



**Kennedy Odhiambo Owiti t/a Odhiambo Owiti & Company Advocates v Dominion Farms Ltd & 3 others (Commercial Case 1 of 2020) [2024] KEHC 139 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE 1 OF 2020  
RE ABURILI, J  
JANUARY 19, 2024**

**BETWEEN**

**KENNEDY ODHIAMBO OWITI T/A ODHIAMBO OWITI & COMPANY  
ADVOCATES ..... PLAINTIFF**

**AND**

**DOMINION FARMS LTD ..... 1<sup>ST</sup> RESPONDENT  
LAKE AGRO LTD ..... 2<sup>ND</sup> RESPONDENT  
THE REGISTRAR OF COMPANIES ..... 3<sup>RD</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling determines two applications, one dated February 20, 2020 filed by the plaintiff and the other is dated October 22, 2021 by the 1<sup>st</sup> defendant/ respondent herein. In the application dated February 20, 2020, the plaintiff/ applicant herein Kennedy Odhiambo t/a Odhiambo Owiti & Company Advocates filed this suit simultaneous with an application under certificate of urgency dated 20<sup>th</sup> February 2020 seeking for the following orders:
  1. Spent
  2. Spent
  3. Spent
  4. That pending the hearing and determination of this suit, this Honourable Court this Honourable Court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, whether by themselves, their agents, representatives, servants and/or employees from transferring the business from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup>



Defendant pursuant to gazette notice number 350 of 17<sup>th</sup> January, 2020 unless and until the sum of Kshs. 15,478,960.53 owed to the Plaintiff is settled.

5. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the 3<sup>rd</sup> Defendant, whether by itself, its agent, representatives, servants and/or employees from effecting the transfer of business, from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant pursuant to gazette notice number 350 of 17<sup>th</sup> January, 2020 unless and until the sum of Kshs. 15,478,960.53 owed to the Plaintiff is settled.
6. That costs of this application be provided for.
2. The Application is supported by the grounds on the face of the application and on the supporting affidavit of Kennedy Odhiambo Owiti dated 20<sup>th</sup> February 2020. In the said affidavit, the Plaintiff, Kennedy Odhiambo Owiti deposes that he was the sole proprietor of the law firm Odhiambo Owiti & Company Advocates, which firm was engaged by the 1<sup>st</sup> Defendant as their external advocates, to represent the 1<sup>st</sup> Defendant in all its legal matters within the country for which, the Plaintiff was entitled to be paid legal fees, allowances, expenses and commissions.
3. That the Plaintiff represented the 1<sup>st</sup> Defendant in various claims, until a time when the Plaintiff could no longer represent the 1<sup>st</sup> Defendant, on account of failure by the 1<sup>st</sup> Defendant to furnish the Plaintiff with sufficient instructions and failure by the 1<sup>st</sup> Defendant to pay legal fees to the Plaintiff.
4. That the Plaintiff sent out fee notes in the various legal matters in which the 1<sup>st</sup> Defendant was represented by the Plaintiff, seeking that the Plaintiff's professional fees be settled by the 1<sup>st</sup> Defendant, but the same were never settled.
5. It is deposed further that the 1<sup>st</sup> Defendant then applied for taxation of costs in the various matters that the Plaintiff was representing the 1<sup>st</sup> Defendant, and was issued with various Certificates of Costs for the total amount of Kshs. 14,237,073.50, which Certificates of Costs were adopted as decrees pursuant to Section 51 of the Advocates Act, which sum, inclusive of interest of Kshs. 1,241,887.03 now stands at Kshs. 15,478,960.53, which amount continues to accrue interest till payment in full.
6. The plaintiff/ applicant annexed copies of decrees marked as KOO1. The plaintiff further deposed that he learnt vide Gazette Notice no. 350 of 17<sup>th</sup> January, 2020 Volume CXXII, (annexed) that the 1<sup>st</sup> Defendant was transferring their business to the 2<sup>nd</sup> Defendant under The Transfer of Business Act, Cap 500 Laws of Kenya, which Gazette Notice no. 350 of 17<sup>th</sup> January 2020 stated in part that all debts or liabilities due and owing by the Transferor (in this case Dominion Farms Limited, who is the 1<sup>st</sup> Defendant herein), in respect of the business up to the date of the transfer as set out therein, shall be received and paid by the Transferor and that the transferee (in this case Lake Agro Limited, being the 2<sup>nd</sup> Defendant herein), is not assuming nor will it intend to assume any liabilities whatsoever incurred by the Transferor in the business up to the date of transfer.
7. The plaintiff's apprehension therefore is that as the 1<sup>st</sup> Defendant has never settled the sum of Kshs. 15,478,960.53, which amount continues to accrue interest till payment in full, should the 3<sup>rd</sup> Defendant proceed and register the transfer of business pursuant to the said Gazette Notice, the Plaintiff is likely to suffer irreparable harm as the 1<sup>st</sup> Defendant shall remain a shell company with no attachable assets to repay any debts owed to the Plaintiff.
8. Only the 1<sup>st</sup> Defendant filed grounds of opposition 25<sup>th</sup> February, 2020 and a replying affidavit sworn by Moses Oduor Otieno, its Human Resource Manager, on 7<sup>th</sup> June, 2021, opposing the application by the plaintiff denying that it owes the plaintiff any debt, that the notice of transfer set out the manner



in which the any purported creditor of the 1<sup>st</sup> defendant is to address its claims, that the application does not address any inability of the 1<sup>st</sup> defendant to settle any claims owed to the plaintiff, that the application is grounded on speculation and conjecture and meant to circumvent the process of transfer of business as stipulated in the Transfer of Business Act and is premature in law, that there is no legal or factual basis for the grant of the orders sought, that the orders sought are prejudicial to the 1<sup>st</sup> defendant/respondent as there are established mechanisms for settling debts , that no prima facie case is established to warrant the orders sought, that damages are adequate remedy and that the balance of convenience tilts in favour of the 1<sup>st</sup> defendant/ respondent.

