



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 410 OF 2012**

**BETWEEN**

**VENTAGLIO INTERNATIONAL S.A LUXEMBURG.....1ST PETITIONER**

**ISAAC RODROT.....2ND PETITIONER**

**AND**

**THE REGISTRAR OF COMPANIES .....1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2ND RESPONDENT**

**AND**

**SALAMA BEACH HOTEL LTD.....1ST INTERESTED PARTY**

**ACCREDO A.G.....2ND INTERESTED PARTY**

**HANS JUERGEN.....3RD INTERESTED PARTY**

**ZAHRA LANGER.....4TH INTERESTED PARTY**

**STEFFANO UCCCELLI.....5TH INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The 1st Petitioner, **Ventaglio International SA Luxemburg** is a body corporate having its principal place of business in Luxemburg. It is an international investor company in resorts and has hotels in Kenya, Bahamas, Mexico, Tanzania, Italy, Cape Verde, Maldives Island, Thailand, Switzerland, Egypt, Tunisia and Morocco. Its registered office is in Lugano, Switzerland.
2. As at the year 2009, it owned 41,000 fully paid up shares at Salama Beach Hotel in Malindi, Kenya which were held up by the 2nd Petitioner, **Isaac Rodrot**, on its behalf as the sole agent. Another company, Abacus Services Ltd also held 9,000 shares on behalf of the 1st Petitioner as its nominee. The 2nd Petitioner who is also the Chief Executive Officer of the 1st Petitioner held

40,000 shares in the same hotel.

3. The facts leading to the Petition are as hereunder;
4. Sometime in 2009, a foreign company known as Accredo AG instituted legal proceedings at the Malindi High Court in **Accredo AG v Salama Beach Hotel Ltd, HCCC No. 118 of 2009** seeking to enforce a foreign judgment issue by a Court in Milan dated 14th December 2001. In the Milan suit, Adinos AG had sued a company known as Viaggi Del Ventaglio S.P.A. and the suit was settled in favor of Adinos AG. Judgment was thereafter passed against Viaggi Del Ventaglio S.P.A. in the sum of Euros 825, 000 plus costs and interests. Years later, in the Malindi case, **Accredo AG v Salama Beach Hotel Ltd**, Accredo AG instituted the suit claiming that Adinos AG had assigned the judgment to it and that Accredo AG had now sought to claim and execute the same against Salama Beach Hotel since the judgment debtor, Viaggi Del Ventaglio SPA in the Milan case had already become insolvent and had no assets to satisfy the Italian judgment.
5. Subsequently, a consent order was made and issued on 21st January 2010 before Ibrahim J as (he then was) wherein *inter alia* the 1st Respondent herein, The Registrar of Companies, was ordered to transfer all the shares held by the Petitioners as shareholders to the Directors of Accredo AG, namely, Juergen Langer and Zahra Langer on a 50%:50% basis. Consequently, the 1st Respondent transferred the shares of Salama Beach Hotel Ltd to the directors of Accredo AG. Co. as ordered.
6. In their Petition dated 13th September 2012, the Petitioners claim that the Court in **Malindi HCC No. 118 of 2009**, was duped into issuing the decree as it originated from a purported judgment in Italy that never was and was therefore illegal and a nullity. They now seek the following orders;

***“(i) A declaration that the Registrar of companies, the 1st Respondent registering the consent order and/or decree in a manner which purported to divest the Petitioners of their rightful ownership stake in Salama Beach Hotel Limited, thus such an action is unlawful, unconstitutional, null and void.***

***(ii) A declaration that the Registrar of Companies in registering the consent order and/or decree which purported to divest the Petitioners of their rightful ownership stake proprietorship and shareholding in Salama Beach Hotel Limited in breach of Article 40(1) of the Constitution which guarantees the Petitioner's right to property.***

***(iii) A declaration that the Registrar of Companies in registering the consent order and/or decree which purported to divest the Petitioners of Salama Beach Hotel Limited amounted to arbitrary deprivation of the Petitioners rightful property in breach of Article 40 (2) of the Constitution.***

