REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 83 OF 2012

DR. JANE WAMBUI WERU..PLAINTIFF

VERSUS

OVERSEAS PRIVATE INV. CORP...1st DEFENDANT

HAVEN GODHEK..2nd DEFENDANT

DANIEL MUTISYA NDONYE...3RD DEFENDANT

JOHN PAUL NJOROGE...4TH DEFENDANT

RULING

By a plaint dated 10th February 2012 and filed on 16th February 2012, the Plaintiff seeks the following orders:

"a) Declaration that the Charge over LR NO. 27253/42 is null and void having been procured by fraud.

b) Declaration that the loan agreement entered into by the 1st defendant and 4th defendant is null and void.

c) A declaration that the charge over LR NO. 27153/42 does not confer a statutory power of sale upon the 1st Defendant.

d) A declaration that Jopa Villas LLC is not bound to pay the 1st Defendant any amount of money or at all.

e) An order directed to the 1st Defendant to return to the Plaintiff the document of title pertaining to LR NO. 27253/42.

f) A permanent injunction restraining the Defendants, their servants or agents or auctioneers or any other person acting for or on their behalf from, advertising for sale, disposing of, selling by public auction, completing any conveyance or transfer of any sale concluded by auction or private

treaty and or continuing to offer for sale LR NO. 27253/42.

g) A declaration that the 1st Defendant is not entitled to appoint the 2nd and 3rd Defendants or any other person as receivers of the suit property of Jopa Villas LLC and all the assets under the debenture.

h) A declaration that the appointment of the 2nd and 3rd Defendants are receivers and managers of the plaintiff is illegal, null and void.

i) A permanent injunction restraining the 2nd and 3rd Defendants whether by themselves or their agents and or servants from acting or purporting to act as Receivers.

j) An order cancelling the registration of the charge and/or debenture both dated 16th March 2008, over the property known as LR NO. 27253/42.

k) Costs of the suit".

Together with the plaint, the plaintiff filed a Notice of Motion dated 10th February 2012 expressed to be brought under the provisions of **sections 3A & 51** of the *Civil Procedure Act*, **Order 40 Rules (1)(a) & (b), 2(1) & (2), 10(1a)** of the *Civil Procedure Rules* and all other enabling provisions of law. By the said motion, the plaintiff seeks the following Orders:

"1. THAT this application be certified as urgent and be admitted to be heard ex-parte in the first instance.

2. THAT service of this application be dispensed with in the first instance as the object of this application and the suit will be defeated should the suit property be sold.

3. THAT the 2nd and 3rd defendants be restrained whether by themselves, their agents and or servants or otherwise howsoever from acting or purporting to act as receivers and/or managers of the suit property and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of the suit property, pending the hearing and determination of this application.

4. THAT an order for injunction be issued restraining the Defendants by themselves, servants or any of them or otherwise from intermeddling in any way whatsoever with the suit property either by selling, advertising for sale and or alienating and or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty the land known as L.R. No. 27253/42 pending the hearing and determination of this application.

5. THAT an order for injunction be issued restraining the Defendants by themselves, servants or any of them or otherwise from intermeddling in any way whatsoever with the suit property either by selling, advertising for sale and or alienating and or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty the land known as L.R. No. 27253/42 pending the hearing and determination of this suit.

6. THAT in the alternative an order be issued for the preservation of the suit property pending the determination of this suit.

7. THAT costs of this application be in the cause".

Of relevance to the present ruling are prayers 5, 6, and 7 aforesaid.

The said application is supported by the supporting affidavit sworn by **Jane Wambui Weru**, the plaintiff herein, sworn on 10th February 2012 and a supplementary affidavit sworn by the same deponent on 27th March 2012. The deponent, according to the supporting affidavit, is one of the directors (secretary) of **the**

Jopa Villas LLC (hereinafter referred to as the company although the plaintiff keeps on referring to it as the plaintiff company) which was founded and registered in Texas in the United States of America on the 9th July 2003, with the 4th defendant as the sole director. With the domestication of the said company in Kenya the directorship of the said company changed and in accordance with the Kenyan law the plaintiff was added as a director of the company. Accordingly, it was logical to effect the same change in Texas which was done in the articles of incorporation. Apart from that it was provided that for any transaction engaged in by the company, it was mandatory that the two directors execute the documents relating thereto. By a Board of Directors resolution in the year 2006 the company decided to purchase LR No. 27253/42 with funds generated by the company and pursuant to this US$ 800,000 was set aside for the said purchase. The company, through the 4th defendant, purportedly entered into an unauthorised and illegal contract with the 1st defendant, to obtain a loan to purchase the suit property and used the same as collateral. The said transaction, the plaintiff avers, was entered into without a Board resolution and was not sanctioned by the President and the Secretary as required under the company's Articles. According to the deponent, the said transaction was null and void due to the failure to have the documents relating thereto duly executed in accordance with the company's constitution since none of the said documents were executed by the plaintiff herein. The plaintiff only came to learn of the intended foreclosure through an e-mail sent by a friend who chanced upon the offer and advertisement made by the 1st defendant. As the 2nd and 3rd defendants have already received bids in respect of the offer, the plaintiff contends that the sale of the suit property is eminent. According to her she has a prima facie case on the authority of the ***Giella vs. Cassman Brown Case.*** She further deposes that although the property's value is about Kshs. 1 Billion, it is being offered for sale at Kshs. 600,000,000.00 which value, it is deposed, is ridiculously low. The 1st defendant, the plaintiff contends, is a foreign company with no known assets hence may not be able to settle a decree that may be passed against it. It is the plaintiff's further contention that she has a sentimental attachment to the suit property hence she will suffer pain and anguish which cannot be compensated by an award of damages and since no sale has taken place so far, the balance of convenience tilts in favour of granting the orders sought.

