REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 253 OF 2001

ELIJAH ADUL ………………………………………… 1ST PLAINTIFF

JOHN WILLIAMS ……………………………………. 2ND PLAINTIFF

YUSUF K. ORLOOH ………………………………… 3RD PLAINTIFF

VERSUS

RIFT VALLEY SPORTS CLUB ……………………..DEFENDANT

JUDGEMENT

Three persons went before this Hon. Court at Nakuru on 20. 7. 2001 and sued their Social and Sports Club. I will refer to them henceforth as Adul, Williams and Yusuf . I will also refer to Rift Valley Sports Club as *"The Club"* . In the plaint they are described as *"The Plaintiffs"* while the Club is described as *"the Defendant"*

They state in the Plaint that they were members of the club which was a Private company Limited by guarantee and having no share capital. Their quarrel was about two Resolutions made by the club in an adjourned Extra-ordinary General Meeting held on 6. 7. 2001. They were to the effect:

(1). That each member be limited to be appointed a proxy by only two members.

(2). That the Chairman and vice Chairman of the Board of Directors be elected by members at every Annual General Meeting.

It is pleaded that those resolutions were objected to and a Poll was demanded in accordance with Section 137 of the Company's Act before any voting was carried out, but the objections were overruled by the Chairman of the meeting. The Resolutions would amend the Articles of Association of the Club, specifically Articles 32, 33 and 35 which amendments would inflict irreparable loss to the Plaintiffs. They say they gave notice to the club to desist from the intention of changing the clubs Articles of Association but the notice was not heeded. Hence the suit.

The manner in which they sought relief has turned controversial and I will therefore reproduce the prayers made:

(a) "A declaration that the resolution passed by the members of the plaintiff company on the 6 th day of July, 2001 are null and void.

(b). A permanent injunction to restrain the defendant, either by itself, its agents, servants or

otherwise howsoever from eff ecting any change in its articles of association pursuant to the resolutions passed on the 6 th day of July, 2002 or from presenting the said resolutions to the Registrar of Companies for registration."

Despite the existence of the suit, the club went ahead and held its Annual General Meeting on 07. 12. 2001 and carried out elections in accordance with the resolutions amending the Articles of Association. The plaint was then amended on 08. 02. 2002 to plead that fact and to specify the irreparable loss the Plaintiffs stood to suffer; that is:

"Their right to be appointed proxies will be limited which right cannot be compensated by damages."

They pleaded that the Annual General meeting and the election of officials of the Club were null and void for illegality because they were based on illegal Articles of Association amended on 06. 07. 2001. The first prayer was also amended to include nullification of the elections held on 7. 12. 2001. The original two prayers reproduced above otherwise remained the same.

That the three Plaintiffs were members of the club was not denied by the club in its defence filed on 02. 8. 2001. It asserted however that the two Resolutions complained of were validly and lawfully passed in the Extra Ordinary General Meeting of members.

The club denied that a poll was demanded before voting as alleged and further denied that any prejudice would be caused to the three plaintiffs when the Company's Act and the Articles of Association of the club were followed in making resolutions. The Resolutions should be registered in order to effect the desired change in the Articles of Association. According to the club no demand notice or notice of intention to sue was given by the three Plaintiffs. The suit should therefore be dismissed with costs.

Somewhere along the line Yusuf developed cold feet and withdrew instructions from the Advocates on record. He filed a Notice of Intention to act in person. He also filed a notice of withdrawal of the suit against the club. The manner of withdrawal was however improper and it was not therefore accepted by the Court. The hearing of the case thus proceeded, his absence notwithstanding since he had notice of it. The outcome of the suit would be binding on him.

William similarly developed cold feet and never showed up at any stage of the proceedings despite his ostensible representation by Counsel. He is said to have informed the Vice- Chairman of the Club (DW5) in the presence of a Director (DW1) that he had not sued the club and that his name was just used. He nevertheless remains a party in the proceedings and will be bound by the result of the litigation.

As for Adul, he soldiered on in his own right. He was not representing any other person and was protecting his rights as he perceived them. He testified at length and called two witnesses. The club also testified through five witnesses.

No issues were framed by the parties or agreed for determination but Learned Counsel on both sides agreed to file written submissions which they supplemented with oral submissions. It is in the evidence tendered and in submissions of Counsel that various issues arise and were indeed addressed by Counsel. For purposes of my Judgment, however I perceive the following as the pertinent and substantive issues for determination:

(1). What was the status of the defendant club? Was it a Private company limited by guarantee and having no shares as pleaded by the Plaintiff or a Public Company limited by guarantee? In either case what are the legal consequences?

