REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 468 OF 2012

DAVID LANGAT ……..…..……. PLAINTIFF

VERSUS

ST. LUKES ORTHOPAEDIC AND TRAUMA HOSPITAL LIMITED ……. 1ST DEFENDANT

DR. LECTARY KIBOR KEIYO LELEI ……..……. 2ND DEFENDANT

SUNRICE ORTHOPEDIC AND TRAUMA HOSPITAL LIMITED ..…… 3RD DEFENDANT

R U L I N G

1. On the 20 July, 2012, the Plaintiff came before court under Certificate of Urgency with his Notice of Motion dated 19 July, 2004 seeking an interim injunction restraining the Second Defendant herein from anyway interfering with the Third Defendant\'s financial facility with Ecobank Kenya Ltd. The application also sought that leave be granted for the prosecution of the suit herein as a derivative suit/action on behalf of the Third Defendant. In his initial submissions ex parte, Mr. Mogaka for the Plaintiff explained that that the urgency was that there were differences between the two directors of the First Defendant company. Those directors were the Plaintiff and the Second Defendant. He informed court that the Court of Appeal in *Civil Appeal No. 269 of 2011* on 28 March, 2011, had ordered that the Appellant (the Second Defendant herein) should not dispose of or transfer the First Defendant\'s property, being Eldoret Municipality/Block 8/90 (“the suit property”). Counsel also detailed that on 12 July, 2012 it was brought to the attention of Ecobank who by letter dated 11 April, 2012 were advised by the Second Defendant that he was organizing the taking over of the financial facilities of the First Defendant by I & M Bank Ltd, without the consent of the Plaintiff. According to Mr. Mogaka the reorganization of the financial facilities of the First Defendant would involve the lifting of the Ecobank Charge over the said property and the registration of a new Charge in favour of I & M Bank Ltd. In counsel\'s opinion the definition of *"disposition"* as per the Court of Appeal\'s Ruling and as defined by the *Land Registration Act (2012)* included leasing and charging of the property. It has also come to the attention of the Plaintiff that the Second Defendant was in the process of leasing out the said property to the First Defendant. It is on the basis of the above that, on 20 July, 2012, I granted the second prayer of the Application as set out above pending the hearing of the Application inter parties.

2. For clarity’s sake, I set out as follows the prayers of the Plaintiff\'s Notice of Motion dated 19 July, 2012 as well as the grounds in support

thereof:

“1. The matter be certified as urgent and service be dispensed with at the 1st instance.

2. There be an interim injunction restraining the 2nd Defendant from in any manner interfering with the 3rd Defendant's financial facility with Messrs. Ecobank Kenya Limited by way of transferring to and/or take over by any other Bank without the 3rd Defendant' Board of Directors resolution.

3. Leave be granted for the prosecution of the instituted matter herein as a derivative suit/action on behalf of the 3rd Defendant.

4. Save in the name, favour and for the benefit of the 3rd Defendant there be an order of injunction restraining the 2nd Defendant from obtaining any trade, professional licenses or permits for operating in any manner from Plot No. L.R. No. Eldoret Municipality/Block 8/90 till final determination of suit.

5. Pending hearing and determination of suit the 2nd Defendant be restrained from in any manner interfering with the 3rd Defendant's financial facility with Messrs. Ecobank Kenya Limited by way of transferring to and/or take over by any other Bank without the 3rd Defendant's Board of Directors resolution.

6. The 1st Defendant be restrained from carrying out the 1st Defendant's business/operations from the 3rd Defendant's hospital premises and/or in any manner interfering with the 3rd Defendant's premises, machinery and equipment situate on Plot No. LR. No. Eldoret Municipality/Block 8/90 pending hearing and determination of this suit.