***(iv) A declaration that the actions, inactions, commissions and omissions of the registrar of Companies the 1st Respondent in registering the consent order and/or decree which purported to divest the Petitioners of their rightful ownership stake, proprietorship, and shareholding in Salama Beach Hotel Limited was in breach of the Rules of Natural Justice, and the legitimate expectation of the Petitioners.***

***(v) A declaration that the actions, inactions, commissions and omissions of the registrar of Companies the 1st Respondent in registering the consent order and/or decree which purported to divest the Petitioners of their rightful ownership stake, proprietorship, and shareholding in Salama Beach Hotel Limited violates the Petitioners rights to Fair Administrative Action as guaranteed under Article 47 of the Constitution.***

***(vi) A declaration that the actions, inactions, commissions and omissions of the registrar of Companies the 1st Respondent in registering the consent order and/or decree which purported to divest the Petitioners of their rightful ownership stake, proprietorship, and Shareholding in Salama Beach Hotel Limited was in breach of Article 27(1) of the Constitution which secures the Petitioners right to equal protection and equal benefit of the law.***

(vii) A declaration that the actions, inactions, commissions and omissions of the registrar of Companies the 1st Respondent in registering the consent order and/or decree which purported to divest the Petitioners of their rightful ownership stake, proprietorship, and shareholding in Salama Beach Hotel Limited was in breach of Article 29 which guarantees the Petitioner's rights to secure protection of the law.

(viii) A declaration that the Registrar of Companies, by virtue of Article 156(5) and 156(6), had the duty to enjoin himself in the proceedings of Malindi HCCC No.118 of 2009 Eccredo AG versus Salama Beach Limited owned the 1st and 2nd Petitioner's constitutional duty of care to contest against the implementation of the order and Decree issued therein dated 21st January 2010 on both legal and constitutional grounds.

(ix) A declaration that the fundamental rights and freedoms of the Petitioner's as guaranteed under Article 40 of the Constitution of Kenya have been breached by the Registrar of Companies through the unlawful rectification of the Register of Companies dispossessing the 2nd Petitioner of the entirety of its shares in the 1st petitioner Company.

(x) An order of Mandamus directed against the Registrar of Companies to rectify the Register of companies restore the shareholding in the 1st Petitioner Company as it pertained prior to the 21st of January 2009.

(xi) Alternatively, a declaration that the 1st and 2nd Petitioner's are entitled to the protection of the law as guaranteed under Article 27(1) of the Constitution of Kenya entitling the 1st Petitioner's asset known as Temple Point Resort to be placed under a Receiver Manager pending the hearing and determination of any pending Court processes.

(xii) Costs of the Petition.”

### **Case for the Petitioners**

7. The Petitioners' case is as contained in their Petition, the Affidavit of Isaac Rodrot sworn on 13th September 2012 and written submissions dated 24th June 2013.
8. The Petitioners contend that the Court in **Malindi HCC No. 118 of 2009** did not have jurisdiction to adjudicate on the claim. That the issuance of the decree in that case was contrary to the available policies of enforcing a foreign judgment and that the Plaintiff in that Case, Accredo AG, had misled the Court into believing that the foreign judgment debtor was the 1st Petitioner, whereas the 1st Petitioner and Viaggi Del Ventaglio are not the same in fact or in law. They thus claimed that Accredo AG had no *locus standi* to institute **Malindi HCC No. 118 of 2009** and submitted that non-compliance with the principles of *locus standi* vitiates the legality of the decree issued on 21st January 2010. They relied in that regard on the case of **Moloji Nar Singh Rao v Shankar Saran AIR (1962) SC 1737**, where the Supreme Court of India held that if the foreign decree did not meet the legal threshold, it could not be executed in India and further claim that the proceedings in the Milan Court would have no force of the law in Kenya. They referred the Court to the case of **Jet Holdings Inc v Patel (1990) 1 QB 335** where it was held that in instances where a foreign Court determined it had no jurisdiction, an English Court could not rely on the foreign Court's judgment.
9. It was their submission that the Interested Party herein, Staffano Uccelli, had admitted that he was put under pressure and was coerced by the Accredo AG director, a Mr. Hans Langer, into entering the consent judgment on behalf of Salama Beach Hotel Ltd and also claimed that the undue influence vitiated the contract and the decree in **Malindi HCC NO. 118 of 2009** should also be set aside. They relied on the case of **Ladak Abdallah Mohamed Hussein v Griffiths Isingoma Kakiiza and Others SCCA No. 8 of 1995** where Court stated that consent judgments may only be interfered with on limited grounds such as illegality, fraud or mistake which principle was applicable to the Malindi case.