(2). Were the Resolutions made by the Club on 6. 7. 2001 and the Annual General Meeting held on 7. 12. 2001 when elections were carried out, illegal or lawful? If illegal did they cause irreparable loss to the Plaintiffs?

(3). Are the remedies sought by the Plaintiffs capable of grant?

I will answer those issues from the evidence on record. I will also consider the submissions of both counsel.

The first issue is a fundamental one. That is because although both Private and Public companies may have slight differences, they fulfill different economic purposes. Some provisions of the Companies Act may also apply to one and not the other.

By definition (Section 30 Cap 486) a Private Company is one which:

(a). Restricts the right to transfer its shares,

(b). Limits the membership to fifty,

(c). Prohibits the company from making any invitation to the public to subscribe for its shares or debentures.

Any other company is a Public Company. Whether it is a guarantee company with or without share capital would depend on the purpose for which it was formed.

The pleading made is that the defendant was a Private Company limited by guarantee and having no share capital. The evidence of Adul however in support of that pleading was that the status of the company was confusing. He sued the club relying on an alleged letter from the Registrar of Companies (the Registrar) describing it as Private Company. That letter was marked for identification as MFI 1 but it was not produced in evidence. Instead Adul called two witnesses: an Officer from the Registrar's Office, *John Njoroge Kingoro (Kingoro)* (PW2) and the Company Secretary of the defendant *Joseph Odingo Agola*) (Agola) (PW3). Both witnesses however directly contradicted him on that aspect of the matter.

Kingoro works as a senior Clerical Officer in the Attorney General's Offices and had in his custody the file on the club. He had previously dealt with a search on the same issue which he personally carried out and endorsed on three occasions that the defendant company was registered on 10. 05. 1946 as a Public Company Limited by guarantee and having no share capital. It appears in the Public Companies Register. He produced letters dated 2. 11. 99, 2. 3. 2001 and 7. 6. 2001 as Exhibits 6(a) (b) and (c) respectively. Another letter dated 23. 4. 2002 signed by one Lucy Ndung'u (Mrs.) from the same office (Exhibit D5) confirmed the same status.

Agola was the Company secretary of the club since March 2001 and was responsible for the statutory functions including custody of the members Register, Directors Register, and Company Seal. He recorded minutes of General Meetings, filed Returns to the Registrar involving change of Directors and other officers and he signed Accounts and Annual Reports. It is the same Agola who in Exhibit D6 advised the club after carrying out thorough legal research that the defendant could only be a Public Company as its constitution defies the definition in Section 30 of the Companies Act. Furthermore it never filed Annual Certificates under section 129 of the Company's Act which is a requirement for Private Companies. It has always proceeded under Section 128 of the Act which is mandatory for Public Companies. He advised that there had been no change of the status of the defendant since 1946. However, Agola referred to some Articles of Association adopted by the Club in 1971 which described the company as Private. They were produced in evidence as exhibit P3.

The evidence tendered for the club through *William Njuguna Kimiti (Kimiti) (Dw1) Dr. Vinubhai Ambalal Patel (Dr. Patel) (Dw2)* and *Jayantilal Shamji Shah (Shah) (Dw5*) is that the club was a Public company limited by guarantee and having no shares. Dr. Patel produced a court order dated 17. 6. 2002 (Exhibit D7) obtained in a different case, declaring the club a public company limited by guarantee. It was however challenged as a mere consent order which was recorded without any evidence in record.

The preponderance of that evidence from both sides, which I accept, establishes that the club is indeed

a Public Company limited by guarantee and having no shares. The exhibit P3 which refers to it as a "Private Company" contains only the Articles of Association. The 'Memorandum" is not exhibited although it is the one that must state whether the Company is Private or Public and state its objects. To that extent the exhibit loses it probative value on the status of the Company and I do not rely on it. The pleading that it was a Private Company limited by guarantee with no share capital was not proved and was infact disproved.

On that finding one relevant consequence falls in place. It is a consequence raised in evidence and in submissions of Learned Counsel for the Club Mr. Mwenesi. He submitted that Section 136 (1) of the Companies Act which provides for proxies expressly excludes companies without a share capital. It provides as far as is relevant in Section 136 (1) (i):-

> *"Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoi nt another person …. as his proxy to attend and vote instead of him …. Provided that unless the Articles otherwise provide -*
>
> > *(i). This subsection shall not apply in the case of a company not having a share capital.*

There was no Article in Exhibit P3, he submitted, which specifically applied that Section to the Club. Consequently Section 137 which relates to the "Right to demand a Poll" does not begin to apply since proxies come in use when there is a demand for a poll. The club had no obligation under the law therefore to resort to proxies in the conduct of its business. That submission was supported in the evidence of Kimiti DW1.