9. In the very detailed affidavit sworn on 7<sup>th</sup> June, 2021 by Moses Oduor Otieno the Human Resource Manager with the 1<sup>st</sup> Respondent deposed in contention that the applicant's application does not meet the prerequisites for grant of the orders sought.
10. The deponent admits that the 1<sup>st</sup> defendant instructed the plaintiff to handle their matters in court but that all the legal fees due was settled upon completion of the legal services rendered by the plaintiff.
11. That the plaintiff, instead of executing the decrees some of which date way back in 2019, he has instituted this fresh suit which is a non-starter, is subjudice to the various causes and decrees being executed hence pursuing the same matter through different courts; that the applicant has come to this court with unclean hands hence he should not be granted equitable orders sought.
12. That in any event, the 1<sup>st</sup> defendant/ respondent is challenging all the decrees and certificates of costs which the applicant is relying on to file this suit and application; that attached properties cannot be sold or transferred as stipulated in section 47 of the *Civil Procedure Act*; that the exact amount owing is disputed as the taxations were done exparte and the amounts inflated; that the 1<sup>st</sup> defendant gave the plaintiff six motor vehicles to settle the whole debt of Kshs 30 million, which the applicant has not acknowledged in this suit or even given an account of yet he still claims for more.
13. The 1<sup>st</sup> defendant also contended that it complied with section 3 of the Transfer of Business Act on the procedure for transfer of the business; that the applicant can attach proceeds of transfer instead of injunctioning the transfer process which will yield no benefit; that having objected to the transfer, he should have waited for the decision of the Registrar hence this suit and application are premature and a waste of the court's time and resources; that no prima facie case has been raised; that the value of his claim is known and can be compensated in damages; that the suit is intended to disrupt the flow of economies and preventing the respondent from revamping its business to liquidate some of its debts; that the 1<sup>st</sup> respondent is not just a private venture but that the public has an interest in it as taxes for transfer of the business will be paid and that the suit and application would unnecessarily delay the revamping of the Yala Swamp to the economic disadvantage of Siaya County, the people of Siaya and the Nation at large hence it should be dismissed with costs.

### **The plaintiff/Applicant's Submissions**

14. The application was canvassed by way of written submissions. In the applicant's submissions, he framed the issues around the conditions that must be met for grant of a temporary injunction as enunciated in the celebrated case of *Giella versus Cassman Brown & Another* (1973) EA 358. The principles are:

- " i. The Applicant must establish a prima facie case with a probability of success,  
and



- ii. The Applicant must show that unless granted the injunction, he will suffer irreparable harm which cannot be adequately compensated by an award of damages,
  - iii. And if the court is in doubt it should decide the application on the balance of convenience.
15. On whether the has the plaintiff disclosed a prima facie case with a probability of success at the intended trial? it was submitted that the grounds in support of the application constitute a prima facie case with a probability of likely success at the intended trial for purposes of grant of the order for Temporary Injunction sought.
16. On what a prima facie case is, he relied on the case of Mrao Ltd. V First American Bank of Kenya Ltd. & 2 others [2003] KLR 125 where it was stated that:
- “But as I earlier endeavoured to show, and I cited ample authority for it, a Prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and a probability of success of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.’ (See page 138 of the decision attached herewith, at lines 1 - 5).
17. It was submitted that the plaintiff had discharged the burden of proving a prima facie case as the 1<sup>st</sup> Defendant will transfer its business to the 2<sup>nd</sup> Defendant, who does will not take up any liabilities owed by the 1<sup>st</sup> Defendant, with the effect that the Plaintiff will never be able to execute for the decretal sum of Kshs. 15,478,960.53. Further, should the transfer of business proceed before the 1<sup>st</sup> Defendant settles the said sums to the Plaintiff.
18. It was further submitted that the Defendants by their actions, intend to circumvent the provisions of Section 3 of The Transfer of Business Act by failing to first settle the liabilities of the Plaintiff before concluding the said transfer. The said Section 3 of the Transfer of Business Act provides as follows:
- “(1) Whenever any business or any portion of any business is transferred, with or without the goodwill or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this Act has been given and has become complete.
  - (2) The liability of the transferee under subsection (1) shall cease immediately notice given in accordance with this section has become complete:  
 Provided that should proceedings be instituted against the transferee before such liability has ceased the said notice shall (for the purposes of such proceedings but for such purposes only) be deemed incomplete pending the final determination of such proceedings, including all possible appeals, and pending the expiration of all periods during which such appeals may be brought.
  - (3) Nothing in this section shall have the effect of relieving the transferor from any liability to which he would otherwise be subject.”
19. It was submitted that the Plaintiff raised a notice of objection to the Registrar General against the said transfer of business in which the Plaintiff notified the 3<sup>rd</sup> Defendant, who is the Registrar General



of Companies, that the Plaintiff objected to the transfer of business as per Gazette Notice No. 350 dated 17<sup>th</sup> January 2020, and that the 1<sup>st</sup> defendant owes the Plaintiff the total sum of in excess of Kshs. 15,478,960.53, which sum continues to accrue interest till payment in full and there are no plans on how the same shall be settled once the transfer of Business between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant is complete.