10. They further submitted that the High Court in Malindi was misled into believing that there was a foreign judgment to be executed whereas the case in the Italian Court was still pending and only a plaint was availed to the Court in any event. They referred the court to the case of **Redgrave v Hurd (1881) 20 CH. D 1** where it was held that an opportunity to discover the truth that was not used was not a bar to relief even where the misrepresentation was innocent and where there was actual and reasonable reliance on the misrepresentation. They also relied on the case of **Sankaran v Lakshmi AIR (1974) SC 1764**, where it was held that judgments and decrees that were issued on the backdrop of trickery and mistake ought to be set aside.
11. They further claim that even if the Italian judgment was enforceable in Kenya under the provisions of the **Foreign Judgments (Reciprocal Enforcement) Act, Chapter 43**, the 1st Petitioner, Salama Beach Hotel Ltd is a totally different entity from the Judgment debtor in the Italian case, a fact allegedly accepted by the 1st Respondent and his records as of 2009 reflected that its shareholders were the 1st Petitioner, whose shares were held by the 2nd Petitioner as its agent and Abacus Services Ltd as nominee shareholder of 2nd Petitioner. Its directors were listed as Enrico Poma, Stefano Uccelli and Marion Scotti Camuzzi. It further claimed that there was no evidence that the 1st Petitioner was a subsidiary of Viaggi Del Ventaglio SPA or that they were similar entities in law or at all.
12. Further that a charge had been registered by the 1st and 2nd Petitioners in favour of two foreign banks namely Unicredit Banca D'Impresa SPA and Banca Intesa SPA for a sum of Euros 7, 500,000. They thus claimed that their shares were therefore not available for transfer to any other party without the notification and consent of debenture holders. They also alleged that prior to the transfer of the shares, the 1st Respondent did not satisfy himself that the debenture holders had been informed of the suit or the order that required him to adversely deal with the debenture holders' security. That in that regard, **Section 95 of the Companies Act, Cap 486** recognizes the rights of debenture holders with respect to any charge created over the shares and property of the 1st and 2nd Petitioners and even in the winding up, only preferential creditors may have higher priority than debenture holders.
13. They claimed that the 1st Respondent was not a party to the Malindi case and the suit was not seeking rectification of the register or the transfer of any shares held by any shareholder in Salama Beach Hotel particularly by Accredo AG who was not its member or shareholder. They submitted that the 1st Respondent having been served with the order issued in **Malindi HCC No. 118 of 2009**, did not satisfy himself to the required legal standard that the order he was required to comply with was not among the ones issued upon an application made under **Section 118 of the Companies Act** and hence he ought to have declined to effect the same.
14. They further submitted that the order and decree before the 1st Respondent was void and a nullity in law, and anything done subsequently thereafter was a nullity in law. That therefore, the 1st Respondent was supposed to uphold the law and the Constitution and decline to implement the order issued in the Malindi case and thereafter advise the Court of the unlawfulness and unconstitutionality of its order.
15. It was their contention that the 1st Respondent acted ultra vires the Constitution and the relevant law in registering the consent order which purported to divest the Petitioners of their rightful ownership stake, proprietorship and shareholding in Salama Beach Hotel Ltd. That this was in breach of **Article 40(1)** of the Constitution which guarantees the Petitioners rights to property and that it was also in breach of the rules of natural justice, the legitimate expectation of the Petitioners and a contravention of **Articles 27 and 47** of the Constitution.
16. That in any event their stakes in Salama Beach Hotel whose sole asset is Temple Point Resort has now been placed under the control of the directors of Accredo AG, and certain German citizens who did not have any known assets in Kenya and the decisions they make are prejudicial to the legitimate interests of the Petitioners.