The 1st, 2nd, and 3rd defendant swore an affidavit in reply to the said application through **Nathan Bayer** on 27th February 2012. According to the deponent, he is the Associate General Counsel, Special Assets of the first defendant (hereinafter referred to as OPIC) and that he is duly authorised by the 1st, 2nd and 3rd defendants. According to the deponent the 1st defendant is an agency of the United States of America Federal Government which inter alia fosters economic development in new and emerging markets, complements the private sector in managing risks associated with foreign direct investment, and supports United States foreign policy with a mission to mobilise and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries in transition from no-market to market economies. According to the deponent there was a loan agreement between the 1st defendant and the company in the sum of US$ 1,100,000 secured inter alia by promissory notes, debenture and charge. Before entering into the said transaction the 1st defendant pursuant to the terms of the loan agreement received from the company's lawyer in the United States where the company is incorporated, Shackelford Melton & McKinley, a favourable opinion to the effect that the company's membership interests were owned beneficially by JNP Properties Inc and that the company's actions had been duly authorised by the necessary corporate action. To buttress this, a certificate confirming the position was issued by the 4th defendant confirming that no other person had any ownership interest in the company. According to the deponent, as the documents furnished did not disclose the plaintiff's shareholding in the company the documents relied upon by the plaintiff herein are fake. According to the legal advice received there is no requirement that a company registered under Part X of the Kenya Companies Act must have two directors. Accordingly, it is deposed, the 1st defendant disbursed to the company a sum of US$ 2,870,166 which sum was admitted as owing in *Machakos HCCC 215 of 2008* (the Machakos suit) and which sum the company despite due demand failed to pay prompting the 1st defendant to appoint the 2nd and 3rd defendants as receivers pursuant to the provisions of the debenture. An attempt to challenge the said appointment in the Machakos suit failed and a similar attempt in the Court of Appeal suffered a similar fate. Another application filed by alleged depositors in respect of the suit property was also dismissed in *Milimani HCCC No. 450 of 2009*. Two further attempts to review the ruling in the Machakos Suit were also unsuccessful and it was immediately thereafter that these

proceedings were, according to the deponent, instituted six years after the execution of the loan agreement without any explanation as to the delay. It is the deponent's position that these proceedings are an afterthought and amount to an abuse of the process of the court brought solely with the intention of delaying the 1st defendant from realising the sale of the suit property. The plaintiff is, according the deponent, guilty of laches and undeserving of the equitable remedy sought. In light of the non-disclosure of the past injunctive applications, the plaintiff has come to court with soiled hands. Since the plaintiff has no legally recognised interest in the suit property and is not privy to the contract between the company and the 1st defendant, it is the deponent's position that the plaintiff has no locus in this matter. The 1st defendant being a secured creditor its rights take priority over the rights, if any, of the plaintiff. The grant of the orders sought will occasion irreparable and/or substantial loss to the 1st defendant whose undisputed substantial debt remains unpaid. On the issue of the 1st defendant not having assets, it is deposed that the charged property belongs to the 1st defendant and if disposed of at this stage the amount realise is likely to settle the 1st defendant's costs and a balance would accrue to the company and the plaintiff a situation which might not prevail if the orders sought are granted and the interest continue to accrue. It is further deposed that the 1st defendant being a United States Agency would be in a position to pay any damages that would be awarded against it.

By a supplementary affidavit sworn by the same deponent on 21st March 2012, by which time the company had been joined as the 5th defendant, the company is registered in the United States of America under Texan law and registered as a foreign company in Kenya under Part X of the Kenyan Companies Act and therefore it is only one company since a company registered under Part X aforesaid is simply a branch of the main company. It is deposed that before the plaintiff can claim stake in the company she has to prove the same by making a claim therefor in Texas hence these proceedings are speculative and premature. It is further deposed that this court has no jurisdiction to resolve a shareholder's dispute in relation to a foreign based company. Under the agreement, a dispute between the 1st defendant and the 5th defendant being entities in the U.S. is determinable in the State of New York, the courts of southern District of New York and the courts of the District of Columbia. Therefore any dispute with respect to the plaintiff's shareholding in the 5th defendant arising from an agreement that is alleged to be illegal should be filed in the said courts so as to have the same set aside. It is further deposed that since the allegations of fraud are levelled against the 4th and the 5th defendant and the 1st defendant carried out due diligence, the plaintiff has no cause of action against the 1st defendant. It is the deponent's view that the plaintiff, the 4th and the 5th defendant have colluded to fake particulars of the company's shareholding in Kenya without disclosing the true position in the U. S. which is the most critical information. According to the deponent the 1st defendant advanced to the company US$ 951,000 towards the purchase of the suit property as a result of which the property was charged to the 1st defendant. A competent court of law in the Machakos suit has already made a finding with respect to the authenticity of the security documents hence the same are valid and the plaintiff being a non-party to the agreement cannot challenge the same. Since the 4th and 5th defendants have exhausted all avenues of obtaining any injunctive orders, the plaintiff, the 4th and 5th defendants are acting in collusion in this suit hence the tacit support being given to the plaintiff by the said defendants.

