidavit of Ibrahim Suram Isaak sworn on 16th May 2013, that the deponent stated that the Plaintiff had contributed Shs. 13 million towards the purchase of the said Tusker House. Such payment quite obviously entitled the Plaintiff to shares in the 3rd Defendant company. In its submissions, the Applicant referred the Court to the case of **Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co. Ltd** [1993] 3 All E.R 897 on the separability of an arbitration clause, which was cited by Kimaru, J in **Blue Limited v Jaribu Credit Traders Ltd** (2008) eKLR. The learned Judge in the rendering of his ruling, reiterated as regards the issue of arbitration clauses as follows:

“That principle recognizes the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration. A party to an arbitration cannot raise issues relating to the validity or otherwise of the agreement to defeat the arbitration clause in the agreement.”

10. The Respondents cited **Eckerle & Others v Westfalenstahl & Another** (supra), **The Machine Exchange Co. v Rustomji Framji** (supra), **Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd** (supra) to refute the Applicants claim. In their submissions, the Respondents reiterated that the Applicant, not being a Shareholder in the 3rd Respondent Company, could not therefore purport to enforce an arbitration clause in a contract that was void *ab initio* for lack of consideration. The common principle emanating from the aforementioned cases cited by the Respondents was that one cannot be deemed to be a shareholder if one has not subscribed to the shareholding of the company as such. The case made by the applicant is to have the matter referred to arbitration as per Clause 23.1 of the Shareholders agreement. The issue as to whether the Applicant is a shareholder or not is an issue that should effectively be determined by the arbitrator. The issue as to whether the Applicant is a shareholder is in consonance with the issue are regards ‘...*any dispute, controversy or claim arising out of or in relating to this agreement.*’ As was reiterated in **Blue Limited v Jaribu Credit Traders Ltd** (supra) the issues that the Respondents are propounding would be dealt with at the arbitration, be it the validity of the agreement, or otherwise.

11. The Court in **Civil Application No. 130 of 2011 Kay Construction Co. Ltd v A.G & Another**, Ogola, J in his rendering in the same reiterated *inter alia*;

“It was held by the Court of Appeal in the case of East African Power Management Ltd v Westmount (K) Ltd Nairobi Civil Appeal No. 55 of 2006 that the Court under Section 10 of the Arbitration Act had a limited role in intervening in matters where parties have agreed to refer matters to arbitration except where the Act specifically provided for such intervention. [emphasis added]. The Court consequently held that the said provision was mandatory and that the Court’s role in arbitration matters was merely a facilitative one.”

12. Under *Article 159 (2) (c)* of the *Constitution*, the Court is empowered, and has a duty to promote alternative forms of dispute resolution. As had been reiterated in the aforementioned cases of **Kay Construction Co. Ltd v A.G & Another** (supra) and **Blue Ltd v Jaribu Credit Traders Ltd** (supra), the Court’s intervention in matters in which the parties to an agreement have specifically and expressly stated their desire to refer any dispute to an alternative mode of dispute resolution, is limited to that of a supervisory and facilitative one. The Shareholders’ Agreement provided at Clause 23.1 to have disputes arising referred to arbitration. The Court, pursuant to the provisions of **Sections 1A, 1B and 3A** of the *Civil Procedure Act*, **Section 7(1)** of the *Arbitration Act* as read with **Order 46 Rule 20(1)** and *Article 159(2)(c)* of the *Constitution*, is therefore obligated and mandated to play its facilitative and supervisory role in promoting alternative forms of dispute resolution. The Court is persuaded by the rulings of Ogola, J and Kimaru, J in the aforementioned cases, and would thereby direct that the matter to be referred to arbitration.

13. The Courts wide and discretionary power as regards interlocutory application for injunctions has

been determined in numerous cases, the *locus classicus* being the case of **Giella v Cassman Brown & Co. Ltd [1973] E.A 358**. As to whether the matter could be stayed pending arbitration, the Respondents refuted the same by citing **Agip (K) Ltd v Kibutu Civil Appeal No. 43 of 1981** where Madan, J (as he then was) reiterated *inter alia*;

“...[The] only way in which an application for stay to enforce an arbitration clause can be made is by way of notice of motion supported by affidavit; it cannot be disguised as a point of law contained in a pleading. As the application must be made before any step is taken in the suit, it cannot be incorporated in a pleading, delivery of which constitutes a step in the proceedings.’