Learned Counsel for Adul Mr. Wandago alluded to the section as a reinforcement of the right to vote by proxy on a poll. He also invoked section 137 and submitted that it was flouted by the club.

I think the argument is well founded that section 136 (1) (i) of the Act excludes the Club as there is no Article making the Section applicable to it. By extension the provisions relating to polls under Section 137 where proxies would come in hand would not apply. In matters of proxies and poll demand the club has chosen to be bound by its own Articles of Association and it cannot therefore be said that the club acted ultra vires the Act or in contravention thereto. All I need to examine in dealing with the second issue therefore is whether the club complied with the provision of its Articles of Association or acted ultra vires . those Articles. In the latter case Adul, under one of the exceptions to the Rule in *Foss Vs Harbottle* (1843) 2 Hare 461 would be entitled to a remedy.

The central contest in the second issue is the alteration of three Articles of Association of the club. That is Articles 32, 33 and 35. There was however no evidence relating to Article 33 which is the Form of the instrument appointing a proxy. But Articles 32 and 35 before their amendment provided:

> *"32. On a poll votes may be give either personally or by proxy. A proxy shall be appointed in writing under the hand of the appointer. No person shall act as a proxy unless he is a Full Member or Life Member of the Company. The instrument appointing him shall be deposited at the registered office of the company not less than forty -eight hours before the time of holding the meeting at which he proposes to vote. In case of an equality of votes, the chairman shall have a second or casting vote."*
>
> *"35. The Directors for the Company shall consist of not less than nine and not more than twelve Full or Life Me mbers elected as herein provided. The officers stated in Article 34 hereof will not be Directors. At the first meeting of directors subsequent to the Annual General Meeting the Directors shall elect a Chairman and a Vice Chairman from their number."*

The amendments ultimately registered through a special Resolution which was produced as Exhibit D3 provides:

> *"1. THAT clause 32 of the Articles of Association of the Company be and is HEREBY amended by*

the insertion of the following sentence after the first sentence: - 'No member shall be allowed to act as proxy for more than two members.'

"2 That Clause 35 of the Articles of Association of the Company be and is HEREBY amended by the deletion of the last sentence and substituted as follows: - 'At every Ann ual General Meeting the members shall elect from amongst the Directors the Chairman and the Vice - Chairman of the Board of Directors. No Director shall be eligible for election as Chairman or Vice-Chairman for more than a third consecutive term save for a sitting Vice-Chairman being elected to the position of Chairman of the Board."

For a valid alteration of Articles of Association, a special Resolution of the Company is required. That is to say a resolution passed by a majority of not less than ¾ of those members entitled to vote and actually voting either in person or by proxy where proxy voting is allowed. Twenty one (21) days notice must have been given of the meeting at which it was proposed. In addition the notice of the meeting must have specified the intention to propose the resolution as a special resolution.

On the evidence, a notice was published on 31. 5. 2001 for the meeting of 6. 7. 2001. That was more than 21 days away. It was not the first notice to be issued as there was an earlier notice issued for discussion of the same matter in an earlier Annual General Meeting but it was adjourned. It is not contended that the earlier notice was not validly issued. The purpose of the meeting was stated thus:

"Considering and if thought fit pa ssing the following resolutions which will be proposed by certain members by special resolutions."

The proposed resolutions in Exhibit P2 were:

"1. "That Article Nos. 32, 33, 63 and 64 of the Articles of Association of the Company which permit the use of proxy and voting by way of a poll be deleted and the following substituted:" 32. There shall be no voting by way of poll.

63. At any General Meeting, a declaration by the Chairman that a resolution has or has not been carried and an entry to that effe ct in the book of proceeding s of the Company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour or against the resolution.

2. "That Article No. 35 of the Articles of Association of the compa ny be deleted and the following substituted:"

35. The Directors of the Company shall consist of not less than nine and not more than twelve Full of Life Members elected as herein provided. The officers stated in Article 34 hereof will not be Directors.

35A. At every Annual General Meeting the Members shall elect from amongst the Directors, the Chairman and Vice Chairman of the Board of Directors. No Director shall be eligible for election as Chairman or Vice Chairman for more than a third consecutive term save for an election of current Vice Chairman to the position of Chairman."