7. Costs be provided for.

The grounds in support of the Application are as follows:

a) There are serious differences between the Directors and shareholders of the 3rd Defendant that has made it difficult for the Company to transact business and to pass a resolution for institution of a suit against the Defendants in order to protect the Company's interest.

b) That the 1st and 2nd Defendants are bent to steal a match against the 3rd Defendant.

c) The said Defendants are in the process of circumventing court orders by attempting to transfer for a takeover the 3rd Defendant's Bank Account, financial facility with Ecobank Kenya Limited and purporting to introduce the 2nd Defendant to operating from Plot No. LR. No. Eldoret Municipality/Block 8/90.

d) The actions of the said Defendants in respect of the 3rd Defendants are without the sanction of the Board of Directors.

e) The Defendants are to complicate the dispute between the shareholders/directors of the 3rd Defendant".

I have set out in the prayers and grounds of the Notice of Motion in detail for reasons that will become obvious later on in this Ruling.

3. The Plaintiff\'s Application was supported by the Affidavit sworn by the Plaintiff on 19 July 2012. In that Affidavit the Plaintiff averred that he and the Second Defendant were equal shareholders and the only directors of the Third Defendant. The deponent went in to the history of the Third Defendant Company which had been incorporated for the purposes of the development of a hospital on the suit property, although the suit property in Eldoret was registered in the name of the Second Defendant. He claimed that monies were raised, bank accounts were opened and buildings were constructed on the suit property

seemingly under the direction of the Second Defendant. He maintained that he had heavily invested in the hospital project but was now being shut out of the Third Defendant Company's business and activities, including the suit property, by the Second Defendant. Further, the Plaintiff claimed that the Second Defendant and his spouse had incorporated the First Defendant to what he saw as a *"fallback entity to utilize/operate a hospital"* on the suit property. It should be noted that the Plaintiff, in his Affidavit in support of the Application, didn\'t mention at paragraphs 22 and 23 thereof, that he had filed what he termed an unsuccessful litigation on the part of the Third Defendant being *Eldoret HCCC No. 130 of 2011* which claim been struck out by reason of the lack of a Resolution from the Board of Directors permitting institution of the suit. The deponent noted that the subsequent appeal had been disallowed by the Court of Appeal in *Civil Appeal No. 269 of 2011*. The Court had discharged all the Orders of the High Court which the Plaintiff had obtained on 1 December, 2011 as well as the Order as regards the suit property as detailed above.

4. The Second Defendant filed a comprehensive Replying Affidavit on 30 July, 2012. In that Affidavit he immediately embarked upon giving full details to this Court of what had transpired in *Eldoret HCCC No. 130 of 2011*, which case the Plaintiff had instituted as against the Second Defendant. The Second Defendant went to the extent of attaching a copy of the Plaint in that suit as well as the Defence thereto. He detailed that he had purchased the suit property in Eldoret on 2 July, 2007 for a consideration of Shs.16 million. The Third Defendant Company was incorporated long after the Second Defendant had purchased the suit property at Eldoret. It was therefore no basis for the Plaintiff to maintain that the said property belonged to the Third Defendant. Indeed, one of the prayers in the suit at Eldoret was for a declaration that the Second Defendant do hold the land in trust for the Third Defendant but that suit had not as yet been heard or determined. The Second Defendant confirmed that it was currently in possession of the land where he had opened and operates a hospital. At paragraph 39 of the Second Defendant\'s said Affidavit, he maintained that the Plaintiff\'s suit and application before court was incompetent, bad in law and an abuse of the court process for reasons as follows:

"(i) The Plaintiff has not obtained leave to file a derivative suit and the reliefs purportedly sought on behalf of the 3rd Defendant are all incompetent.

(ii) It is only the 3rd Defendant which can seek relief to enforce any rights purportedly accrued to it.

(iii) Any application for injunction is Res-judicata.

(iv) There is a pending suit in the High Court at Eldoret where the Plaintiff has sought relief over the same subject matter and this suit is therefore an abuse of the court process.

(v) There is a pending application for leave to file a derivative action pending before the High Court of Kenya at Eldoret and the seeking of the same relief before this court amounts to an abuse of the court process.

(vi) The orders sought in this application cannot be granted".

These sub-paragraphs detailed by the Second Defendant in his said Affidavit upon advice from his advocates on record, are basically the same grounds upon which the Preliminary Objection to the Plaintiff\'s Application has been raised by the advocates for the First Defendant.