There is a supplementary affidavit sworn by the plaintiff on 27th March 2012 in which she states that pursuant to the provisions of section 34 of the Evidence Act, she relies on the affidavit sworn in support of the application dated 7th March 2012. She further refutes the allegations of collusion between her and the 4th defendant as mere conjectural hypothesis. In paragraph 5 of the said affidavit she avers that the correspondences from the registrar of companies which have been dismissed by the 1st defendant are based on Articles of Organisation and by-laws of the company as it existed in 2004 and hence the allegations of fraudulent alteration of the documents made by **Nathan Bayer** are blatant falsehoods. It is on the basis of the domestication of the company based on the so called fake documents that the company acquired the property the subject of the dispute since a company can only hold property in Kenya upon registration under section 366 of the Companies Act. This incorporation, it is deposed, was done by one **J M Chege**, the same advocate who gave the 1st defendant the opinion giving the transaction a clean bill of health and is faulted for having not based her opinion on the true state of affairs of the company. The

deponent further states that she brought the suit as soon as she became aware of the intended disposal of the suit property and in any case in claims where fraud is alleged time starts to run on discovery of the fraud. She associates herself to the averments made by the 4th defendant with respect to the purchase of the suit property and contends that since the suit property is situate in Kenya and the charge and security debenture grant exclusive jurisdiction to this court, this court has jurisdiction. Since United States of America is not recognised under the Foreign Judgement (Reciprocal Enforcement) Act Cap 43 as one of the reciprocating countries on the issue of reciprocal enforcement of court orders and decrees coupled with the fact that the 1st defendant has no assets in the country, the 1st defendant should have been cautious about its investments. The property, it is deposed, is situated in an area where property value has in the last 12 months shot up tenfold hence the loss likely to be sustained as a result of the said illegalities cannot be quantified in damages since there is sentimental attachment, business profit, investment capital, interest and other unquantifiable interests in the subject property. She further deposes that she has never been a party to the proceedings cited by the 1st defendant. On territorial jurisdiction it is averred that this court has jurisdiction to try the matter.

The 4th defendant similarly swore an affidavit on 8th March 2012. Though that affidavit was expressed to be a replying affidavit, a close scrutiny of the same discloses that apart from denying conning the plaintiff, the said affidavit in the end supports the orders sought by stating in paragraph 14 thereof that "the first defendant and its agents should be stopped from interfering with this property". There is also a further affidavit sworn by the same party on 26th March 2012 which in substance supports the orders sought by the plaintiff since in paragraph 8 thereof he states that "in reality the difference between Kshs. 130,000,000 and Kshs. 56,192,049.25 which is over 73,807,951 which is more than the 1st defendant's alleged contribution was contributed by the plaintiff".

The application was prosecuted by way of written submissions, which were highlighted by counsel. First, the plaintiff, through her learned counsel **Mr. Gatheru,** submitted that she relies on the oral submissions made herein on 8th March 2011. Relying on **Dadani vs. Manji & 3 Others [2004] 1 KLR 95**, it is submitted that if due to an illegality a shareholder perceives that the Company is put to loss and damage but cannot bring an action by way of relief in its own name, such a shareholder can bring action by way of derivative suit. Since the plaintiff as a shareholder has an interest in the property and stands to suffer irreparable loss unless the 1st defendant is restrained, this case falls under the exceptions to the rule in ***Foss vs. Harbottle*** **[1843].** Since leave to join the company in the proceedings was granted by the court, it is submitted that the issue of locus raised by the 1st defendant is unmerited. It is contended that in light of the pending litigation, the doctrine of *lis pendens* which applies to these proceedings by virtue of section 52 of the Transfer of Property Act, 1882 bars any dealing therewith till the determination of the case. The court is invited to apply the said doctrine to these proceedings in order to avoid the removal of the suit property from the jurisdiction of the court and **Mawji vs. U S International University [1976-80] 1 KLR 229** and **Yego & Another vs. Mujisu & 3 Others [2004] eKLR** are cited in support of this contention. The plaintiff submits that in domesticating the company, she acquired shares in the company and hence contributed to the purchase of the suit property whose sale by the 1st defendant is pegged on a loan granted without due diligence being carried out and in breach of the Articles of Association of the company hence the reliance on **Morris vs. Kanssen and Others [1946] AC 459 at 475.** Accordingly, it is the plaintiff's contention based on **Affordable Homes Africa Limited vs. Ian Henderson and 2 Others HCCC No. 524 of 2004** and **Joan Kathryn Henkel vs. Herman Robert Wilhelm [2008] eKLR** that she has established a prima facie case since the 4th plaintiff illegally put the company's property at risk by charging the same to the 1st defendant contrary to the Articles of Association and By-laws. Since the 1st defendant is a foreign agency, and moreso a federal government agency, recovery of damages in the event of success is bound to be herculean and cumbersome if not impossible. In light of the conflicting evidence adduced, the plaintiff submits that the court should not summarily without cogent evidence and proof try and reconcile the documents and/or establish their authenticity or otherwise but should be guided by **Mbuthia vs. Jimba Credit Finance Corporation & Another [1988] KLR 1** by weighing up the relevant strengths of each side's proposition but not deciding issues of fact.