There was a third proposal which was abandoned and is not relevant in this case. The meeting was duly convened as scheduled on 6. 7. 2001. Out of a total club membership of 1482 (exhibit P7) the attendance was 110 members and 218 proxies. On the evidence the average number has never exceeded 150 – 200 in the history of the Club. Two sets of the minutes of the meeting were produced in evidence as Exhibits D2 and P4. The former was an unsigned draft, while the latter formed the record of the club as it was signed by the Chairman. The minutes were also subject to confirmation and were indeed confirmed with amendments in the subsequent Annual General Meeting held on 7. 12. 2001. Apart from the minutes those who were present testified on oath on what transpired at the meeting and were cross-examined at length.

Kimiti DW1 proposed the first amendment and he was seconded. The thrust of the motion was to do away with proxies altogether as they had been abused over a long period of time by a small clique of members to control meetings of the club and elections of officials. It had established a dictatorship of some Directors for periods in excess of 10 or 30 years thus rendering the presence of members in the Annual General Meetings valueless. The example of one Ken Josylyn was given that he has been re-elected every year since 1959 through the old system.

Discussions on the motion ensued and it transpired that the majority of members present were not averse to the use of proxies so long as it was controlled to give some leeway to members who were genuinely unable to participate in meetings to do so by proxy. The proposer then moved an amendment to the motion retaining the system of proxies but limiting the proxies to two per member. The amended motion was put to the vote and was carried.

What transpired soon after is not clear but will it be examined shortly. I will deal first with a point of law raised by Mr. Wandago. It is this. A special Resolution as drawn was incapable of amendment and the amendment made on the floor of the meeting ought to have been rejected. He cited two reasons: firstly because it contravened Section 141 (1) of the Companies Act which requires a 21 – day notice. Secondly *"Palmer's Company Law"* at page 485 and 585 says so expressly. So does *"Shackleton on the Law and Practice of Meetings"* at page 168 and 170.

For his part Mr. Mwenesi doubted the authority for the rigid construction of amendments to Special Resolutions. He relied on *Betts & Co. Ltd Vs Macnaghten* (1910) 1 Ch.481 for the proposition that "the Court was entitled and indeed bound to look at the notice as part of the *res-gestae* and must read it and the rest of the record of the proceedings to see whether what was done could legitimately be done having regard to the notice by which the meeting was convened. The question to be asked is "was the business transacted at the meeting within the scope of the special business indicated in the notice?"

For my part I think it is understandable that special resolutions should be specified in sufficient detail to enable members to decide whether they should personally attend the meeting at which it is discussed. It has been doubted in various treatises on Company Law however that Section 141 should be construed rigidly. For one the authority relied on by the Plaintiff, Shackleton expresses no conclusive proposition. It states at page 70:

> *"There is no ruling as to whether …. a special resol ution can be amended but it is questionable having regard to the wording of Section 141 (1), (20) whether any amendment (except possibly to correct an obvious mistake) would be permissible under that section."*

Similarly Gower on "The Principles of Compan y Law" at page 545 opines:

> *"Indeed it is often suggested that no amendment is permissible to ……. a special resolution since the Act specifically requires "notice specifying the intention to propose <u>the</u> resolution." <u>This however may be too strict an interp retation</u>; until the 1908 Act, amendments to special resolution were certainly permissible. It is <u>therefore submitted that they are still allowed within the narrow</u> limits indicated below."*

He then laid down the test for allowance of such amendment namely:-

> *"Would the amendment so alter the nature of the business stated as to cause any member who had stayed away reasonably to wish he had not?"*

The proposed resolutions in this case were specified in sufficient detail to enable members to decide whether or not to attend the meeting. The business to be discussed was to do away with proxies altogether. The amendment that was carried was to allow a maximum of two proxies. It is an amendment that in my view fits the narrow limits stated and is therefore acceptable. I so find.

According to the unconfirmed minutes, Exhibits P4 and D2, and in Adul's evidence, as soon as the

amendment was carried, Adul, supported by one Ken Josylyn and 16 others, demanded a Poll but it was declined by the Chairman. The second proposed resolution was then put forward for discussion and was carried. One member Dr. Podho supported by 8 others, including Adul, demanded a Poll which was declined by the Chairman.