5. The Second Defendant being on record as represented by the firm of Gicheru & Co., Advocates, the firm of Havi & Co. came on the record as representing the First Defendant on 30 July, 2012. Simultaneously on that day, the First Defendant raised a Preliminary Objection both to the Plaintiff\'s suit and his Application dated 19 July 2012. The Preliminary Objection was based on the following grounds:

"1. The Plaintiff has no locus standi to institute legal proceedings to enforce purported rights owed to a limited liability company.

2. The 3rd Defendant is a distinct and separate legal entity from the plaintiff and is capable of suing

in it's on right.

3. There is no resolution filed with the suit authorizing the Plaintiff to institute any suit on behalf of the 3rd Defendant.

4. The Plaintiff has not obtained leave to institute any derivative suit and the orders sought in the application are incompetent.

5. There is a pending application for leave to file a derivative suit pending for ruling before the Honourbale Lady Justice A. Mshila in Eldoret HCCC No. 130 of 2011 and the making of a similar application before this court amounts to an abuse of the court process.

6. The 1st Defendant has been wrongly joined into this suit.

7. The application for injunction is Res-judicata.

8. The suit and the application are generally an abuse of the court process".

Thus it was when the counsel for the Plaintiff and the First and Second Defendants appeared before me on 31 July, 2012, Mr. Havi for the First Defendant noted that he had filed the Preliminary Objection on behalf of his client which went to the jurisdiction of this court and requested that it should be heard first. Mr. Gicheru for the Second Defendant, heartily endorsed Mr. Havi's suggestion noting that there was a pending application for hearing before the High Court in Eldoret on whether the 2nd Plaintiff therein and the Plaintiff herein should have leave to file a definitive action. In turn, Mr. Mogaka stated that he was ready to take on both the Plaintiff\'s said Application as well as the Preliminary Objection but that he was entirely in this court\'s hands.

6. Having perused the Plaintiff\'s Application, as well as the Preliminary Objection, I ruled that I would hear the latter first. Mr. Havi opened his submissions by saying that he was commencing with objections nos. 1 and 2 of the Preliminary Objection. The intent of those two objections was that the Plaintiff lacked *locus standi* in respect of relief to the Third Defendant. Counsel referred me to the prayers in the Plaint. He observed that prayer a) referred to the suit property in Eldoret whereas prayers nos. 2 and 3 sought restraining orders as against the Second Defendant with regard to the business of the Third Defendant. Counsel stated that it is trite law that a limited liability company has a separate legal entity from its shareholders and directors, so that in the event of injury to the company, it is the company and the company alone who should sue. To this end Mr. Havi referred the court to 2 authorities being first the case of **Affordable Homes Africa Ltd vs Henderson and 2 Ors (2004) 2 KLR 473.** Counsel also referred the court to **Omondi & Anor. vs National Bank of Kenya Ltd & 2 Ors (2001) KLR 579**. Counsel maintained that the thread running through those two authorities was consistent with the perception that only a company can sue for injury to itself.

7. Turning to objections nos. 3 and 4, Mr. Havi referred the court to paragraph 7 of the Plaint where it was detailed that pending before the High Court in Eldoret was *HCCC No. 130 of 2011*. The Plaint therein was filed by Sunrise Orthopaedic and Trauma Hospital Ltd. as well as David Langat, the Plaintiff herein. The said hospital company is now the Third Defendant in this suit. Counsel noted that in the suit in Eldoret, the Third Defendant, Sunrise Orthopaedic and Trauma Hospital Ltd. was struck off as a plaintiff for failing to have a resolution of its shareholders or directors to the filing of the suit. Further, counsel maintained that there was a Ruling pending for delivery in which the Plaintiff herein has sought leave to proceed with the suit in Eldoret as a derivative action. Such had been admitted in the Plaint. Further Mr. Havi noted that a derivative action can only be commenced after leave has been sought and granted. In that regard, he referred the court to the case of **Dadani vs Manji & 3 Ors (2004) 1 KLR 95.**