In the supplementary submissions filed on 29th March 2012, the plaintiff contends that estoppel does not

apply in this case where the plaintiff contends that the documents were executed behind her back. Relying on **Ekwesera Onditi vs. Kenya Commercial Bank [2010] eKLR** the plaintiff submits that there is no evidence in support of the allegations of fraudulent collusion. It is submitted that the acquisition of the suit property was done after domestication of the company which could only have taken place after due compliance with Part X of the Companies Act and hence the 1st defendant cannot dismiss off-hand the documents emanating from the Companies registry which confirm the plaintiff as a shareholder and director/secretary of the company and under the documents deposited with the registrar execution of the disputed documents was required to be done on a resolution undertaken by the Board of the company. The failure to obtain the necessary Board resolutions nullified the actions between the 1st defendant and the company and the flawed legal opinion relied upon by the 1st defendant, it is submitted, are of immaterial. The said submissions also reiterate that the court has jurisdiction to entertain the suit. Since this is a court of equity, the court should avoid the application of the strict common law principles with respect to the locus of a shareholder to institute proceedings since equity, according to ***Snell's Principle of Equity*** shall not suffer a wrong to be without remedy. Since the 1st defendant relied on flawed opinion of the lawyers, it lost the immunity and hence the need to interrogate the said opinions.

In their submissions the 1st to 3rd defendants, through their learned counsel **Mrs. Opiyo**, accuse the plaintiff of intentionally expressing simplistic arguments without taking into account the complexities that were involved in finalising this international financing project. It is submitted that a company registered under Part X of the Companies Act does not have a separate entity from its parent company and as such, such registration only makes it a branch of the parent company. What is crucial is therefore the information with respect to the Texas Company and not what emanated from the registrar of companies. Without evidence of the position in Texas, the plaintiff has not proved that she is a director of the company in the U. S. a fact admitted by the 4th defendant. Since the plaintiff's claim that she is a shareholder have first to be determined, which determination can only be done by a Texan Court, the present proceedings are premature and speculative, it is so submitted. Relying on **SAA Technical (Property) Limited vs. Air Kenya Aviation [2006] 2 EA 317**, it is submitted that the fact that no demand was served before the institution of these suit, when the impugned documents were executed in the year 2004, shows that the plaintiff's case is not genuine but is fraudulently filed for the sole purpose of obtaining injunctive relief. It is further submitted that under the loan agreement disputes arising therefrom are to be determined by Court in the United States of America and if the plaintiff claims that she is a shareholder, she ought to have filed its claim in the said courts so as to set aside the said Loan Agreement on determination of her status as a shareholder. It is further submitted that in light of the fact that allegations of fraud are made against the 4th and 5th defendants, there is no cause of action against the 1st defendant herein. It is submitted that the 1st defendant took all the necessary steps under the loan agreement and citing **Morjaria vs. Kenya Batteries [1981] Ltd and 2 Others** the said defendants contend that whether a Company has or has not complied with its internal procedures as to borrowing or execution of contracts is an internal management issue and the third party is entitled to assume that the company has complied with its internal rules and regulations unless he has had actual knowledge of them or there are suspicious circumstances putting him on inquiry.

It is submitted that the plaintiff, being an unsecured creditor cannot prioritise its claims to those of the secured creditor and **SAA Technical (Property) Limited (Supra)**, **J K Industries vs. KCB & Another [1987] KLR 506** and **Madhupaper International Ltd vs. Kerr [1985] KLR 846** are relied upon. It is further submitted since the plaintiff has not obtained leave of the court to pursue a derivative action, she has no locus standi to pursue these proceedings in which she alleges fraud, a claim whose standard of proof is higher than on a balance of probabilities and in accordance with **Dadani vs. Manji, (supra)**, the plaintiff has not satisfied the requirements for a derivative action. It is submitted that taking into account the fact that these proceedings were instituted only a day after the 5th defendant was denied injunctive orders, it cannot be by coincident that the plaintiff instituted these proceedings and collusion allegation cannot be far-fetched. The suit property, it is submitted is within Mavoko which falls within Machakos High Court hence this court lacks jurisdiction to entertain the suit. The plaintiff being an unsecured creditor cannot have a better right than the 1st defendant's or even that of the borrower, the 5th defendant. Relying on **Halsbury's Laws of England, 4th Edn. Vol. 24 para 942** and section 120 of the Evidence Act, it is submitted that if a person stands by and knowingly, but passively encourages another to expend

money under an erroneous belief as to his rights, then comes to court for an injunction, his remedy lies in damages. Delay, it is contended, defeats equity and in this case where the security documents were finalised in March 2006 and receivers appointed in the year 2008, there has been a delay of 6 and 4 years respectively, which according to the said defendants, is inordinate without cogent and reasonable delay compounded with the fact that indebtedness is not disputed. Based on **Hyundai Motors Kenya Ltd vs. EADB HCCC No. 503 of 2003 and Lords Healthcare Ltd vs. Salama Pharmaceuticals Ltd [2008] eKLR** it is submitted that the issue of whether or not there was a resolution authorising the borrowing must await the hearing of the suit, according to these defendants. With respect to *lis pendens*, it is submitted that the doctrine is inapplicable to situations where receivers have been appointed pursuant to a debenture since to do so would be a clog on lending transactions and if section 52 of the ITPA was to apply to receivers, the Companies Act would have clearly stated so and this caveat would also appear under section 69G of ITPA. Since indebtedness is admitted, it would be unacceptable to apply the doctrine to this case. The doctrine, it is further submitted, does not apply to charges/mortgages since, based on Law of **Transfer of Property by C L Gupta**, **Chai Ltd vs. Trust Bank Limited & Another [1998] LLR 4409**, **Church Road Development vs. Barclays Bank & Others HCCC 296 of 2006** and **Approtech Services Ltd vs. Savings & Loan Kenya Ltd [2001] LLR 1498** the doctrine embodied in section 52 has no application whatever to a mortgagor who has given, under that mortgage, an express power of sale and that, he cannot, by starting a suit, perhaps a perfectly useless suit for redemption, derogate from that which he has, in express terms, conferred on the mortgagee by the instrument, namely, the power of sale. It is further submitted relying on **Mrao Ltd vs. First American Bank Ltd & 3 Others [2003] KLR 125** that a mortgagee cannot be restrained from selling charged property merely because a mortgagor has begun a redemption action. The 1st to 3rd defendants further contend that sections 69, 69A, 69B and 69D of the ITPA do not indicate that the power of sale of a mortgagee is subject to section 52 of the ITPA and that the provisions of section 52 are clearly repugnant and inconsistent with the mortgagee's power of sale under section 69, 69A, 69B and 69D of the ITPA. Based on the foregoing it is submitted that **Mawji vs. USIU Case** is inapplicable while **Yego & Another vs. Mujisu & 3 Others** was decided per incuriam. Again these defendant contend that an application filed under section 52 of the ITPA is dependent on whether the Plaintiff has demonstrated a prima facie case and cannot operate independently and reliance is placed on **Surinder Mediratta vs. KCB & Others and Jopa Villas vs. OPIC HCCC No. 215 of 2008**.