20. It was therefore submitted that the Plaintiff has discharged the burden of establishing a prima facie case for the grant of an injunction, as prayed for in the application dated 20<sup>th</sup> February 2020.
21. On whether damages would be adequate compensation and where the balance of convenience tilts, it was submitted that the 1<sup>st</sup> Defendant owes the Plaintiff the outstanding sum of Kshs. 15,478,960.53, which amount continues to accrue interest till payment in full. That the 1<sup>st</sup> Defendant has never settled this amount in full yet it is, per the Gazette Notice no. 350 of 17<sup>th</sup> January, 2020 Volume CXXII, transferring their business from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant under The Transfer of Business Act, Cap 500 Laws of Kenya, which Gazette Notice no. 350 of 17<sup>th</sup> January 2020 stated in part that all debts or liabilities due and owing by the Transferor (in this case Dominion Farms Limited, who is the 1<sup>st</sup> Defendant herein), in respect of the business up to the date of the transfer as set out therein, shall be received and paid by the Transferor and that the transferee (in this case Lake Agro Limited, being the 2<sup>nd</sup> Defendant herein), is not assuming nor will it intend to assume any liabilities whatsoever incurred by the Transferor in the business upto the date of transfer.
22. It was submitted that the 1<sup>st</sup> Defendant has never settled the sum of Kshs. 15,478,960.53, which amount continues to accrue interest till payment in full and that should the 3<sup>rd</sup> Defendant proceed and register the transfer of business pursuant to the said Gazette Notice, the Plaintiff is likely to suffer irreparable harm as the 1<sup>st</sup> Defendant shall remain a shell company with no attachable assets to repay any debts owed to the Plaintiff. Effectively, the Plaintiff will never be able to recover the said sum from the 1<sup>st</sup> Defendant at all.
23. Accordingly, it was submitted that the balance of convenience shifts in favour of the Plaintiff, who is likely to suffer irreparable loss that the Plaintiff may never be able to recover from, should the orders of temporary injunction, not be granted. The plaintiff prayed that the application dated 20<sup>th</sup> February 2020 be allowed.

#### **Submissions by the 1<sup>st</sup> Defendant/Respondent**

24. In the submissions filed by the 1<sup>st</sup> respondent opposing the application, it was contended that the applicant had not established a prima facie case to warrant grant of a temporary injunction the reasons being that the applicant has several decrees which he should execute instead of filing a fresh suit; that the suit is duplicitous and subjudice hence in violation of section 6 of the *Civil Procedure Act*, reliance being placed on the case of Stanley Koech and another v Charles Gibson Ombasa [2022]e KLR; that the 1<sup>st</sup> respondent had shown prima facie case in its application dated 22/10/2021 for stay of this suit and that this suit and application offend section 34 of the *Civil Procedure Act* which bars filing of another suit for execution of decree obtained in another suit.; that the 1<sup>st</sup> defendant is disputing the decrees and the amounts in the decrees as per the certificates of taxation obtained from Siaya and Kisumu High Courts.
25. It was submitted that the 1<sup>st</sup> defendant paid all the legal fees due by handing over an assortment of six motor vehicles to the applicant which he has not acknowledged herein or given an account to the 1<sup>st</sup> defendant hence the applicant is guilty of non-disclosure. Reliance was placed on Unicom Limited v Diamond Trust Bank and another [2020] e KLR.



26. It was submitted that there was no circumvention of section 3 of the Transfer of Business Act because the 1<sup>st</sup> respondent issued Notice which the applicant accessed and objected to the transfer, that 2 months elapsed; that there is an impending insolvency petition in Nairobi High Court vide Tax and Commercial Insolvency Petition No E001 of 2020 wherein the applicant can prove his debt; that there was no evidence that all the directors of the 1<sup>st</sup> respondent were Americans who had left the country; that the 1<sup>st</sup> respondent is cash strapped and hence the injunction will halt its efforts to revamp its business by investing in other ventures; that in any event, the applicant can attach the proceeds of sale of the business.
27. The 1<sup>st</sup> respondent further submitted that there is no provable irreparable loss since no prima facie case is established hence the balance of convenience tilts in its favour.
28. On whether the debt claimed is quantifiable, it was submitted that as the amount claimed is known, though disputed, it can be compensated in damages and that the 1<sup>st</sup> respondent was only transferring its business in Siaya not all its business everywhere else.
29. Further, that the applicant can also seek to recover the debt by lifting the corporate veil of the 1<sup>st</sup> respondent hence the orders sought should be denied with costs to the 1<sup>st</sup> respondent.

### **Determination**

30. I have considered the application dated 20<sup>th</sup> February 2020 by the plaintiff/applicant and the opposition thereto by the 1<sup>st</sup> Defendant/Respondent. The main issue for determination is whether the applicant has made a case for grant of a temporary injunction to stop the transfer of business by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent, and therefore for the 3<sup>rd</sup> defendant not to effect such transfer.
31. The principles for granting of a temporary injunction are now well settled through judicial pronouncements. In *Giella v Cassman Brown* (1973) EA 358, which decision has been reiterated in many cases including the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to (a) establish his case only at a prima facie level, (b), demonstrate irreparable injury if a temporary injunction is not granted and (c) allay any doubts as to (b), by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

32. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that he has established a prima facie case in that he had demonstrated that he has several decrees which are unsettled by the 1<sup>st</sup> defendant and that the first defendant was in the process of transferring its business to the 2<sup>nd</sup> defendant vide a transfer instrument which absolves the 2<sup>nd</sup> defendant from settling any debts due to the 1<sup>st</sup> defendant thereby making it impossible for the plaintiff to recover debts due from the 1<sup>st</sup> defendant.
33. The 1<sup>st</sup> defendant on its part elaborately gave its reasons in finer details why it is convinced that the plaintiff /applicant had not established a prima facie case and I have reproduced herein above those reasons. I need not repeat them here.