8. Mr. Havi then turned to objections nos. 5 and 7 and drew the attention of the court to prayer (a) of the Plaint herein which counsel maintained sought to restrain all dealings with the suit property Eldoret Municipality/Block 8/90. Counsel maintained that the prayer was caught up by *res judicata*, the same having been dealt with in the case in Eldoret and the Appeal therefrom. Counsel referred the court to the

Judgement of the Court of Appeal at page 231 of the Plaintiff\'s bundle of documents. He asked the court to peruse the final holding of that Court at page 243 which amounted to a preservative Order forbidding the disposal of the property and detailing that the same should continue to be used as a hospital. If it was thought that the First Defendant should be answerable in respect of the suit property, then the Plaintiff ought to have applied to enjoin the First Defendant as a party to the suit in Eldoret. Counsel referred me to the case of **Bundotich vs Managing Director Kenya Airports Authority & Anor. (2007) 2 EA 90**. Counsel noted that the court at page 2 of that case had deprecated the actions of suing as regards a single property in two different fora. Counsel requested me to abide by the provisions of **section 6** of the *Civil Procedure Act* which empowers this court to stay the action before it and refer the suit to the Court in Eldoret. Counsel also maintained that this court was entitled to strike out the suit in view of the provisions of **section 7** of the Act so as to allow the Plaintiff to pursue the matter in the Eldoret case. Finally, Mr. Havi referred the court to the case of **Kenya Bus Services Ltd & 2 Ors vs the Attorney General & Ors (2005) 1 EA 111** as per the Ruling of **Nyamu J** (as he then was). He also pointed out the provisions and powers of the court contained in **Order 47 rule 6 (2)** *Civil Procedure Rules*. He stated that the Defendants requested the court to make such orders because (a) the property is situated in Eldoret and (b) there was already a suit before the High Court in Eldoret. He requested the court that this suit should be struck out in its entirety with the Plaintiff seeking his remedy in the case in Eldoret.

9. In turn, Mr. Gicheru for the Second Defendant entirely supported the submissions of Mr. Havi and wanted to point at and emphasize 3 issues that he had raised. Firstly, in the **Bundotich** case (supra) for counsel noted that the court had found that the number of parties as between two separate suits did not matter so long as the dispute related to the same property. Further in relation to the **Omondi** case (again supra) the purposes of *res judicata*, it did not matter whether the persons were litigating in the same capacity. Certainly, with regard to the Court of Appeal\'s decision arising out of the Appeal against the injunction, the Court discharged all injunctive orders that the Plaintiff herein had obtained in the High Court and directed that the Plaintiff should have the suit heard as early as possible in Eldoret. Instead, the Plaintiff had filed this suit in this court. Counsel then urged me to either strikeout the suit to prevent an abuse of the court process or order the same to be transferred so that all the issues could be dealt with by one court, otherwise it may bring the court into a multiplicity of suits as per the **Bundotich** case in which **Ochieng J.** had emphasised the danger involved if two different branches of the High Court were handling the same matter. Such could lead to the danger of having contradictory judgements which would bring the court into disrepute. Counsel noted that **Ochieng J.** had struck out the second suit.

10. Mr. Mogaka for the Plaintiff opposed the Preliminary Objection and referred the court to 4 areas of the law in this regard

(a) **Sections 6 and 7** of the *Civil Procedure Act*;

(b) **Spokes vs The Grosvenor and West End Railway Terminus Hotel Company Ltd & Ors. (1897) 2 QB 124**;

(c) *HCCC No. 2 to 7 of 2001* **Intimate Beauty Care Ltd T/A Simply Fine Fashions vs Kundani Singh Construction Ltd T/A Leopard Beach Hotel**;

(d) **Mulla on the Code of Civil Procedure Vol 1 at page 81**.