Adul says he objected to the two motions because he would be disenfranchised as he can only henceforth act as a proxy for two members. According to him the Poll on the two resolutions was demanded immediately the Chairman declared the motions carried. That is after the voting and not before. He felt the meeting was unfairly conducted and decided to challenge the outcome in Court. He did so on 20th July but shortly thereafter Notices were served by the Club for the Annual General Meeting held on 7. 12. 2001. Adul attended the Annual General Meeting with 130 others and 370 proxies. His pleas that there was a pending suit were brushed aside on the argument that there was no Court Injunction to stop the meeting. Amendments were also made to the minutes recorded on 6. 7. 2001 despite his protest that the original draft reflected correctly what transpired. The election of new Directors was then carried out without considering the proxies present. The minutes of that meeting were produced as Exhibit P5.

On the sequence of events at the Extraordinary General Meeting held on 6. 7. 2001, Adul's evidence appears to stand alone. His other witness Agola (PW3) was present at the meeting and recorded the minutes. He was also present at the Annual General Meeting held on 7. 12. 2001 and recorded those minutes too. He produced both minutes as Exhibits P4 and P5 respectively. But it is in the minutes of 7. 12. 2001 (Exhibit P5) where corrections were made to the minutes of 6. 7. 2001 before they were confirmed. Where the earlier minute had said that a Poll was timeously demanded on the first proposed Resolution, the correction said the demand was made when the next agenda was under discussion. Where the earlier minute had said members were cautioned by the secretary on the provisions of Section 141 (1) of the Companies Act, the correction said there was no reference to that section in the meeting. It was also clarified that Articles 33, 63 and 64 were to be retained while only Article 32 was to be amended. The amended Article 35 was also properly set out and the minutes were confirmed with those amendments. Agola certified those minutes as correct. He said nothing in his oral evidence to detract from the minutes.

In consistent fashion, the five witnesses who testified for the club vouched for the sequence of events as stated in the confirmed minutes of 6. 7. 2001 as amended. Kimiti DW1 was present and recalled that there was no Poll demanded on the first Resolution when it was put to the vote. A demand was only made in the middle of discussion on the next resolution. Another Poll was demanded by 8 people in the second resolution which was far below the number required. Both were rejected. He was also present at the Annual General Meting on 7. 12. 2001 where he was elected Director under the new procedure. No objection was raised by those present on that procedure save for one member who referred to a Court Injunction having been issued against the meeting, but none was produced.

Dr. Patel (DW2) is the Chairman of the Club and was also present in the Extraordinary General Meeting which he remembered was orderly. He was the Chairman of that meeting and was the one who put the first amended resolution to the vote. It was carried but there was no Poll demanded. Under the Articles 1/3 (one third) of the members present in person may demand Poll. Only after the Poll is properly demanded may the proxies present be utilized. According to him, the Poll is demanded after the Chairman has closed all deliberations and before voting. That was in accordance with Article 63. But the demand that was made on the first resolution was raised when the second resolution was being discussed and it was therefore declined. It was also declined because the members present in person were 110 and therefore only 1/3 (one third) about 33 members, could demand a Poll. Those who supported Adul were less than 20. On the second resolution, the Poll was demanded by Adul and 8 others. They were less than 1/3 of those present. The resolutions were therefore properly carried and were registered in the absence of any Court Injunction to restrain the club from proceeding to do so. Registration was on 10. 12. 2001 (Exhibit D3). As for the Annual General Meeting of 7. 12. 2001 which he also chaired it was properly conducted and no complaints were raised except this court case by Adul. Other complaints raised later were in respect of other aspects of the club affairs particularly the Board of Directors but these have been addressed. The members have no problems with the club.

It was put to Mr. Patel that Article 63 did not provide for the moment in time when a Poll may be

demanded and that it may therefore be validly made at any time. He responded that the meeting would take too long if there was no time limit for poll demand. It ought to be demanded at the close of deliberations on the issue at hand.

In his evidence, the quoram for General Meetings under the Articles was 12 members present and it is 1/3 (one third) of those members and not 1/3 (one third) of the total membership of the club that determine the validity of a Poll demand.

The other three witnesses *Gatiba* (DW3) who is the chairman of the Board of Directors; *GWIYO* (DW4) the acting secretary of the club since 27th August 2002; and *Shah* (DW5) the Vice Chairman of the Board, all supported the evidence that the Articles of Association of the club were complied with in both meetings. In particular the election of the Board and new Officers of the company as happened in the Annual General Meeting on 7th December 2001 complied with Article 39.