34. Copies of the issued decrees in Siaya and Kisumu High Courts arising from certificates of taxation decrees were attached to the application. The Notice of Transfer of Business as per the Gazette Notice was also attached. The 1<sup>st</sup> respondent vehemently opposed this saying that the suit is bad in law as it is subjudice the various decrees pending which should be executed instead of the plaintiff herein filing a fresh suit; that the suit is duplicitous and offends the provisions of section 34 of the Civil Procedure Act and that the decrees are also disputed as they are being challenged since they were issued following exparte taxations.
35. From the above decision, a prima facie case is not necessarily one that must succeed. It must however have a probability of success. In this case, the applicant has filed suit against the 1<sup>st</sup> defendant judgment debtor, the intended transferee and the Registrar General of Companies. Albeit the decrees are available for execution, it is clear that the said decrees are being seriously challenged and, in some cases, as stated by the 1<sup>st</sup> respondent, they are being set aside on account that the 1<sup>st</sup> respondent was never served with bills of costs which were taxed and certificates of costs issued.
36. From the material placed on record, no doubt, the applicant has encountered hurdles in executing the decrees drawn adopting various certificates of taxation from Siaya and Kisumu Law Courts and whether those decrees are eventually set aside in favour of the 1<sup>st</sup> defendant or not, the 1<sup>st</sup> defendant admits in its depositions herein that it instructed the plaintiff advocate herein to handle various cases on its behalf but that it settled the legal fees due. It is therefore for the courts handling the matters to consider the merits of the challenge by the 1<sup>st</sup> defendant.
37. What is also clear is that this suit is not for execution of those decrees but for preservation of the business of the 1<sup>st</sup> respondent which is intended to be transferred to the 2<sup>nd</sup> defendant but with a rider that the 2<sup>nd</sup> defendant does not assume any liabilities owing as at the date of transfer. That rider is what caused apprehension on the part of the plaintiff herein, seeking to preserve the business of the 1<sup>st</sup> defendant so that after the courts in the Miscellaneous applications finally conclude the cases, I say conclude because the 1<sup>st</sup> defendant is rightly entitled to challenge the decrees, the plaintiff will not be armed only with paper decrees as there will be nothing left of the 1<sup>st</sup> defendant to pay off the decrees.
38. It is contended by the 1<sup>st</sup> defendant/Respondent that there is an insolvency petition pending where the applicant can prove his debt. I note that the Insolvency Petition is not filed by the 1<sup>st</sup> defendant but by a creditor. What the 1<sup>st</sup> Defendant is telling the plaintiff is that he should join in the petition for insolvency in order for the plaintiff's debts to be settled. The question is, why would the 1<sup>st</sup> defendant/respondent choose the venue for the plaintiff to recover his debt? In addition, why is the 1<sup>st</sup> defendant determined to transfer its business yet it has an insolvency petition pending against it? Has it made this intention known to the Insolvency Court or the Petitioner in the Insolvency Petition? Is there no risk of dissipation of the assets of the 1<sup>st</sup> defendant company?
39. On the argument that the plaintiff should instead attach the proceeds of sale of the business, I observe that there is no disclosure of the amount of consideration if any, is passing between the two entities for the scheduled transfer of business. Where there are no tangible proceeds, the plaintiff will be acting in vain
40. On whether the plaintiff should have litigated through the Miscellaneous applications, I observe that this suit involves other parties who are not parties to the decrees mentioned. Furthermore, Section 3(2) of the Transfer of Business Act envisages a challenge to the Transfer of Business not only by way of Notice to the Registrar General of Companies but also via court proceedings and the question is whether the plaintiff in challenging such process should have dragged the 2<sup>nd</sup> to 4<sup>th</sup> defendants into the Miscellaneous applications where he is seeking for his costs against his client the 1<sup>st</sup> defendant. My



answer is an outright no. Some litigation cannot be mixed up with other pending litigation and this, in my view, is such type of litigation that can only be conducted on its own without violating any law or rule of sub judice or being duplicitous.

41. Thus, in execution proceedings, other than garnishee proceedings which are proceedings within proceedings or attachment of debts, a party cannot bring in other parties and different causes of action which are as substantive as is the case herein where the 2<sup>nd</sup> defendant is to benefit from the business of the 1<sup>st</sup> defendant but assume no existing liabilities of the 1<sup>st</sup> defendant.
42. On the alleged surrender of the six assorted motor vehicles to the plaintiff to clear the outstanding debt, the 1<sup>st</sup> respondent did not attach any evidence of a settlement agreement of the said debt or that the 6 motor vehicles allegedly surrendered were in full and final settlement of the outstanding taxed costs or legal fees. If that were to be the case, nothing prevented the 1<sup>st</sup> respondent from annexing a surrender and settlement agreement or evidence of transfer of the said vehicles in favour of the applicant. There is also no valuation report of the six vehicles to indicate their value.
43. On the contention that the suit and application are premature since the transfer of the business should have been left to be completed, it is clear that section 4 (1) is subject to the proviso to section 3(2) of the Business Transfer Act. A party opposing the transfer can file suit which has the effect of staying the transfer until the suit is heard and determined up to the appeal stage. The section provides:
  - 3(1) ....
  - (2) The liability of the transferee under subsection (1) shall cease immediately notice given in accordance with this section has become complete:

Provided that should proceedings be instituted against the transferee before such liability has ceased the said notice shall (for the purposes of such proceedings but for such purposes only) be deemed incomplete pending the final determination of such proceedings, including all possible appeals, and pending the expiration of all periods during which such appeals may be brought.
44. Contrary to the 1<sup>st</sup> respondent's submissions, the Notice of transfer is incomplete until the suit filed is heard and determined up to appeal level. The plaintiff having challenged the transfer, such transfer can only await the determination of this suit and an appeal process if any aggrieved party elects to appeal the decision of this Court.
45. On the contention that the applicant should execute the various decrees for recovery instead of seeking to injunct the transfer of the business of the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant, I find this argument contradictory and defeatist of the 1<sup>st</sup> defendant because it is conceded by the 1<sup>st</sup> defendant/respondent that the decrees are being challenged on account of exparte taxations and that the 1<sup>st</sup> respondent is cash strapped. In addition, it is clear from the annexures filed by the 1<sup>st</sup> respondent that some of the properties which the plaintiff instructed auctioneers to attach were released through objection proceedings filed and successfully prosecuted by third parties, claiming to be the bonafide beneficial and legal owners of the attached motor vehicles. That being the case, the applicant could not execute the decrees which are being challenged and the attached properties having been transferred to other parties prior to the attachments which are being challenged in courts.
46. On the contention that the applicant is guilty of non-disclosure of surrender of an assortment of vehicles and had not given an account, nothing would have been easier for the 1<sup>st</sup> respondent to annex



evidence of settlement and or transfer of the 6 assorted motor vehicles and or valuation reports on the same, to cover the claimed debts.

47. On the contention that the plaintiff should have applied for lifting of the corporate veil of the 1<sup>st</sup> defendant, a corporate veil can be lifted or pierced to see what is happening behind it if there is evidence that the corporate veil is being used to shield fraud and improper conduct on the part of the shareholders and/or the controllers of the company. In this case there is no mention of fraud on the part of the 1<sup>st</sup> respondent and its directors or shareholders. Further, piercing of a corporate veil is a last resort measure for execution of decree after all other modes of execution have failed. In this case, as earlier stated, the 1<sup>st</sup> defendant's intention to transfer the business to the 2<sup>nd</sup> defendant is what is being challenged until the decrees against it are settled since there is no liability being passed over to the intended transferee.
48. On the contention that damages if any are quantifiable, I am satisfied that the 1<sup>st</sup> respondent having admitted that it is cash strapped albeit claiming that it has other businesses elsewhere which businesses are not disclosed and that it is only transferring the Siaya Business, I therefore find that the argument by the 1<sup>st</sup> defendant is contradictory.
49. On the whole, I find that the plaintiff has on a balance of probabilities at this stage established a prima facie arguable case to warrant grant of an injunction on a temporary basis.
50. In *Mrao Ltd v First American Bank of Kenya Ltd (2003) ECLR* the Court of Appeal stated as follows regarding what a prima facie case is:
- “... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
51. The second requirement for grant of a temporary injunction is that the applicant has to demonstrate that irreparable injury will be occasioned to him if an order of temporary injunction is not granted. The case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eCLR* explains what is meant by irreparable injury as follows:
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
52. The plaintiff applicant deposed that he will suffer irreparable damages if the business is transferred and yet the liabilities of the 1<sup>st</sup> respondent are not being taken over by the 2<sup>nd</sup> respondent. On this, as earlier stated, the 1<sup>st</sup> respondent has conceded that it is cash strapped albeit it alleges that the sale or transfer of the business is to revamp it and invest elsewhere, there is no disclosure of what other assets the 1<sup>st</sup> respondent have which can be liquidated to settle the claimed sums even after re taxation, assuming all the taxations done are set aside. That being the case, I am satisfied that an irreparable injury will be occasioned to the applicant if an injunction is denied and the transfer is effected since there is no guarantee that the applicant will find any tangible asset of the 1<sup>st</sup> respondent after transfer of the business to the 2<sup>nd</sup> respondent who is not taking up the liabilities of the 1<sup>st</sup> respondent and noting that the 1<sup>st</sup> respondent has an insolvency petition pending against it yet it is transferring its business.



53. The third element in applications for temporary injunctions is that the Plaintiff has to demonstrate that the balance of convenience tilts in his favour. The case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] EKLRL defined the concept of balance of convenience as follows:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.”

54. Further in the case of Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others [2016] eKLR, the court expressed itself thus on the issue of balance of convenience:

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

55. The Plaintiff/Applicant averred that the balance of convenience tilts in his favour because he could not drag the other defendants herein into the various proceedings wherein taxations were done against the 1<sup>st</sup> defendant to recover advocate/ client costs. The said taxations are also being challenged, while execution of the decrees already obtained are also being challenged by other persons claiming ownership of properties which the plaintiff believed belonged to the 1<sup>st</sup> defendant. In addition, the 1<sup>st</sup> defendant who claims that it is cash strapped and wants to revamp its business while it is also facing an insolvency petition by another creditor. No insolvency order has been exhibited before this court. That said, it is apparent that the 1<sup>st</sup> defendant is still a going concern.

56. In Amir Suleiman v Amboseli Resort Limited [2004] eKLR, the learned judge offered further elaboration on what is meant by “balance of convenience” and stated that:

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

57. Bearing this in mind, I am persuaded that the balance of convenience tilts more in favor of the plaintiff/ applicant than the 1<sup>st</sup> defendant and that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not



had opportunity to delve deep into and or interrogate all the documents that might be filed by both parties and that are relevant in providing other evidence or full details in this matter.