Counsel commented that it was apparent from the Affidavit of the Second Defendant that there were several differences of opinion as between him and the Plaintiff. There were only the two of them as the directors of the Third Defendant Company. The Board of Directors or the shareholders of the company could meet but there would be no resolution forthcoming hence there could be no authority given to the Plaintiff by the Third Defendant Company to institute proceedings on its behalf. Counsel maintained that the proposition is that the Third Defendant company itself ought to be the Plaintiff in this suit but where there exists circumstances which do not allow the company to go to Court, then one of the shareholders or a director shall, on behalf of the company, in his own name sue for the benefit of the company. Counsel further maintained that in those circumstances, the company for whom the action is being commenced becomes a nominal defendant so as to ensure that it gets the benefit of any judgement. There would be no

necessity for the company to seek leave as a defendant. However, the Plaintiff had sought leave to file a derivative suit which was to be argued as part of the Application. To this end, Mr. Mogaka referred the court to the **Spokes** case which as per **A. L. Smith L. J. t**herein detailed the position as follows:

"The proper plaintiff in such an action would obviously be the company; but in the circumstances existing this is not possible, for the impeached directors who have a controlling power in the company do not assent to the company being made plaintiffs, and without that assent the Company cannot be made plaintiffs.

To obviate this difficulty it has for many years been the practice of the Court of Chancery, in circumstances such as the present, to make the company parties to the action as defendants, in which action the plaintiff shareholder asks for an order, not that the damages recovered should be paid to him, but to the defendant company; and in this way the otherwise insuperable difficulty of maintaining the action is not over."

Counsel submitted that the question of seeking leave to file a derivative suit is not required when the company is made a defendant as per the above case.

11. In terms of the prayers in the Plaint, Mr.Mogaka noted that the Plaintiff was seeking no relief as against the Third Defendant and when it was appropriate, and if need be, the Plaintiff would seek leave to amend his pleadings as necessary. As regards the matter of jurisdiction, counsel maintained that **section 7** of the Civil Procedure Act did not apply in these circumstances. He asked the court to consider the relief being sought in the Eldoret case prayers (a) to (i) as compared to the relief sought in the present Plaint before court. For example, counsel noted that the first prayer for relief in this suit was as against the First Defendant, who was not a party to the case in Eldoret. That prayer sought to restrain the First Defendant from operating a business from or out of the suit property. The order sought in the Eldoret case was to restrain the Second Defendant from disposing of the suit property and to allow the Third Defendant to operate a hospital therefrom, as was intended as between the Plaintiff and the Second Defendant. That intention was apparent, said counsel, from the letter from Ecobank Ltd offering loan facilities to the Third Defendant – see the paragraph headed *"Purpose of Loan"*. Counsel also referred to the approval for further loans given by the said Ecobank Ltd. including the detail of "the borrower" in the Ecobank Charge document. From the above, counsel maintained that he was demonstrating that there was no *res judicata*. He reiterated that there was no time in the Eldoret case that there was any suggestion made that the First Defendant should be invited to operate a hospital. The intention was to operate a hospital in the name of the Third Defendant not the First Defendant. The arrival of the First Defendant\'s involvement had come after the Ruling in the High Court and indeed that of the Court of Appeal. Similarly, there was no arrangements for the First Defendant to take over the loan from the said Ecobank Ltd and, according to counsel, these are all totally different issues to those being raised in this case. Counsel again referred the court to the **Intimate Beauty Care** case (supra) as well as **Mulla's Code of Civil Procedure Act V of 1908** at **page 83**. Counsel noted that the Plaintiff had shown new causes of action in the present matter and that there was no provision for striking out in **section 6** of the *Civil Procedure Act*. He asked that this court find that the Preliminary Objection is unsustainable.

12. In reply, Mr. Havi submitted that the admission by the Plaintiff that there is an application in the Eldoret case for leave to commence a derivative action in itself confirms the issue that the First Defendant had raised in the Preliminary Objection. He also maintained that the claimant that the First Defendant was not a party to this suit in Eldoret does not stand, as the First Defendant could easily have made an application to enjoin it. Counsel stated that all the documents exhibited in this suit refer to the matter in Eldoret, which stands to reason that itshould be tried there. In his turn, Mr. Gicheru in response to the Plaintiff for the Second Defendant noted that the issue of the injunction that this court was being urged to grant had already been dealt with by the Court of Appeal. He maintained that *res judicata* applied to applications as well as to suits.

