REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 100 OF 2016

YUSUF ABDI ADAN .....PLAINTIFF/RESPONDENT

-VERSUS-

HUSSEIN AHMED FARAH .....1ST DEFENDANT/APPLICANT

HUSSEIN UNSHUR MOHAMED .....2ND DEFENDANT/RESPONDENT

MOHAMED ABDIKADIR ADAN .....3RD DEFENDANT/RESPONDENT

BLUE BIRD AVIATION LIMITED.....4TH NOMINAL DEFENDANT/APPLICANT

RULING

1. This ruling relates to the notice of motion applications, dated 14th December 2018, filed by the 1st Defendant (herein "the 1st Applicant) and 4th February 2019, filed by the 4th Nominal Defendant (herein "the 2nd Applicant"). The first application is brought under the provisions of; Section 1A, 1B and 3A of the Civil Procedure Act, (Chapter 21), Laws of Kenya and all other enabling provisions of the Law, while second application is brought under the provisions of Section 1A, 1B and 3A of; the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Regulations 10 of the Insolvency Regulations 2016 and all enabling provisions of the Law.

2. The 1st Applicant is seeking for orders;

(a) That the Honourable court do order that the Plaintiff to provide the relevant documentation to facilitate his being one of the signatories of the account of; Blue Bird Aviation Limited to the Bank accounts at I&M Bank Limited, Ngong Road Nairobi.

(b) That the Honourable court do clarify that the order issued on the 18th May 2016 and the clarification issued on 24th May 2016 by the Honourable Justice Ogolla, places the onus upon the Defendants to inform the Plaintiff or any or all transactions in respect to the Bank with regard to Blue Bird Aviation Limited of which the Plaintiff is not a signatory;

(c) That the costs of the application be provided for.

3. The 2nd Applicant is seeking for orders:-

(a) That the Honourable court be pleased to grant it leave to be enjoined as an interested party to these proceedings for the limited purpose of prosecuting this application;

(b) Spent;

(c) That the Honourable court be pleased to vary, set aside and/or discharge the orders pursuant to the ruling of Justice Ogolla, delivered on 18th May 2016;

(d) That the Honourable court grants any further or other orders it may deem fit;

(e) That the costs of the application be borne by the Plaintiff/Respondent in any case.

4. The applications are premised on the grounds on the face of it. The first application is supported by an affidavit dated 14th December 2018, sworn the 1st Defendant; Hussein Ahmed Farah, while the second application is supported by an affidavit dated 4th February 2019, sworn by Hussein Unshur Mohamed, the 2nd Defendant and a shareholder of the 2nd Applicant.

5. The Plaintiff and the Defendants are directors and shareholders of Blue Bird Aviation Limited, the 2nd Applicant, which initially named was named as a 2nd Plaintiff but was struck off pursuant to the Honourable Court's ruling dated and delivered on 16th February 2017.

6. The applications herein are informed by the orders made on 18th May 2016, by Hon. Justice Ogolla in relation to the bank accounts of the 2nd Applicant which orders had the legal effect making the Plaintiff (herein "the Respondent") a signatory to the 2nd Applicant's bank accounts held at the Commercial Bank of Africa Limited. After the issuance of those orders, the parties sought for clarification of thereof, which the Court gave on 24th May 2016.

7. The orders were fully complied with vide a special resolution passed at an extra ordinary general meeting of the members of the 2nd Applicant held on 31st May 2016. However, the 2nd Applicant avers that, whereas paragraph 24(c) of the said, ruling is couched in no uncertain terms that, the Respondent be added as a signatory to all of its accounts, the Respondent has sought to mischievously extrapolate the orders to have himself as a mandatory signatory.

8. The 1st Applicant on its part avers that, on the 1st October 2018, he received a letter from the bank, addressed to the 2nd Applicant enclosing a letter written by the Respondent's Advocate, in relation to the closure of the 2nd Applicant's bank account. The 1st to 3rd Defendants, respondent to the letter and the bank sensed that there was a dispute between the directors of the 2nd Applicant and invited them for a meeting on the 4th October 2018.

9. On various dates between 4th and 30th October 2018, the 1st to the 3rd Defendants tried to plead with the bank not to close the account without success. On 30th October 2018, the bank sent a further letter stating that the account would be closed. As a result the 2nd Applicant called for a meeting vides a notice dated 1st November 2018 but the Respondent failed to show up. However, the meeting proceeded on; whereby a resolution was passed that the 2nd Applicant should open an alternative bank account.

10. On the 6th November 2018, the 2nd Applicant wrote a letter of the even date to the bank explaining the circumstances that had given rise to the dispute between the parties. Thereafter the 1st to 3rd Defendants held a meeting with the bank and explained the content of the said letter giving the background and the informing factors in relation to the suit herein. However on 13th November 2018, the bank wrote yet another letter stating that the accounts would be closed on the 14th December 2018.