17. It was therefore the Petitioners' argument that this court, has the powers to determine the legality and constitutionality of the Malindi High Courts' action, its procedures and subsequent issuance of the decree. They pray that the Court should set aside the consent order as it derives its standing from an unlawfully enforced foreign judgment and as such it is null and void and has no force of the law.

### **Case for the Respondents**

18. In response to the Petition, the 1st Respondent, **The Registrar of Companies** and the 2nd Respondent, **The Attorney General** filed a replying affidavit sworn by Faith Chirchir, the Assistant Registrar of Companies on 24th September 2012. They also filed written submissions dated 2th June 2013.

19. It was their contention that the Petitioners had failed to adduce evidence to the effect that Ventaglio International SA Luxemburg and Viaggi Del Ventaglio SPA have no correlation. They claimed that if there are any errors at the time of issuing the decree in **Malindi HCC No. 118 of 2009**, they should be construed as intentional and were aimed at duping the court to the advantage of the Petitioners.

20. They further contend that the 1st Respondent was at all times acting in accordance with the orders and decree issued in **Malindi HCC No. 118 of 2009** and also in accordance with his powers as provided for under the **Companies Act**. They claimed that the 1st Respondent was acting pursuant to the consent order as presented to it and further claimed that the 1st Respondent is the custodian of the records of the company registry, and in his records, Viaggi Del Ventaglio SPA is not a shareholder of Salama Beach Hotel and that the Petitioners' shares in Salama Beach Hotel had been divested. Accordingly, no judgment can be enforced against a non-party and relied on the cases of ***Maganbhai Chhotubhai Patel v Maniben AIR 1985 Guj 187***, and ***R. Vishwanathan v Rukn Ul Mulk Syed Abdul Wajid AIR 1963 SC*** in support of that position.

21. They claimed that if there was fraud in Court and the matter forming subject of the case in **Malindi HCC No. 118 of 2009** had not been concluded in Italy, then under the provisions of the Foreign Judgment (Reciprocal Enforcement) Act, Kenya has no reciprocal arrangement with Italy and in any event, the alleged foreign judgment did not exist in the Court at Milan as is seen from a search conducted by the firm of Taglioretti Farese Cicerchia Capua, that indicated that the case was still pending in Court and as such the 1st and 2nd Petitioners' rights have clearly been violated. They relied on the case of ***Flora Wasike v Destimo Wamboko (1988) 1 KAR 625*** and ***Purcell v F.C Trigal Ltd (1970) 3 ALL ER 671*** where it was held that a consent order could be set aside on grounds which would justify setting aside a contract and the principle was applicable to the present case.

22. They further claimed that the foreign judgment was enforced in Kenya in blatant disregard of the procedure set out under **Sections 5 and 6** of the **Foreign Judgment Reciprocal Enforcement Act** and as such, the decree in **Malindi HCC No. 118 of 2009** should be treated as being a decree bad in procedural law and ought to be set aside as it was in violation of our law and the Constitution and resulted in the infringement of the 1st and 2nd Petitioners' rights.

23. They thus claimed that the consent order was founded on an illegality and was thus null and void and should be set aside in the interests of justice, otherwise the Petitioners' rights will continue to be violated since the directors of Accredo AG continue running the Salama Beach Hotel illegally and accruing business profits while violating the 1st and 2nd Petitioner's rights. They further claim that the act of issuing a decree against a non-party that has not been heard, was unconstitutional. In that regard, they relied on the case of ***Macfoy v Unite African Ltd (1961) 3 ALL ER 1169***, ***United States v Throckmorton 98 US 61***, ***Laufer v West Minister Brokers Ltd 532 A. 2d 130*** where it was held that a foreign judgment can be impeached only for extrinsic fraud which deprives the aggrieved party a right to present its case in Court.

24.They conclude by urging the Court to find that the decree was founded on an illegality, was in breach of laws as aforesaid and ought to be set aside and the rights of the Petitioners restored.