13. From the submissions of learned counsel for all 3 parties as I have outlined above, this court first needs to look at the 3rd prayer of the Plaintiff\'s Notice of Motion dated 19 July, 2012. That prayer asks that the leave be granted for the prosecution of the case instituted herein as a derivative suit on behalf of

the Third Defendant Company. In the **Dadani** case (supra) **Mwera J.** defined such action as follows:

"So this is basically is intended to be what is called a derivative action. By such actions in company law, minority shareholder (s) feeling that wrongs had been done to the company which cannot be rectified by internal company mechanisms like meetings and resolution, 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)."

The Plaintiff herein, although not a minority shareholder but an equal shareholder of the Third Defendant, has come before this court to seek leave to prosecute this suit by way of a derivative action. Again in the **Dadani** case, **Mwera J.** found as per the 9th holding therein:

"the proper way to lay a derivative claim is to begin with filing the suit, then following it with an application, to be served along the plaint, on whether the derivative claim should continue."

The learned Judge then said quoting from **Joffe, V (2000) Minority Shareholders: Law, Practice and Procedure** as follows:

"Then under 'Application for permission to continue' with the derivative action Joffe says *inter-alia*:

'Before proceeding with a derivative claim a claimant ought to at least be required to establish a *prima facie* case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the exception to the rule of Foss vs Harbottle.'

And that also the claimant is entitled to: bring on the derivative claim to be determined as a preliminary point at the earliest possible time after commencement of proceedings. That process is entirely procedural and no minimum tests or hurdles are set for the claimant to satisfy. All it involves is:

"……., the onus on the claimant to adduce evidence establishing a *prima facie* case, not only as to the entitlement of the company to the relief to which the claimant asserts it is entitled to but also as to the propriety of derivative proceedings.

…….. After the claim form has been issued, the claimant is required to make an application which must be supported by written evidence – for permission to continue the claim. '

This was an authority submitted to court by the Second Defendant. Although the **Spokes** case was not referred to therein, it is obvious to this court that the principles as expounded in both cases as to leave to continue with derivative actions are the same. I have perused the Affidavit in support of the Plaintiff\'s Application herein, in which he outlines the history of the incorporation of the Third Defendant and what was agreed as between him and the Second Defendant with regard to the development and user of the suit property. As regards the prosecution of a derivative action, the Plaintiff had this to say at paragraph 24 of his said Affidavit:

"THAT I aver that in view of the existing differences between the Board of Directors of the 3rd Defendant Company, it is not practicable to convene a meeting for the passage of any resolution to instituting this suit in the name of the Company as one of the two Directors (2nd Defendant) is in full participation in the aforementioned efforts intended to totally injure the interests of the 3rd Defendant for his own personal gain, his spouse and that of the 1st Defendant with whom he is associated. Hence, this is a proper Case in which the Court should grant leave for a Derivative Suit/Action to be instituted."

As regards Preliminary Objection No. 1, based on the above extract from the Plaintiff's Supporting Affidavit to the Application and adapting the reasoning of the **Stokes** and **Dadani** cases aforesaid, I find

that the Plaintiff does have the *locus standi* to bring this suit with the company as the Third Defendant.

14. As regards Preliminary Objections Nos. 2, 3 and 4, I believe that such can be disposed of by reference to my finding as to Preliminary Objection No. 1 supra. In the **Affordable Homes** case(supra), my learned brother Njagi J. made relevant (to this case) findings when he detailed:

"2. As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty."

The learned Judge continued:

"3. As to which of these two organs should give the necessary sanction depends, in the case of registered companies, entirely on the construction of the company's articles of association."