11. The Applicants aver that, even after instigating the closure of the 2nd Applicant's bank accounts at Commercial Bank of Africa, the Respondent has not sought out the other directors on how to mitigate the consequence of his actions. In the circumstances, the 2nd Applicant was forced to open a fresh account at I & M Bank Limited. However, pursuant to the Court order issued herein, the Respondent, need to sign the account opening forms, but has refused to execute the bank mandate of new account at I & M Bank and National Bank of Kenya, arguing that he would only sign if he is made a mandatory signatory.

12. The Applicants further aver that they are aware the Respondent has threatened to instigate the closure of these new accounts, as I&M Bank Limited, has suddenly threatened to issue a notice to close the accounts. It is argued the Respondent does not go to the 2nd Applicant's offices and there is no way of communicating with him saves by mobile phone. The text messages send by 3rd Defendant have gone unanswered by Respondent, and so are SMS send by the Applicant on the 13th December 2018 at approximately 1.30pm requesting the Respondent to sign the forms.

13. Therefore, if the bank accounts at Commercial Bank of Africa are closed and there is no other account, the 2nd Applicant will suffer irreparable loss, as it will not be able to proceed with its functions to receive payments from its customers, and pay its suppliers and employees amongst others. The plaintiff will not suffer any prejudice if the orders sought are granted.

14. The 2nd Applicant further avers that, in addition to the Respondent's patently unlawful conduct, he continues to solely make and issue prejudicial correspondences in the name of the 2nd Applicant without authority and in the absence of any concurrence by any of the other directors. The said misconduct is contrary to the said orders of the Honourable court and the memorandum and articles of the 2nd Applicant.

15. Further, the Applicant being an Airline has leased a number of Aircrafts from Amazon International F.Z.E., Dubai to facilitate its flight operations. That the Respondent communication with the 2nd Applicant's bankers, has contrived the effect and tenor of the subject court orders, to block contractual Aircraft Lease payments to Amazon International F.Z.E., Dubai with the result that, the said Lessor has now threatened to repossess the leased Aircrafts from the 2nd Applicant, which eventuality will cripple its operations.

16. That it is evident from the foregoing, the Respondent is using the interlocutory orders which have been subsisting for close to three (3) years, to wrongfully assert rights and veto powers that he is not entitled to as director or shareholder under the 2nd Applicant's memorandum and Articles of Association. Therefore, the court ought to assert itself for the reasons that the unintended consequence with which the Respondent has deployed the orders is brazenly wrong. The Honourable court ought not to countenance his deliberate scheme to bring the 2nd Applicant's process into disrepute. It is obvious that the Respondent hook winked the court into granting an order it ought not to have granted.

17. However, the Respondent filed a replying affidavit dated 21st February 2019, in response to the two applications. He deposed that the two applications forms part of a series of well calculated move and strategy on the part of the Defendants to delay this matter, which has been pending before this Honourable Court for more than three (3) years. That it is an undisputed fact that the 2nd Applicant is run and controlled by the 1st, 2nd and 3rd Defendants herein, thus the filing of the application by the 2nd Applicant was obviously at the instigation of the said Defendants.

18. The Respondent denied that he has embarked on a series of disruptive conduct that led to the closure of the two accounts held in the name of 2nd Applicant at Commercial Bank of Africa. He termed the allegations as untrue, baseless and not grounded.

19. That the 2nd Applicant used to operate and run two accounts with Commercial Bank of Africa namely:

Account Name: Bluebird Aviation Limited

Account Number: [xxxx]

Account Type: Current Account Corporate

Currency: Kenya Shillings

Account Name: Bluebird Aviation Limited

Account Number:[xxxx]

Account Type: Current Account Corporate

Currency: USD

20. That upon issuance of the court orders on 18th May 2016, the orders were immediately brought to the knowledge of the bank on or around 31st May 2016, vide a letter forwarded to the Branch Manager. However despite the existence of the order, there have a number of transactions, including those carried out between 1st of August 2017 to 23rd October 2017, in the total the sum of; USD 841,320, that have taken place through the account at Commercial Bank of Africa Limited, whereby money, in blatant breach of the court order was being sent to Amazon International FZC in Ajman within the United Arab Emirates.

21. He further avers that these transactions are ongoing to date now using other bank accounts being run and operated by the 2nd Applicant upon the instructions of the 1st, 2nd and 3rd Defendants and their employees namely Mr. Paul Kasina, the Finance Manager and Mr. Bishar Abdikadir from the Accounts department, in clear breach of the court Orders. As a consequence he instructed his Advocate to write to the bank and put them on strict notice that he reserves all the rights of the subject matter and would in due course take appropriate steps to enforce his rights. The letter was not responded to prompting him to instruct his Advocates to write to the bank again on the same issue.

22. In response, the bank wrote a letter dated 1st October 2018, addressed to the Directors of 2nd Applicant, copied to his Advocates, informing the parties that based on the account general terms and conditions governing the operations of account, it had in its discretion decided to suspend any transactions from both KES and USD accounts. The accounts were then frozen due to the apparent disputes between the directors of the 2nd Applicant on the operations of its account and to avoid any liability or risks that may accrue on their part.