However, the application in the said case of **Agip (K) Lyd v Kibutu** (supra) was dismissed ostensibly on the grounds that the applicant did not apply for stay of proceedings before referring the same to arbitration. In the instant application, however, the Applicant relies on the provisions of **Section 7(1)** of the *Arbitration Act*. The said provision allows for an applicant to seek interim measures of protection from the Court before or during arbitral proceedings. It should be noted that the Applicant seeks for interim measures, i.e. injunctive orders to preserve the status quo, as was in **Alvidza v LZ Engineering Construction Ltd** (supra) at paragraph 40 and not a stay of the pleadings as alleged by Respondents.

14. In response thereto, the Applicant cited **Alvidza v LZ Engineering Construction Ltd** (supra) where Mbaluto, J, in allowing an application similar to the instant one, cited the case of **Foster v Hastings Corporation [1990] LT 730** and the learned authors in **Russell on Arbitration, 19th Edition** whereby it was held that both parties in recognizing that there indeed was a dispute, the *status quo* had to be maintained and that the suit premises, the issue of contention, had to be preserved and that as such, restraining orders would be appropriate orders. This Application was the only effective action that the Applicant would have made, and thus in following the Ruling of Madan, J, in the **Agip (K)** case above, the same was made in the proper manner and at the most effective time. With regards to the issue of injunction, **Giella v Cassman Brown & Co. Ltd** (supra) enunciates the three (3) tier principle by which an application for injunction may be allowed by the Courts. The same test is restated in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others** (supra) as well as **Kenya Oil Co. Ltd & Another v Kenya Pipeline Co. Ltd (2006) eKLR**. The aforementioned cases, cited by both the Applicant and the Respondents, cover the position with regard as to whether the prayers for injunction sought by the Applicant should be granted by this Court. The issues arising out of the said Shareholders agreement would suffice as pertinent issues that would be deserving of the determination of a court or tribunal, as was illustrated in **Mrao Ltd v First American Bank of Kenya Ltd** (supra).

15. In **Microsoft Corporation v Mitsumi Garage Ltd [2001] 1 E.A 129** it was held that the evidence of a *prima facie* case was based on the evidence adduced. This was the position reiterated in **Giella v Cassman Brown** (supra). The evidence before this Court is the Shareholders' Agreement dated 1st July, 2008, Certificates of Transfer of Shares, duly signed by the parties hereto, letters from the Senior Deputy Registrar General dated 27th July, 2011 and 9th November, 2012 and other documents and statements produced by the parties. The signing and execution of the Shareholders' Agreement by the parties established and created a relationship between the Applicant and the Respondents. The various clauses within the Agreement, more particularly Clauses (A), (H), 1.1.25, 3.3, 7.1.2 and 7.1.3 clearly established such a relationship. The Applicant alleges that there emanated a dispute as to the management and development of the 3rd Defendant Company, whereby it was sidelined and locked out of various meetings of the Board and was unaware of the financial dealings of the said Company. With its interest in the Company at stake, it was therefore necessary for the Applicant to institute the suit herein as well as the Application, in order to safeguard its interests. I find that it has established a *prima facie* case in that the Applicant, being a shareholder of the 3rd Defendant Company, is apprehensive that the 1st and 2nd Respondents may be engaging the 3rd Defendant company, in activities and business to its exclusion, and detriment. Having satisfied the 1st ambit of the **Giella v Cassman Brown** case (supra), the Court would only observe that the detriment suffered by the Applicant

cannot be compensated for in foreseeable damages. As the Court has found as above, there is no need to consider the balance of probabilities.

16. The upshot of the foregoing is that the Application is allowed in terms of prayers 5, 6 and 7 thereof. Further and in the circumstances, the matter is referred to arbitration, as per the Arbitration Clause in the Shareholders' Agreement dated 1st July, 2008. The Arbitrator is to be appointed as provided for under Clause 23.2, 23.3 and 23.4. thereof. Failure by the parties to invoke the said provisions within 15 business days of this Ruling and agree upon an arbitrator, then the Court shall exercise its supervisory jurisdiction and will, on application by either party, direct the Chairman of the Chartered Institute of Arbitrators Kenya Branch to appoint a suitable arbitrator to consider and determine the disputes between the parties. Costs will be in the arbitration.

DATED and delivered at Nairobi this 14th day of November, 2013.

J. B. HAVELOCK

JUDGE