From the totality of the evidence on the second issue, I am persuaded that the club complied with the provisions of its Articles of Association in conducting the affairs of the club on 6th July 2001 and 7th December 2001.

In the first place, there is no complaint laid that the Annual General Meeting held on 7th December 2001 was improperly held or that the elections conducted were other that in the manner provided for under Article 39. The only complaint raised in the pleadings and on the evidence is that the meeting, as well as the elections, were illegal for using a procedure that was not lawfully adopted by the club on 6th July 2001. If that unlawful adoption is not proved, then the complaint on the Annual General Meeting dissipates.

Article 63 was relied on to justify the conduct of the chairman in the Annual General Meeting on 6th July 2001. It states:

> *"63. At any general meeting, unless a poll is demanded by at least one - third of the Full and Life Members personally present, a declaration by the Chairman that a resolution has or has not been carried, and an entry to that effect in the book of proceedings of the Company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the resolution."*

It seems clear to me that the requirement of 1/3 (one third) of the membership personally present admits of no construction that it is 1/3 (one third) of the total membership of the club. It is common ground that the members personally present at the extraordinary General Meetingon 6.7.2001 was 110 and there were 218 proxies. It is therefore a matter of arithmetic whether those who demanded a poll at the meeting met that requirement. On the evidence on record they did not. It did not matter therefore at what stage of the discussions the poll was demanded.

The Article does not expressly state when a poll on any issue may be demanded. But as stated in <u>Carruth v ICI</u> (1937) A.C 707 H.L at Pg 754-755 and Holmes v Keyes (1959) Ch 199 CA

> *"It is a question of construction of the relevant articles whether a poll can be demanded before there has been a vote on a show of hands"*

The Chairman of the meeting cannot be strictly faulted for placing the construction he did on the time of poll demand. But it is arguable, assuming that the plaintiff had commanded the members for a valid poll demand, that he was not time barred in so doing. That however is now academic. I find that the meeting was conducted *Intra vires* the Articles of the Club.

With that finding the complaints laid are stripped of any illegality or *Ultra Vir es* acts, and lie squarely within the Rule in the *Locus Classicus* case of *Foss Vs Harbottle*. Consequently the Court will refuse to interfere in the management of the company at the instance of a minority of members who are dissatisfied with the conduct of the company's affairs by the majority or by the Board of Directors. It cannot be the

Court's function to take management decisions and to substitute its opinions for those of the Directors and the majority for the members. That answers the second issue, and it follows that there was no irreparable loss caused to the Plaintiffs.

On the third issue I will deal with the second remedy first. It is an Injunction seeking to stop the registration of the special resolution passed on 6. 7. 2001. It appears to be a prayer made in vain since it was overtaken by events. On the evidence the resolutions were confirmed in a subsequent Annual General Meeting and were registered as required under the Companies Act. Although there was an attempt made to obtain interim orders pending the hearing of the suit, the Plaintiffs did not pursue the Application for Injunction and no explanation is offered for failure to do so. The prayer was not amended to enable the Court to reverse any registration in the event that it found for the Plaintiffs. The prayer is incapable of grant on that score. At all events the Plaintiffs did not prove their case on a balance of probability.

The major attack directed at the first prayer is not because the Court cannot grant declaratory relief, but because it refers to *"members of the Plaintiff Company."* Considerable time was spent in submissions of Counsel for the Club arguing that the whole suit ought to be struck out on that ground alone, and I was vilified for ignoring the significance of the Complaint. But some matters are too plain for argument. The reference to *"the members of the Plaintiff Company"* in the context of this suit is a piece of obvious non-sense that can be ignored without causing prejudice to either party. The pleadings in the Plaint describe who the parties are. The Plaintiffs are described as individuals and there is only one "defendant company." There is no *"Plaintiff Company"* . There was no attempt to correct the mis-description even when the opportunity was there, which is inexcusable, but the matter was put to the first Plaintiff in crossexamination and he swore that it was a mistake of counsel. By analogy, perhaps a poor one, referring to Learned Counsel for the Defendants as "Mr. Mwenesi" through-out this Judgment and then suddenly referring to him as "Justice Mwenesi" in the last paragraph, does not make him the writer of it! The point is not necessary for my decision in this matter since the prayer, is not capable of grant for different reasons. I would have nonetheless adopted a sensible construction which is consonant with the main pleadings if I had to analyse issue.

The plaintiffs' suit is dismissed with costs to the borne by the three Plaintiffs.

Dated this 7th day of February, 2003.

P. N. WAKI

JUDGE