With respect to irreparable loss, it is submitted that the value of the plaintiff's stake in the suit property is known and the suit property being a commercial property, damages would suffice. The converse, it is submitted would subject the 1st defendant to greater loss since the 5th defendant admits that the debt is due. On this line of submission support is sought from **HCCC No. 450 of 2009 – Stephen Wainaina & Others vs. OPIC** and **Jopa Villas vs. OPIC**. Since the plaintiff's claim is pegged on her shareholding in the 5th defendant whose application for injunction has been dismissed, the balance of convenience tilts against granting the injunction moreso as the 1st defendant is capable of paying the damages. The plaintiff and 4th defendant, according to the 1st 2nd and 3rd defendant are simply employing delaying tactics to enable them buy time to get alternative financing to pay the amounts due to the 1st defendant and the court should not lend itself to such adventures but bind the parties to the terms of their contract.

According to the 4th and 5th defendants, through their learned counsel **Mr. Enonda,** since the changes that took place in the United States of America were not reflected in Kenya, it is an indication that the Kenyan Company and the Texas Company are two distinct companies. It is submitted that the suit property was bought in 2006 by the Kenyan Company and the loan purportedly taken by the American Company never found itself to Kenya. Accordingly, it is submitted that the first defendant had no basis to appoint a receiver for the property since it never entered any arrangement with the Kenyan Company at all.

Having outlined the application, the supporting affidavit and the submissions, both written and oral I now proceed to determine the same. However, before going into the merits of the matter I wish to deal with some mundane matters.

In the supplementary affidavit sworn in support of the application, the deponent has purported to rely on

the affidavit sworn in support of the application dated 7th March 2012. That application was, however, struck out by a ruling dated 12th March 2012. The mere fact that the earlier application was struck out does, not, however, bar the plaintiff from relying on the affidavit in support of the struck out application as long as the conditions under section 34 of the Evidence Act are fulfilled. See **Central Kenya Limited vs. Trust Bank Limited & 4 Others Civil Appeal No. 215 of 1996 [1995-1998] 2 EA 57; Charles Mwithali vs. Julius Bariu M'itobi [1988] KLR 268; Vol. 2 KAR 85; [1986-1989] EA 389; [1988-92] 2 KAR 85;** and **Stephen Kogooivo vs. Joseph Waithaka Kabai & 5 Others Nairobi HCCC No. 4089 of 1998.**

Section 34 aforesaid states as follows:

(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances–

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

and where, in the case of a subsequent proceeding–

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

In my view the four conditions in subsection **1(a), (b), (c)** and **(d)** are to be read conjunctively and not disjunctively. The provisions apply to two circumstances. The first case scenario is where evidence is sought to be used in subsequent proceedings in which case all the four conditions must be fulfilled. The second scenario is where the said evidence is sought to be used at a later stage in the same proceeding. In that case only the first condition needs to be fulfilled. In the present case we are concerned with the later scenario. Accordingly it was incumbent upon the plaintiff to prove that ***"the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable".*** In the present case none of the requisite conditions exist since it is the same deponent who swore the earlier affidavit that now also seeks to rely on the said affidavit. If the first condition was ignored in all subsequent proceedings, it would give parties a *carte blanche* to avoid giving evidence in such subsequent proceedings which in my view was not the intention of the drafters of that piece of legislation. That section, in my considered view, was not meant to short-circuit the procedure for adducing evidence but assist genuine litigants in cases where the witnesses who testified in earlier proceedings were either dead, could not be found or whose availability was not possible or not possible without unreasonable delay or expense.

The second issue is with respect to the affidavits sworn by the 4th defendant. As already stated, the said affidavits were largely in support of the plaintiff's application. **Order 51 rule 14** of the *Civil Procedure Rules* provides as follows:

(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents -

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

It is not in doubt that the 4th defendant is not the applicant in these proceedings. Being a respondent, under the above cited provisions, he could only file a replying affidavit if he wished to oppose the application. He, however, could not strictly file a supporting affidavit disguised as a replying affidavit as he attempted to do in this case. In other words, a respondent to an application cannot hijack an application filed by another party in the case as a forum to advance his case and obtain orders favourable to him without filing his own application just as a defendant cannot expect the court to make orders favourable to him unless there is a counterclaim for it, or perhaps, where it is merely the negative of a declaration claimed in the plaint. See **Abdul Rehman vs. R H Gudka Civil Appeal No. 35 of 1956 [1957] EA 4.** For this reason it has been held that even in cases where there are more defendants than one and an application for striking out is made by only one defendant the only orders that the court may grant are orders with respect to the applicant and not generally.