### **Case for the 1st, 2nd, 3rd and 4th Interested Party**

25.In opposing the Petition, the Interested Parties, Salama Beach Hotel Ltd, Accredo A.G, Hans Juergen and Zahra Langer filed replying affidavits sworn by Christopher Kenyariri on 8th October 2010 and Hans Juergen Langer on 15th May 2013 and written submissions dated 25th June 2013.

26.The crux of their case is that the matters herein are sub judice and that this court cannot sit on appeal from the decision of the Malindi **High Court in HCCC 118 of 2009.**

27.They claim that in any event, the 1st Petitioner is a company within the Ventaglio group of companies and the Petitioners should be estopped from denying the correlation between the two entities. They further claim that in the power of attorney dated 19th October 2005, was donated to Isaac Rodrot for the purposes of securing a facility extended to I Viaggi Del Ventaglio SPA because the 1st Petitioner is under receivership.

28.They also claimed that the 2nd Petitioner has commenced several other suits against the Interested Party; such as **Petition No. 2 of 2012, Petitions Nos. 410 and 437 of 2012** and state that the 2nd Petitioner has also commenced commercial proceedings against Interested Parties, in **Malindi HHCC No. 106 of 2010, Isaac Rodrot v Accredo AG & 3 Others**, with regard to the issue of transfer of shares and the said suit is yet to be heard and determined. That there are other many suits that have been filed by the Petitioners and their failure to disclose the position with regard to those other existing suits will lead to a situation where the Courts may issue conflicting orders.

29.They contend that the Petitioners have not demonstrated to this Court how their rights have been violated and why the Malindi High Court cannot determine the issues raised in this Petition within **HCCC No. 118 of 2009** and yet the High Court in Malindi has competent jurisdiction to adjudicate on the issues now raised by the Petitioners. That because the Petitioners have neglected to raise the issues they are raising in this Petition in that case, they are engaged in forum shopping and are in abuse of the Court process.

30.They further stated that there is evidence of Communication between Ms. Bruno Colombo, the Chairman of the 1st Petitioner and I Viaggi Del Ventaglio SPA, dated 4th September 2009 which acknowledges the debt owed to Accredo AG and talks of possible purchase of Temple Point Resort, the hotel in dispute. Further, that all the documents creating legal obligations in the 1st Petitioner, i.e. the deed of waiver, the share transfer and the supplementary charge have all been signed by one, Bruno Colombo, on behalf of the 1st Petitioner and that even the documents purportedly transferring ownership in Salama Beach Hotel are executed by one Enrico Pomar, who is not a shareholder.

31. They further claim that the power of Attorney purportedly appointing the 2nd Petitioner has not been stamped and was thus not registered and they allege that the Petitioners have colluded with the Respondents and the 5th Interested Party to deny the legitimacy of all the transactions now in issue. They claim that the Registrar of Companies and the Attorney General have been negligent and in breach of their duties in accepting unregistered documents that have not been properly executed, attested and sealed.

32.It was therefore the Interested Parties' contention that the declarations sought by the Petitioners seek to essentially set aside the decision of the High Court and that this Court has no jurisdiction to substitute its decision with that of the **Malindi High Court in HCC No.118 of 2009.** That to do so would be donating appeal and or review powers to this Court, and this Court has not been granted such jurisdiction. They relied on the case of **Jeanne W. Gacheche & 6 Others vs Judges & Magistrates Vetting Board & 2 Others (2012) eKLR**, and **Peter Nganga Muiruri vs Credit Bank Ltd & 2 Others (2008) eKLR** in support of that proposition.

33.They also contend that while the High Court has the jurisdiction to either review or set aside the orders granted in **HCC No.118 of 2009** it has no jurisdiction to issue orders sought by the Petitioners. They relied on the South African case of **Bezuidenhout vs PatensicSitrus Beherenc Bpk 2001 (2) SA 224** where it was held that an order of a Court stands until it is set aside by a Court of competent jurisdiction.