However, the learned Judge in that case was not dealing with a case in which there was a stalemate as between directors and/or shareholders as is the case here. It is agreed that the 3rd Defendant is a distinct and separate legal entity from the Plaintiff and is capable of suing in its own right. It is also agreed that there is no resolution filed with the suit authorizing the Plaintiff to institute any suit on behalf of the Third Defendant. For the reasons that I have detailed above, neither could there be. In my view, the Plaintiff has adopted the correct procedure so as to come before this Court with this suit citing the company as the Third Defendant but not specifying any relief as against it.

15. In this Ruling, I would like to deal with Preliminary Objection No. 6 next, as I believe that Nos. 5 and 7 can be taken together. Preliminary Objection No.6 as above reads that the 1st Defendant has been wrongly joined into this suit. On this point, Mr. Havi had referred me to the finding in the **Bundotich** case (supra). However, my perusal of that case revealed nothing as regards a defendant in one case not being enjoined or otherwise to the other suit based on the same subject matter. As I understood Mr. Havi, what he was saying was that the Plaintiff in this suit (and as the 2nd Plaintiff in the Eldoret suit) should have made application in the Eldoret suit to enjoin the First Defendant to that suit, not to have just filed a separate suit in this Court. That is as may be but in my opinion it is the question of whether this suit is considered to be *res judicata* which will decide the success or otherwise of the Preliminary Objection.

16. As per the finding of **Waki J.** in the **Intimate Beauty Care** case (supra), the Preliminary Objection therein and herein calls for interpretation and application of **section 6** of the *Civil Procedure Act*. That section reads as follows:

"6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief".

The learned judge while approving commentaries made in regard to **section 10** of the *Indian Civil Procedure Act* which section is *in pari materia* with **section 6** of our Act had this to say:

"It is therefore common ground that the object of the rule is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. Thus the possibility of contradictory verdicts by two or more courts and the attendant ridicule and embarrassment are obviated. It would appear to have been the same objective intended by the Rules Committee when it promulgated the Rule in LR. 36/2000 amending 0.7 to require an averment that there is no other suit pending and that there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject-matter. Such averment would in addition be verified on oath to underscore the seriousness of the requirement.

All the Commentaries agree that the scope and application of S.6 is four fold:-

1) The matter in issue in both suits must be substantially the same.

2) The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court having jurisdiction in Kenya to grant the relief sought.

3) Both the suits must be between the same parties or their representatives.

4) Such parties must be litigating in both suits under the same title".

17. There is no doubt in relation to the 4 requirements as regards **section 6** set out above that firstly there is a suit filed in the High Court at Eldoret being *HCCC No. 130 of 2011*, as has been detailed in paragraphs 7 and 8 as well as 9 in the Plaint filed herein. There is no doubt that the suit in Eldoret is pending and that the Court of Appeal in its Judgement dated 28 March, 2011 directed that the suit there be fast tracked for hearing because the Court took the view that the rights of the respective parties should be adjudicated on merit as early as possible after a full hearing. Although this suit includes the First Defendant, other than the Third Defendant appearing herein as a defendant rather than the First Plaintiff in the Eldoret suit, the parties are the same in both are and litigating in both suits under the same title. The issue at the core of both suits is the suit property at Eldoret and in that regard I take comfort from the words of my learned brother **Ochieng J.**in the **Bundotich** case (supra) as follows:

"Obviously, if the plaintiff succeeded in the other suit the plaint herein would have no leg to stand on. If that issue were to be dealt with before two courts, at the same time, there is every possibility that the courts could reach inconsistent verdicts. If that were to happen the courts would have been put into disrepute. Meanwhile, if the two cases were left to run side-by-side in two different courts that would be a waste of precious judicial time. In order to ensure that judicial time is utilized in an optimum manner and also to safeguard the integrity of the judiciary, by removing the possibility that two courts of concurrent jurisdiction might arrive inconsistent decisions on the same subject matter, this suit should be struck out."

I would also take encouragement from the finding of **Ringera J.** (as he then was) in the **Omondi** case (again supra) when he stated thus:

"The doctrine of *res judicata* would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction, but also to situations where matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined."