58. In *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another* [2019] eKLR the court stated as follows in an application for an injunction:

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

59. Based on all the above, this court is persuaded that if orders of temporary injunction are not granted in this suit, the business of the 1<sup>st</sup> respondent once transferred without passing over liabilities to the 2<sup>nd</sup> defendant, the applicant will have nothing to recover in enforcement of decrees which are in his hands though being challenged.
60. For the foregoing reasons, I find that the Plaintiff/ Applicant has met the criteria for grant of orders of temporary injunction. As sought in the application dated 20<sup>th</sup> February, 2020.
61. Accordingly, the two prayers are granted restraining the 1<sup>st</sup> respondent from transferring its business to the 2<sup>nd</sup> respondent and the 3<sup>rd</sup> respondent from effecting such transfer until this suit is heard and determined on its merits and the several Miscellaneous Cases wherein the plaintiff and the 1<sup>st</sup> defendant are litigating over advocate/ client bills of costs are settled. This order varies the prayers sought for reasons that the amount quoted by the plaintiff as being due and owing to him by the 1<sup>st</sup> defendant is in contention.

#### **The 1<sup>st</sup> defendant’s application dated 22<sup>nd</sup> October, 2021.**

62. The 1<sup>st</sup> Defendant’s Application dated 22<sup>nd</sup> October, 2021 seeks for a stay of proceedings of the suit herein, pending hearing and determination of the various miscellaneous causes, which are pending on the advocate/ client costs between the plaintiff herein and the 1<sup>st</sup> defendant as highlighted in the Application.
63. The application is supported by the affidavit sworn by Moses Oduor Otieno the 1<sup>st</sup> defendant’s Human Resource Manager and the grounds inter alia, that the plaintiff had already obtained an injunction against the 1<sup>st</sup> defendant’s transfer of or sale of its properties; that in 2019, the plaintiff proceeded and attached the same properties of the 1<sup>st</sup> defendant in execution of the various decrees obtained in Siaya; that the plaintiff should elect which suit to pursue because there is likelihood that the two courts will reach conflicting decisions which will be incapable of execution, and which will be embarrassing to the courts and the justice system and a waste of the court’s limited resources.
64. That it is in the interest of justice that the proceedings herein be stayed to allow the proceedings in Siaya and Kisumu to proceed to conclusion first so that no parallel proceedings take place as that will prejudice the 1<sup>st</sup> respondent who will suffer loss that cannot be compensated by an award of damages and that it will be costly to defend two different sets of causes on the same cause in different courts and jurisdictions. The grounds hereinabove were replicated in the depositions of Moses Oduor Otieno in the supporting affidavit sworn on 11<sup>th</sup> August, 2021.
65. Opposing the above application, the plaintiff herein filed a replying affidavit sworn on 21<sup>st</sup> April, 2022 by Kennedy Odhiambo Owiti Advocate and the plaintiff herein.



66. The plaintiff deponent contended that despite his firm representing the 1<sup>st</sup> defendant in various suits, to date, no legal fees had been paid and that the outstanding legal fees is Kshs 15, 478,960.53 which continues to accrue interest.
67. That it was following the nonpayment of legal fees that the plaintiff filed various bills of costs between advocate and client against the 1<sup>st</sup> defendant, which bills were taxed after service of the same upon the 1<sup>st</sup> defendant, certificates of taxation issued and decrees issued after adoption of the certificates of taxation in Siaya High Court as well as Kisumu High Court as shown by Annexed copies of decrees.
68. That soon thereafter, the plaintiff saw a gazette Notice for the transfer of the 1<sup>st</sup> defendant's business to the 2<sup>nd</sup> defendant vide Gazette Notice No. 350 of 17<sup>th</sup> January 2020 Volume CXXII which Gazette Notice absolved the 2<sup>nd</sup> defendant from any liability of the 1<sup>st</sup> defendant as at the date of transfer, which Notice had the effect of denying the plaintiff the opportunity to recover the taxed costs hence the suit herein to stop the said transfer while debts and liabilities owing to the plaintiff by the 1<sup>st</sup> defendant are still outstanding.
69. It was further deposed that as new parties were involved, being the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants herein and the debts owing were still unsettled, it was proper that afresh suit be filed against all the defendants so that all issues are canvassed and determined conclusively. That it would be foolhardy to enjoin the other defendants to the proceedings for recovery of advocate/client's costs.
70. That the execution process commenced in the Siaya matters to recover the decreed costs did not bear fruit.
71. That the applications by the 1<sup>st</sup> defendant in the Siaya matters MISC App Nos. 3-12 of 2029 for enlargement of time to file references are meant to frustrate the plaintiff from proceedings with this matter. And finally, that this suit only seeks to stop the 1<sup>st</sup> defendant from transferring its business to the 2<sup>nd</sup> defendant when the 1<sup>st</sup> defendant's liabilities are still outstanding.
72. Parties filed written submissions to canvass the application dated 22<sup>nd</sup> October, 2021.

### **The 1<sup>st</sup> defendant's submissions**

73. On behalf of the 1<sup>st</sup> defendant, counsel relied on the case of Pacis Insurance Company Limited -v- Ichanga (Commercial Case E004 of 2022) [2022] KEHC 16303 (KLR) which rendered the place of stay of proceedings as follows:

“ 15. LJ Githua in Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR stated:

“...the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principle; Whether the applicant has established that he/she has a prima facie arguable case; Whether the application was filed expeditiously; and Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”



74. Counsel further cited Ringera J. (as he then was) in Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 where it was stated that:

“... whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

75. Further reliance was placed on Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332 where it is stated that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

76. The 1<sup>st</sup> defendant’s counsel argued that his client deserves the orders of stay of suit herein because they have a Prima Facie Arguable Case and reiterated its submissions in the first application that the Plaintiff is not entitled to an order of injunction, as he has not demonstrated that he has a prima facie arguable case.