### **The 5th Interest Party's Case**

34.The 5th Interested Party, **Steffano Ucceli**, supports the Petition. He filed written Submission dated 25th June 2013.

35.He claims that a foreign judgment will only be enforced in Kenya if the foreign Court had jurisdiction recognised by Kenya. He relied on the case of **Taylor v Taylor (1979) 143 CLR 1**, to buttress his argument in that regard. He also claimed that in the alleged proceedings in the Milan Court, the other Interested Parties never endeavoured to serve and even inform the Petitioners of the matter in Court and accordingly their actions were unconstitutional as they were contrary to **Article 47(1) and 50 (1) of the Constitution**.

36.With regard to the consent order, subject of this Petition, he claimed that he was put under pressure and coerced by the 2nd Interested Party, Hans J. Langer, into entering the consent order on behalf of Salama Beach Hotel Ltd. He stated that he was under duress at the time because he had been threatened with arrest and he was indeed charged in **Malindi Criminal Case No.77 of 2010** and claimed that the consent order is illegal. He relied on the case of **Israel Discount Bank of New York v Hadjipateras [1983] 3 All ER 129**; where it was held that undue influence vitiates the capacity to contract. He also contended that the threats and undue influence by Hans Juergen Langer to sign the consent order vitiated the decree and the same should be set aside. He also relied on the case of **Beals vs Saldanha (2003) 3 S.O.R. 416**, where it was held that the merits of a foreign judgment can only be challenged on grounds of fraud and where the allegations are new and not the subject of prior adjudication. That in **Exelmore Trading Ltd v Exelmore Classics Sdn Bhd (1996) 3 AMR 3837** it was also held that a foreign judgment can only be enforced in Singapore where Singapore has a reciprocal arrangement with a foreign State which principle applied to this case and he also relied on the cases of **Brooke Bond Liebig (t) Ltd v Mallya (1978) EA 266 CAD** and **Kenindia Assurance Co Ltd. V Muturi (1940-94) IEA 193**, where it was held that a consent judgment/decree could only be set aside on grounds of fraud and collusion.

37.He also alleged that at the time of signing the consent order, he was not privy to the fact that the 2nd Petitioner had a debenture and submitted that the directors of Accredo AG cannot accept liability in a case where the debenture holder was not involved and therefore this Court should set aside the decree in **Malindi HCC No.118 of 2009** and restore the rights that were extinguished. That as the Petitioners have suffered irreparable damages as a result of the mistake made by the 5th Interested Party, they are entitled to the orders set out above.

### **Determination**

38.The crux of the Petitioners' and the 5th Interested Party's case is that the alleged foreign judgment entered in Italy was enforced in this country contrary to the provisions of the Foreign Judgment (Reciprocal Enforcement) Act. That out of that foreign judgment, **Malindi HCC No. 118 of 2009** was instituted which led to the consent order that was made in the following terms;

*“a) That the judgment of this Court of Milan on the 14th December 2001 for Euros 825,000 plus interest thereof at annual commercial rates of 25% and costs of Euros 2470 plus interests at annual Court rates of 12% be and is hereby ordered to be enforced against the defendant. (sic)*

*b) That a warrant of attachment do issue against the defendant 's plot No.9890 Watamu Grant No.11576. That an injunction do issue restraining the defendant by itself directors, shareholders,*

attorneys, servants and/or agents from selling, disposing off, alienating, and/or wasting Grant No.11576 plot No.9890 Watamu or in a other manner howsoever and whatsoever from dealing with the said plot and and the hotel establishment and developments therein standing in a manner prejudicial and/or likely to defeat the execution of the judgment and decree of the court of Milan given on the 14th December 2001 or prejudicial to the judgment and decree of the court issued herein.

c) That the plaintiff company by itself, directors and shareholders namely HAN – Juergen Langer and Zahra Langer be and are hereby allowed and ordered to take over the shareholding, directorship ownership, management, running, operation and control of the defendant company and the business carried on Grant No.11576 plot No.9890 Watamu for such period and time as shall be the plaintiff company shall recover all related and cosequential costs and expenses incurred properly while owning and managing the defendant company.

d) That the Registrar of companies be and is hereby mandated to transfer all the shares held by the defendant shareholders to the directors of the plaintiff company, namely Hans - Juergen Langer and Zahra Langer on equal number (50%50%) basis.

e) That a one Stephano Uccelli the current resident Director of the Defendant company shall continue to be in the board of directors of the defendant company for the purposes of ensuring that the judgment and decree of this court is fully satisfied and for the interest of the defendant company's previous shareholders and directors without being a shareholder.

f) That this suit be and is hereby marked as settled with each party bearing its owns costs.”