This observation I believe takes into account the position in this case of the First Defendant who, Mr. Havi submitted, should have been enjoined into the Eldoret suit.

18. Quite apart from considering whether res judicata applies as far as this suit is concerned there is the question of the proper place of suing. **Section 12** of the *Civil Procedure Act* reads as follows:

"subject to the pecuniary or other limitations prescribed by any law, suits –

(a) for the recovery of immovable property, with or without rent or profits;

(b) for the partition of immovable property;

(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate".

Although it is appreciated that this court as a Division of the High Court has unlimited territorial jurisdiction, the suit property in both this case and the Eldoret case is situated in Eldoret. Consequently, it would make complete sense that any suit filed in the High Court should be so filed in the Registry pertinent to the local limits of where the suit property is so situated. In this regard, **Ochieng J.** had this to say with regard to commercial courts:

"By their very title, the Milimani Commercial Courts were intended to handle only such cases as were within their purview. Primarily, the courts handle cases arising out of disputes between players in the commercial scene. However, it must be appreciated that if such were the scope of cases to be handled by the said courts, it would be possible for ingenious advocates or parties to stretch the limits of the court\'s jurisdiction. I believe that this is because of that realization, and also in an endeavour to clearly delineate the scope of the court\'s jurisdiction that the Honourable Chief Justice issued a practice note, for the purposes of identifying the nature of cases, which could be dealt with by the Milimani Commercial Courts.

In that regard, disputes about ownership to land, do not fall within the range of cases which may be dealt with at Milimani Commercial Court. However, if such cases were to be filed before his court, it would not, by itself, constitute a sufficient ground for having the plaint struck out, with the attendant consequence that the suit was dismissed."

Bearing the above observation in mind, reinforces my opinion that this suit should never have been filed in the Commercial Division of the High Court. What then would be the appropriate Order to make as regards the fate of this suit? The Notice of Preliminary Objection filed by the First Defendant raises objection both to the Plaintiff\'s suit as well as the Application dated 19 July, 2012. Should the suit be struck out as well as the Application? The submissions that the suit should be struck out for being filed in Nairobi rather than in Eldoret cannot succeed as the High Court has jurisdiction to hear the suit in any location. I bear in mind the judgement of **Okwengu** and **Kihara JJ**. in **Trasroad (Kenya) Ltd vs Alibhai (2008) 1 EA 446** at **P.447** when the learned Judges stated:

"There is no express provision for *intra* High Court transfers from one civil registry to another but the court is empowered, in terms of Order XLVI, V (2) of the Civil Procedure Rules, to order that a case be tried in a particular place and may thereby achieve horizontal movement of *intra* High Court cases from one registry to another. Under Order XLVI, rule 5 (2) of the Civil Procedure Rules, the court can, on its own motion, having regard to the convenience of the parties and their witnesses, direct that the suit be tried in a particular place."

19. In consequence of the above and under Order 47 Rule 6 (1),I order that this file be transferred to the High Court Registry at Eldoret as I believe that Eldoret is the correct place for the trial of the action. I make no order as to striking out the suit. I direct that the file, after transfer, will come before the Presiding Judge at Eldoret, along with the file for *Eldoret HCCC No. 130 of 2011*, so that the learned judge do give his directions as to the hearing and determination of both suits. However, with regard to the Application dated 19 July, 2012, I find that apart from prayer 6 so far as it relates to the activities of the First Defendant vis-à-vis the suit premises, the prayers sought therein are matters that have already been canvassed in the High Court at Eldoret in *HCCC No. 130 of 2011* and indeed considered before the Court of Appeal in *Civil Appeal No. 269 of 2011*. They are *res judicata,* with the result that I strike out the Plaintiff's Application dated 19th July 2012 with costs to the First and Second Defendants. One final word in relation to this suit, I note that from the Articles of Association of the third Defendant herein that dispute as between shareholders of the company should first be referred to arbitration. I leave that point for the consideration of my judicial brethren in Eldoret!

DATED and DELIVERED at Nairobi this 11th day of October, 2012.

J. B. HAVELOCK
JUDGE