77. Secondly, that there is sufficient cause that is in the interest of justice that stay of proceedings be granted because there is every likelihood that the two courts will reach two conflicting decisions which will be incapable of execution and embarrass the courts of concurrent jurisdiction and the justice system, besides wasting the courts’ limited resources.

78. It was submitted that if the proceedings in this suit herein are allowed to proceed, parallel to the other related causes, then the 1<sup>st</sup> Defendant is bound to be prejudiced and suffer loss and that it will also be very costly to pursue two suits on the same cause of action in different courts and territorial jurisdiction.

79. Reliance was placed on the case of Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others [2018] eKLR, where the court stated as follows on the injustice and absurdity of two different courts of concurrent jurisdiction arriving at different decisions on parallel suits arising from the same cause of action:

“66. .... The issue then is this: between this petition and Petition No. 382 of 2017, which one is best placed to determine the issue, granted that both, ... have the jurisdiction in the matter”...However, the greatest absurdity would ensue were this court to find that indeed the 1st Respondent does not possess requisite academic qualifications, only for the court in Nairobi to find that the 1st Respondent is indeed duly qualified. If that were to happen irreparable damage would have been occasioned to the 1st Respondent. This would be



unmitigated injustice against the 1st Respondent. For justice to be seen to be done one of these petitions must give way, ...

67. The Petitioners in full knowledge that Petition No. 382 of 2017 was filed in Nairobi, proceeded to file this petition yet knowing full well that the single issue for determination was the common denominator in both petitions. This was a gross abuse of court process and a misuse of precious judicial time.”

80. In conclusion, the 1<sup>st</sup> defendant submitted that the Plaintiff has not demonstrated any reason, warranting to be granted orders for an injunction. On the other hand, it was argued that the 1<sup>st</sup> defendant had availed more than ample reasons, as to why the Plaintiff is not entitled to the orders sought. That the 1<sup>st</sup> Defendant has ably substantiated how the Plaintiff’s suit is duplicitous and an abuse of the court’s process and therefore in the interest of justice, the suit should be stayed pending hearing and determination of the various miscellaneous applications that have the apparent potential of entirely varying the decrees and figures upon which the current suit is pegged. It was submitted that the Plaintiff has the option of seeking the injunctive orders sought herein in the miscellaneous causes or in one of the miscellaneous causes and not necessarily file in all of them.

### **The plaintiff’s submissions**

81. The plaintiff/ respondent in the latter application framed issues for determination and submitted on the same as follows- on whether the Court should stay the proceedings in this suit, the plaintiff cited Ngugi Joel J (as he was then) in Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) where it was observed as follows when dealing with an application for stay of proceedings:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will not be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.

In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. in Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000): As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.” (emphasis added)



82. It was therefore submitted that from the above decision, stay of proceedings is discretionary and shall only be issued in the exceptional cases where the Applicant has sufficiently demonstrated to court that he should be granted orders for stay of proceedings.
83. On whether there is sufficient reason given for an order sought for stay of suit, it was submitted that no sufficient reasons had been advanced to warrant stay of this suit. According to the plaintiff, the only reason the 1st defendant/applicant has provided to this court in an attempt to have Court exercise its discretion in its favor is that the Plaintiff initially tried to execute the decrees in Kisumu HC Misc Apln No. 16,17,18,36,81 all of 2019 and Siaya HC Misc Apln No. 3,4,5,6,7,8,9, 12 all of 2019 which decrees are the very foundation of this suit as such pursuing this suit will result in the court reaching two conflicting decisions; which reason, according to the plaintiff, does not make sense at all.
84. It was submitted that there are no pending suits in Kisumu HC Misc Apln No. 16,17,18,36,81 of 2019 and Kisumu HC Misc Apln No. 3,4,5,6,7,8,9, 12 of 2019 for determination. That the Plaintiff obtained Judgment in the said matters pursuant to filing its various applications for adoption of certificates costs into judgments. That what is outstanding in the above-mentioned suits are the judgment award which the Plaintiff tried to execute but that the execution did not bear fruit since the 1<sup>st</sup> Defendant did not have any attachables.
85. The plaintiff submitted further that there is thus nothing left for determination in the above-mentioned suits that could lead to this court reaching a conflicting decision with the parent files from which the decrees arose. It was argued that in any event, this suit was filed solely for the recovery of the cumulative Plaintiffs professional fees and to prevent the transfer of the 1<sup>st</sup> Defendant business to the 2<sup>nd</sup> Defendant. That since new parties being the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were to be introduced to the suit, it was only proper that a new suit be filed seeking recovery of the outstanding professional fees. That the new parties could not be enjoined in the proceedings arising from the taxation of an advocate-client bill of costs.
86. On the 1<sup>st</sup> defendant's assertion that it filed references challenging the certificate of costs and the resultant decrees, it was submitted that the said applications were never annexed to the 1<sup>st</sup> Defendants instant application. Further, that in any event, to date, the said alleged applications if any have never been prosecuted and that the 1<sup>st</sup> Defendant similarly has not informed court on whether the said alleged references were ever prosecuted and their outcome or even whether they have ever taken directions on the said application hence it is not proper to simply say that the 1<sup>st</sup> Defendant filed reference applications in 2021 and two years down the line they have not demonstrated whether they have ever prosecuted the said applications.
87. It was submitted by the plaintiff that the instant application is an abuse of the court process and filed solely to frustrate the Plaintiff from recovering its professional fees due. This court was therefore urged to dismiss the 1<sup>st</sup> Defendant's application with costs.