39.It is this decree that the Petitioners and the Interested Party contend was entered into illegally, the 5th Interested Party coerced into signing and the basis for the claim that the 1st Respondent violated the Petitioners' fundamental rights to own property under **Article 40(1)**, fair administrative action under **Article 47(1)** and Right to fair hearing under **Article 50(1)**.

40.Interestingly, the Respondents support the Petition but the 1st to 4th Interested Parties contend that this court sitting as a 'constitutional court' has no jurisdiction to determine the validity or otherwise of a decree issued by the **High Court in HCCC No. 118 of 2009**, since it would be tantamount to this Court sitting on appeal over a decree of a Court of concurrent jurisdiction.

41.To my mind, the issue of jurisdiction is very important and I am in agreement with the important finding in ***Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1***, where **Nyarangi, JA** at page 14 stated;

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step”.*** (Emphasis mine.)

I must therefore address the issue of jurisdiction before anything else. If I find in the affirmative, I will proceed to determine the issues for determination as framed by both the Petitioners and the Respondents. And if not, the matter ends there.

42.The parties have conceded that the orders and the decree as stated elsewhere above have never been set aside and it follows that those orders remain lawful. The 1st Respondent is the regulator of and custodian of the Companies registry pursuant to the provisions of the Companies Act. The Assistant Registrar of Companies, Faith Chirchir in her affidavit stated that she was at all times acting in accordance with the terms of the orders and decree issued in ***Malindi HCC No. 118 of 2009***. To that extent, I do not see any wrong doing on the part of the 1st Respondent in transferring and rectifying the member register on the shareholding of the 1st Interested Party hotel. I am alive to the holding in ***Chokolinyo -vs- Attorney General of Trinidad and Tobago***

(1981) 1 ALL ER 244, which cited with approval the decision in the case of Maharaj -v- Attorney General of Trinidad and Tobago (No. 2) [1978] ALL ER 670 at 679 that;

“.....no human right or fundamental freedom..... is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error.”

43. I agree and a casual look at the Petition would show that it is the Orders in **HCC NO. 118 OF 2009**, that are sought to be challenged and this Court is being asked to declare the consent order as null and void for reasons stated elsewhere above. The complaints raised against the decree of 21st January 2010, fall within the issues and questions that confronts the Court in **Malindi Petition No. 118 of 2009** and several other suits that have been filed by the Petitioners. Those suits including **Malindi HCC No. 118 of 2009**, the parent suit to this Petition are still pending and unresolved. The question at this point is whether this Court can legitimately purport to redress the complaints by the Petitioners when it is conceded that **Malindi Petition No. 118 of 2009**, and the other suits concerned with this Petition are still pending and are not resolved.

44. I have deliberately framed the question as above, because the Petitioners and the 5th Interested Party have raised the following questions as issues for determination in this Petition;

(a) Whether this court has the duty to determine the question as to the constitutionality or otherwise of enforcing an alleged foreign judgment without complying with the provision of the Foreign Judgment (Reciprocal Enforcement) Act and any other law governing enforcement of foreign judgments in Kenya.

(b) Whether a consent order founded on an illegality, misrepresentation of facts and violation of Articles 27(1), (2), 29, 40(1) (a), (b), 47 and 50(1) of the Constitution has the force of law to that extent as issued by the Malindi High Court in HCC No. 118 of 2009.