I now wish to proceed to deal with the issue of territorial jurisdiction. I must state that this matter was raised by the 1st to the 3rd defendants in a half- hearted manner and the reason why this was so is not hard to decifer as will become apparent presently. *Article 165(3)(a)* of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in *Article 162 (2)*. *Article 162(2)* on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. It is therefore clear that the High Court nolonger has original and unlimited jurisdiction in **all** matters as it used to have in the old Constitution.

However, it is my view that the jurisdiction of the High Court can only be limited as provided by the Constitution itself and any purported limitation not founded on the Constitution is null and void. If, therefore the provisions of **section 12** and **15** of the Civil Procedure Act purported to limit the jurisdiction I would not hesitate to exercise the powers bestowed upon the High Court under *Article 2(4)* of the Constitution and declare it void to that extent. The Civil Procedure Act, however, is not the instrument that confers jurisdiction upon the High Court. In **Riddlesbarger and Another vs. Robson and Others [1958] EA 375**, the East African Court of Appeal held as follows:

"As the Supreme Court has jurisdiction throughout, 'court' in sections13, 14 and 15 of the Civil Procedure Ordinance can only refer to a subordinate court. Since the Ordinance applies only to courts in the territory, and 'suit' by definition in section 2 means civil proceedings commenced in any manner prescribed by rules made by the rules committee under section 81 of the Ordinance, the word 'court' in these sections can only refer to a subordinate court. In Kenya there is only one Supreme Court with jurisdiction throughout and there is no need for express exclusion since the sections cannot apply to the Supreme Court in Kenya".

Similarly, I hold that in light of the clear provisions of the Constitution **section 15** of the *Civil Procedure Act* does not apply to the High Court. A word of caution is however, necessary. Where it is clear that a party has filed his case in a particular registry either based on his perception of the results he expects from that court, or in order to cause hardship to the other party or to escape from suffering a fate similar to previous ones in suits filed in other registries, the Court will not hesitate to invoke its inherent jurisdiction and strike out such suits as being an abuse of the process of the court as that would amount to the initiation of proceedings in a Court of justice for the purposes of mounting a collateral attack on a final decision adverse to the decision reached by a Court of competent jurisdiction in previous proceedings in which the plaintiff had full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the Court. See **Hunter vs. Chief Constable of West Midlands & Another [1981] 3 All ER 727.**

Having dealt with the foregoing, I now proceed to deal with the more serious issues.

The conditions necessary for the grant of interlocutory injunction in this country is generally accepted to be the ones laid down in **Giella Vs. Cassman Brown & Co. Ltd. [1973] EA 358** in which Spry, VP who

delivered the leading judgement of the Court stated as follows:

“The granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially…The conditions for grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of **section 1A(2)** of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under **section 1A(1)** of the said Act in exercising the powers conferred upon it under the Civil Procedure Act or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

Therefore, the first issue for consideration by the Court is whether a prima facie case has been made out. It was held by the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than

an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case".

One of the most contentious issues raised by counsel herein was the effect of the registration of a Company under Part X of the Companies Act. It is not disputed that it is Part X that applies to the company in this case. Part X is headed "Companies Incorporated outside Kenya" otherwise also known as foreign companies. Under **section 365(1)** of the *Companies Act Cap 486*, these are companies *"which, after the appointed day, establish a place of business within Kenya and companies incorporated outside Kenya which have, before the appointed day, established a place of business within Kenya and continue to have a place of business within Kenya on and after the appointed day"*. The law as I understand, it is that it is the process of incorporation of a company that gives its distinct identity as a legal person separate from its directors and shareholders. Again it is that process that separates the corporation from firms and other corporations. Without incorporation of a company under *Cap 486*, an entity cannot be deemed to have acquired a distinct legal personality. The process of registration of a company incorporated outside Kenya under part X of the said Act, in my view is for the purposes if giving access to the foreign company to trade in this country. It is not and cannot be another mode of incorporation of a company. To argue otherwise would lead to absurd situations where foreign registered companies would simply facilitate their registration under Part X aforesaid and when faced with claims deny liabilities on the ground that the local company is a different legal entity. To ensure that the country keeps track of the activities of the company, there is a requirement under **section 368** for the lodging with the Registrar of Companies of particulars of alterations made with respect to the status of the company and where winding up proceedings are instituted against the foreign company, particulars thereof. It is my prima facie view, therefore, that a company registered under *Part X* of the *Companies Act, Cap 486*, is not a distinct and separate legal entity from its mother company.