### **Determination**

88. I have considered the application dated 22<sup>nd</sup> October, 2021 seeking for a stay of this suit and proceedings pending the hearing and determination of the various Miscellaneous Applications between the plaintiff herein and the 1<sup>st</sup> defendant on the advocate/ client bills of costs being Kisumu HC Misc Apln No. 16,17,18,36,81 all of 2019 and Siaya HC Misc Apln No. 3,4,5,6,7,8,9, 12 all of 2019. I have given equal consideration to the responses and the submissions for and against the prayer sought.



89. In my view, the issue for determination is whether the orders sought should be granted and if so, on what terms.
90. In *Kikambala Housing Estate Limited v Akash Devani & 10 others* [2020] eKLR, the Court stated thus on stay of suit:

“This is what I get from the author of Halsbury’s Laws of England, 4th Edition. Vol. 37 page 330 and 332, on the threshold for stay of proceedings;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

91. Therefore, in deciding whether to grant a stay of proceedings, a judicious and equitable balance between the principle that matters should be allowed to proceed towards conclusion and that justice should be expeditious to both parties as espoused in Article 159 (2) (b) of *the Constitution* has to be struck. A Court of law will only grant a stay of proceedings if there are exceptional circumstances, which must be deposed in an affidavit.
92. The suit herein was filed, prompted by the 1<sup>st</sup> defendant’s decision to transfer its business to the 2<sup>nd</sup> defendant, and in the said Notice of Transfer of Business under the Transfer of Business Act, the 2<sup>nd</sup> defendant was absolved from taking over any liabilities from the 1<sup>st</sup> defendant as at the time of such transfer.
93. Contrary to the submission by both the plaintiff and the 1<sup>st</sup> defendant, this suit cannot be used to execute the various decrees obtained by the plaintiff against the 1<sup>st</sup> defendant in various matters of Advocate Client Bills of Costs. It follows that section 34 of the *Civil procedure Act* which bars the filing of a separate suit to execute decree has not been breached. I say so because an injunction cannot be a mode of execution of decree already passed in a different or even same suit.
94. Further, the orders sought in this suit are quite different, and are envisaged by section 3() of the Transfer of Business Act. The plaintiff is seeking a temporary injunction to stop such transfer of the business until the decrees obtained by the plaintiff in various matters against the 1<sup>st</sup> defendant are settled.
95. The 1<sup>st</sup> defendant has deposed that it has challenged the said decrees and filed references or sought for enlargement of time to challenge the various certificates of taxation and or decrees which were issued *ex parte* by the various courts.
96. In my humble view, the 1<sup>st</sup> defendant’s challenge of those decrees shall not in any way be affected by this suit or at all as the suit seeks for temporary injunction to stop transfer of the business. In this suit, the plaintiff is apprehensive that should the transfer be effected, then he shall be left with paper decrees in those Miscellaneous causes which remain unsettled.



97. I find no exceptional circumstances demonstrated by the 1<sup>st</sup> defendant in its affidavit in support of the application herein to warrant grant of an order for stay of proceedings. Furthermore, I have already pronounced myself on the issue of whether this suit is subjudice or duplicitous the pending decrees and found that the suit is not duplicitous or subjudice as it does not seek to execute decree already passed, but to protect and preserve the property which the 1<sup>st</sup> defendant intends to transfer to the 2<sup>nd</sup> defendant at the expense of the pending claims against the 1<sup>st</sup> defendant by the plaintiff advocate.
98. On the issue of substantial loss, this Court finds that the 1<sup>st</sup> defendant has failed to demonstrate how it will suffer substantial loss if any, if the orders sought herein are not granted.
99. What in my view, the 1<sup>st</sup> defendant should do, is to move with speed and have the pending applications in the various Miscellaneous applications, challenging the certificates of taxation and decrees, heard and determined expeditiously and further proceed to reconcile what it believes it paid out to the plaintiff vis avis what the plaintiff is claiming.
100. For the above reasons, I find and hold that the application for stay of this suit is not merited. It is dismissed.
101. In the end, I make the following orders:
- a. That pending the hearing and determination of this suit, an order of temporary injunction is hereby issued restraining the 1st Defendant and the 2nd Defendant, whether by themselves, their agents, representatives, servants and/or employees from transferring the business from the 1st Defendant to the 2nd Defendant pursuant to Gazette Notice Number 350 of 17th January, 2020 unless and until the issues pending in the various Miscellaneous Cases between the plaintiff and the 1<sup>st</sup> defendant involving advocate client bills of costs before Kisumu and Siaya law Courts are fully settled. Specifically, the cases are: Siaya HC MISC APPL Nos 3,4,5,6,7,8,9 and 12 of 2019 and Kisumu HC MISC APPL Nos. 16,17,18,36 and 81 of 2019.
  - b. That pending the hearing and determination of this suit, a temporary order of injunction is hereby issued restraining the 3rd Defendant, Registrar General of Companies, whether by itself, its agents, representatives, servants and/or employees from effecting the transfer of business, from the 1st Defendant to the 2nd Defendant pursuant to Gazette Notice Number 350 of 17th January, 2020 unless and until the issues pending in the various Miscellaneous Cases between the plaintiff and the 1<sup>st</sup> defendant involving advocate client bills of costs before Kisumu and Siaya law Courts are fully settled. Specifically, the cases are: Siaya HC MISC APPL Nos 3,4,5,6,7,8,9 and 12 of 2019 and Kisumu HC MISC APPL Nos. 16,17,18,36 and 81 of 2019.
  - c. Costs of the two applications shall be in the cause and await the outcome of the main suit herein.
  - d. I further direct all parties to this suit to comply with Order 11 within 30 days of today. Pre-trial directions shall be given on 26<sup>th</sup> February, 2024.
102. Those shall be the orders of this court.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF JANUARY, 2024**

**R.E. ABURILI**

**JUDGE**