45. To my mind the two questions can only be answered in the context of the single question I have posed above and my answer would be that the Court in **HCCC No. 118 of 2009** is a High Court sitting in its original civil jurisdiction under **Article 165(3)(a)** of the **Constitution**. It follows that all the issues now raised can and should have been raised within **HCCC No. 118 of 2009** and not by the filing of separate proceedings invoking the jurisdiction of the High Court under **Article 165(b)** and **(d)** of the **Constitution**. I say so because this court is a High Court and has no special jurisdiction over that of the High Court in Malindi.

46. For avoidance of doubt, **Article 165** of the **Constitution** provides as follows;

**“(1) There is established the High Court, which—**

**(a) shall consist of the number of judges prescribed by an Act of Parliament; and**

**(b) shall be organised and administered in the manner prescribed by an Act of Parliament.**

**(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.**

**(3) Subject to clause (5), the High Court shall have—**

**(a) unlimited original jurisdiction in criminal and civil matters;**

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

(c) *jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*

(d) *jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

(i) *the question whether any law is inconsistent with or in contravention of this Constitution;*

(ii) *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

(iii) *any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

(iv) *a question relating to conflict of laws under Article 191; and*

(e) *any other jurisdiction, original or appellate, conferred on it by legislation.*

(4) *Any matter certified by the court as raising a substantial*

*question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.*

(5) *.....”*

47. I am therefore in agreement with the Respondents that the High Court can hear any Constitutional question because it is clothed with jurisdiction under **Article 165** above which should be read wholistically. However, there is a dying misconception that the Constitutional and Human Rights Division in Nairobi is a separate Court that can overturn, ignore and shunt aside any Orders or proceedings before other Divisions and stations of the High Court but that is not the Law. This Court and the Judges of this Division have repeatedly held that they do not have the perceived jurisdiction to correct or supervise the orders, actions and decisions of other judges of the High Court - See **Robert Mwangi v Shepherd Catering Ltd & Another (supra), Philip Kipchirchir Moi v Attorney General & Another Petition No. 65 of 2012 e KLR and Edward Mwaniki Gaturu and Another v Attorney General 7 30 Others, Constitutional Application No. 72 of 2013.** Any judge of the High Court in this country has the jurisdiction and power to handle a constitutional question and the fact that a Constitutional and Human Rights Division of the High Court was established in Nairobi did not by such establishment create a Court superior to any other High Court. While the law is clear and straight forward in that regard, it baffles me why it has become so difficult for advocates and litigants to understand that fact.

48. For the above reason alone, I find that this Court has no jurisdiction to determine the constitutionality or otherwise of the decree issued on 21st January 2010, arising out of the foreign judgment. The High Court in Malindi is a superior Court of record with competent jurisdiction to handle all the issues raised in this Petition. I have also read the pleadings and annexures in this Petition, and am aware that the Petitioners have filed **Petition No. 2 of 2011** in the High Court at Malindi seeking similar orders as are in this one. I must therefore express my dissatisfaction that the Petitioners did not disclose to this Court the current position of those other matters neither did they produce the pleadings and proceedings in those matters. Let the parties ventilate the issues they are now raising before me in **HCC No. 118 of 2009** and I say so because it is the instrumental suit and Malindi is the Court properly seized with the proceedings and pleadings touching on all the issues before me. That action would obviously allow that Court to arrive at an informed decision and for avoidance of doubt, it is clear to my mind that the High Court in

Malindi has the jurisdiction to either review or set aside the orders, subject of this Petition.

49. For obvious reasons, I will not delve into whether the orders sought in this Petition can be granted or not. And the reason is simple; that is for the trial judge in **Malindi HCCC NO. 118 of 2009** to do and the Petitioners can raise all the matters in that Court to avoid conflicting decisions by the High Court.

50. In the event, I will politely and with respect, dismiss the Petition.

51. As to costs, from my findings above, no party has wholly succeeded and this case is one where each party must therefore bear its own costs.

52. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Irene – Court clerk

Mr. Wachira holding brief for Dr. Khaminwa for Petitioner

Mr. Kihara for Respondents

Mr. Ndegwa for 1st-4th Interested party

Mr. Kabue for 9th Interested Party

**Order**

Judgment duly ready

**ISAAC LENAOLA**

**JUDGE**