However, it is the plaintiff's position that the records kept by the Registrar of Companies should be deemed as prima facie evidence of the position of the company. In this case there is a letter dated 24th February 2012 purportedly emanating from the Office of the Registrar General confirming that **John Paul**, presumably the 4th defendant, and **Jane Weru**, the plaintiff herein, are the directors of **Jopa Villas LLC** while the person authorised to transact business on behalf of the company is **John Kariuki Muchemi**. That information is disputed as fake by the 1st to the 3rd defendants. They, however, have not produced evidence from the said office to controvert the same. What has been produced are the Articles of Organisation for **Jopa Villas LLC** in Texas which indicates that the company will not have managers but will be managed by the members and the only member indicated therein is **John N Paul.** The Articles are dated 9th July 2003 and according to Certificate of Correction dated 13th October 2004, the name of **John N Paul** as manager/member was substituted with that of **JNP Properties Inc**. The said certificate is signed by John N Paul. Whether it is by coincidence that the JNP are also the initials for the substituted member/manager I cannot tell. The Certificate of Compliance that was issued under Cap 486 is dated 23rd September 2004 and according to the Articles of Incorporation accompanying it the directors are indicated as **Mr. John Paul and Ms. Jane Wambui Weru**. The by-laws of the company annexed also indicate **John N Paul** and **Jane Wambui Weru** as Chairman and Secretary of the Board respectively. Under **section 368** aforesaid, if there had been change in the management of the company, that change should have been reflected in the Texas Registry before being effected in the Kenyan Registry. Whether or not that was the position, the court cannot tell based on the documents on record. Accordingly, the determination of that issue which go to the authenticity of the documents relied upon by the plaintiff herein will have to await the hearing. However, to quote **Warsame, J** in **Hyundai Motors Ltd vs. East African Development Bank Ltd HCCC No. 503 of 2003** (Milimani), whereas the validity or otherwise of a Charge document can only be determined at the hearing of a suit nonetheless *"the interpretation or validity of a charge document cannot be used to obtain orders preserving the status quo of the property"*. Accordingly, I am unable to find that the mere fact that the authenticity of the documents relied upon by the plaintiff is yet to be determined, does, *ipso facto*, warrant a grant of preservatory orders sought.

The plaintiff's bone of contention is that since the Articles of Incorporation more particularly Article X required that any resolution of the company be signed by both directors, and that no one director should

act alone, the fact that the security documents and the agreement herein are only executed by one director, the 4th defendant, on behalf of the company, the validity of the said documents to bind the company, in which the plaintiff is shareholder, has been brought into question. Assuming, without deciding that the documents in question do not bind the company, who would be better placed to challenge the same? Ordinarily the challenge should come from the company itself. It is not disputed that the company did take up challenge to the validity of the security documents in **Jopa Villas LLC vs. Overseas Private Investment Corporation & 2 Others Machakos HCCC No. 215 of 2008** and though this issue was not expressly raised therein, nothing would have stopped the company from raising the issue in those proceedings, if it so wished. In the application for injunction, **Lenaola, J** in his ruling stated that "some of the reasons advanced for challenging the debenture are matters of form, pagination etc. which cannot at this stage lead me to think that the documents are wholly unenforceable. The learned Judge stated:

"I am clear in mind that the Applicant is running away from obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st defendant to recover its monies lawfully advanced…Our Courts must uphold the sanctity of lawful commercial transactions".

That decision, as already indicated, was made in an application similar to the present application. It is now trite that *res judicata* applies to applications as well as suits and further that it applies not only to matters which were the subject of the earlier litigation but matters which properly speaking should have, but due to negligence of counsel, formed the subject of the said litigation. See **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 [1958] EA 450, Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and**Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28.**It is therefore clear that had these proceedings been brought by the 5th defendant, there would have been no hesitation on the part of the court in dismissing the same as being both *res judicata* and an abuse of the process of the court.

It is contended, however, by the plaintiff that she was not a party to the earlier proceedings and these proceedings are a derivative action. What is a derivative action and under what circumstances is it appropriate? In **Altaf Abdulrasul Dadani Vs. Amini Akberazi & 3 Others Nairobi (Milimani) Hccc No. 913 of 2002 [2004] 1 KLR 95**Mwera, J stated as follows:

"By derivative suits, the minority shareholder(s) feeling that wrongs have been done to the company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company, come to court as agents of the "wronged" company to seek reliefs or relief for the company itself, all the shareholders including the wrong-doers, and not for the personal benefit of the suing minority shareholder(s)… It is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights and action vested in the company and to sue for the wrongs done to it and in the absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters…However if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such shareholder can bring an action by way of derivative **action…Mere irregularity in internal running of a company cannot be a basis for one to bring a derivative suit for such can be rectified by a vote/resolution at the company's meeting and if a shareholder contemplates using a personal claim of infringement on his rights then a derivative suit will not avail as the relief must be for the benefit of the company…Where the company is under receivership a derivative action will not be available as there is no reason in principle why the Court should not allow the company to sue the receiver. Similarly where a company is under liquidation a derivative action cannot be brought…Since it is for the benefit of the company that a derivative action is brought the plaintiff ought to add the company as a defendant and by that it is bound by a Judgement that may follow…The permission or leave to continue with a derivative action is sought after the suit has been instituted…The plaint plus the application for permission to continue with derivative action must be served before the application is heard and the application has to be heard *inter partes* because the plaintiff has to demonstrate a *prima facie* case by the**

company against the wrong-doing directors and that the plaintiff should bring the case and before permission, the proceedings are virtually stalled".

The Court of Appeal, on the other hand in **Rai & Others vs. Rai and Others [2002] 1 KLR 668; [2002] 2 EA** 537 was of the following view about the matter:

"If the company has been wronged the remedy lies in the hands of the company and if the company does not act shareholders have a very limited right to bring a derivative action. A derivative action is different from a petition under section 211 of the Act since it is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C; C is the proper plaintiff because C is the party injured and therefore the person in whom the cause of action is vested…The exception to the rule in Foss vs. Harbottle which still stands in Kenya may be taken advantage of by minority shareholders if they can show fraud but they cannot do so by way of a petition; they can only do so as plaintiffs in a derivative action and before one can proceed further with such a derivative action he has to establish a *prima facie* case of fraud the burden whereof is higher than on a balance of probability burden".

Two things clearly come out from the foregoing. Firstly, it is doubtful whether a derivative action may be brought where the company is under receivership as it is in this case. Secondly, before the said action can be continued with, a *prima facie* case of fraud must be shown. The plaintiff's contention is that when the Court granted leave for joinder of the 5th defendant company, that joinder amounted to leave to continue with the derivative action. With due respect, I beg to differ. An order to join a party to proceedings cannot be equated to an order for leave to continue with the action as derivative action. The principles that govern the grant of the two orders are not the same and in an application for derivative action, for example, one of the issues that the court would have to consider, in my view, is whether the company has itself in the past instituted similar actions. That issue was not before the court when the court granted leave for joinder of the 5th defendant. I therefore find that leave to continue with these proceedings as derivative action has neither been sought nor granted.

In the foregoing circumstances whereas the plaintiff has shown that she has an arguable case, I am not satisfied that she has established a *prima facie* case as per the standards of **Mrao Ltd vs. First American Bank Ltd & 3 Others Case** (Supra).

Having found as aforesaid, I am strictly not bound to consider the other conditions for the grant of an injunction since the conditions under **Giella vs. Cassman Brown** are sequential. For completeness of record I will, however do so.

The plaintiff raised the issue of *lis pendens*. The defendant's position is that *lis pendens* does not apply to cases in respect of mortgages and charges. However, most of the cases relied upon were cases where the application for injunction was brought by a mortgagor. In such cases, I agree that the principle may not be applicable since the mortgagor cannot restrain the exercise of a statutory power of sale by the mortgagee merely on the ground that a redemption suit has been commenced. Therefore, whereas I am unable to make a conclusive blanket finding at this stage that the doctrine is not applicable to suits arising cases from mortgages or charges, I do accept the submission that the invocation of the doctrine in applications for injunctions must be subject to the conditions laid down for grant of injunctions.

With respect to issue of irreparable loss a two-pronged argument has been advanced. Firstly, it is argued that the 1st defendant is a foreign company without assets within the jurisdiction and damages are likely to be impossible to recover. Whereas the fact that the defendant has no assets within the jurisdiction is a factor to be taken into account in deciding whether or not the plaintiff is likely to suffer irreparable loss unless an injunction is granted, it is not the sole determinant on the issue but just one of the considerations. In this case the 1st defendant is said to be a U S Federal Government Agency. In the premises and taking into account the fact the allegation that it lent money to the 5th defendant, which money remains unpaid todate, is not challenged in these proceedings, the second condition cannot be said

to have been satisfied. In *Civil Application No. 147 of 2009* between **Jopa Villas Llc vs. Overseas Private Investment Corporation and Others**the Court of Appeal, in dismissing the application for injunction pending appeal from the said decision by Justice Lenaola stated as follows:

"As regards the nugatory aspect, it has to be noted that the suit property is a commercial property of considerable value. We have been told that nobody is in possession but two guards who are stationed on the property presumably to keep away intruders. In that case the applicant would be adequately compensated by way of damages in the event that it is successful in the appeal. We are satisfied that the refusal to grant this application would not render the success of the appeal nugatory".

Accordingly, I am unable to find for the plaintiff on that ground.

The second limb of the argument is that the plaintiff has sentimental attachment to the property whose value has considerably appreciated in the recent past. The property in question, from the record, comprises of commercial premises in so far as the parties to the suit is concerned. As opposed to family, ancestral or communal land, for a Court to be convinced that there is sentimental attachment to commercial property one needs to be satisfied beyond mere allegations since commercial properties ordinarily do not attract sentimental attachment.

Accordingly, the plaintiff has failed to convince the court that it has satisfied the second condition.

With respect to the last condition, it is not in dispute that the 5th defendant owes the 1st defendant money which remains unpaid todate. Although the 4th defendant contends that the 5th defendant is willing to redeem the property, willingness alone does not suffice since faith without action is not satisfactory. There are no tangible signs shown by the 5th defendant to support its said willingness. The court takes judicial notice of the fact that the delay in settling the amount due is likely to aggravate the situation and may likely lead to loss to all the parties concerned. In Middle **East Bank Kenya Ltd vs. Millligan Properties Ltd Civil Appeal No. 251 of 1998** it was held, rightly in my view, that if the realisation of security was kept in abeyance there is a likelihood of the security being diluted and the value of the suit property could depreciate even further and therefore it is in the interest of the plaintiff as well that the property be realised at this stage to avoid further escalation in interest.

I am also alive to the fact that these proceedings were instituted just one day after the 5th defendant failed to obtain favourable orders in the Machakos suit. Whereas that may purely be coincidental, it doesn't advance the plaintiff's case much that she only came to Court after the 5th defendant's efforts were thwarted by the court and may, again without making definitive findings thereon, *prima facie*, be evidence of collusion and equity frowns upon such conduct.

I have also taken into account the fact that there is no offer of undertaking in damages given by the applicant in the supporting affidavit.

In conclusion, the Notice of Motion dated 10th February 2012 has no merit and is dismissed with costs to the 1st, 2nd and 3rd defendants.

Ruling read, signed and delivered in court this 27th day of April 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Macharia for Mr. Gatheru for the Plaintiff

Mrs. Opiyo for the 1st to 3rd Defendants

No appearance for the 4th and 5th defendants