23. The Respondent averred that, Amazon International FZE is a company incorporated purely for the purposes of procuring a fraud and money laundering on the part of the 1st, 2nd and 3rd Defendants. The same is owned and controlled by the 3rd Defendant herein, Mr. Mohamed Abdikadir and any and all correspondences signed allegedly on behalf of Amazon International FZE is done by Mr. Paul Kasina, the 2nd Applicant's Finance director.

24. He averred that, in specific response to the Application dated 4th February 2019, the suit herein is a derivative suit filed for and on behalf of the 2nd Applicant and there are no orders being sought against nor has the same been granted against it. The Company is a Nominal Defendant and should not play any active role in the proceedings before the Honourable Court. Further no full Board meeting was held nor resolution passed to give effect to the decision to open the said accounts. Finally, the first application has been pending for three (3) years down the line, showing obvious contempt on the part of the Applicant.

25. He averred that as regards the 1st Applicant's application, it seeks for on order to interfere with the management and running of a company contrary to the well-known principles of company law. However, he is ready and willing to sign the bank account forms as long as the accounts are not used for money laundering exercise, whereby fake and fictitious entities are created and a false impression with a view to launder money out of Kenya and that he be given bank statements on a daily basis.

26. The Respondent filed a further replying affidavit dated 26th February 2019, stating that on the morning of 26th February 2019, he went to the offices of 2nd Applicant situated at Bluebird Center, Wilson Airport, Langata Road, driven by Patrick Musigi Gimose and accompanied by Mr. Samatar Yusuf, who is not only his son, but personal assistant, for the purposes of checking on the offices, seeing the bank statements, provided by the respective bank and financial institutions including those from Commercial Bank of Africa, I&M Bank, National Bank and or Gulf African African Bank. He carried a copy of a letter dated 24th January 2019, to the effect that he wanted access to the bank statements.

27. He was directed to the parking by the security guard and when he returned, he was informed him that Mr. Unshur, the 2nd Defendant instructed the guard to tell him that he could not enter the building and that he should not be allowed to enter the building premises. Before he left, he took pictures in the presence of the security guard and no objection was raised by anyone, to show that indeed, he was denied access to the building despite being a shareholder and/or director of the Company. He then reported the matter at Wilson Airport at around 12:00/12:30pm, and booked under OB No. 19/26/02/2019. Subsequently he learnt that, Mr. Paul Kasina, the Finance and Administration manager 2nd Applicant had also filed a report under OB No. 22/26/02/2019 at 1430 hours to the effect that the Respondent and the son and were allegedly creating disturbance.

28. The 2nd Applicant filed a further affidavit dated 25th February 2019, in response to the Respondent's affidavits and averred that it has absolutely no interest in delaying the eventual determination of this suit as alleged. It has not been party to these proceedings since its name was struck out in February 2017 and cannot possibly be blamed for any delay spanning three (3) years in the hearing and conclusion of this matter.

29. That it has a functional and competent Board of directors in which the Respondent is a member, and through which the Company affairs are conducted in accordance with the Board's resolutions, its memorandum and articles of association and the applicable law. Therefore to allege that it is being run or controlled by the 1st, 2nd and 3rd Defendants is to impermissibly mischaracterize the legal status of the 2nd Applicant and a denial of a basic fact.

30. It was averred that, the Respondent has attempted to present a skewed and self-serving narrative of facts in relation to his singular pursuit of the closure of the bank accounts at Commercial Bank of Africa. He has cajoled, threatened and bullied the bank by a series of correspondence that it was forced to hire external legal counsel, Hamilton Harrison & Mathews Advocates (HHM), to respond it against the wild demands, through a letter dated 11th October 2018. However, undeterred, the Respondent responded to HHM's letter in a letter dated 18th October 2018, by accusing the bank of engaging in illegal acts of money laundering in cahoots with the "Defendants". HHM responded vide a letter dated 30th October 2018, denying Respondent's assertion that, the bank was an agent of the Defendants.

31. The 2nd Applicant argued that the Respondent makes scurrilous, unsubstantiated and scandalous allegations of money laundering involving the 2nd Applicant's accounts without any basis or evidence. He has neither commenced nor sought institution of criminal proceedings in furtherance of his baseless claims on money laundering. Therefore the Honourable Court ought to strike out and expunge from the record the contents of paragraph 19 of the Respondent's first Replying Affidavit as no basis for such prejudicial averment has been laid.

32. Further the 2nd Applicant is a stranger to the allegations regarding ownership of Amazon International FZE and the document alleged to be a trade license is on the face of it incapable of standing as conclusive proof of its contents seeing that, it is a computer print-out that is neither authenticated nor certified as being a true representation of the record obtaining in the official Companies Registry in Dubai or any other jurisdiction. That it is instructive to note that, the Respondent acknowledges that no order was issued against the 2nd Applicant yet he cries foul when it makes payments to Amazon International FZE.

33. The 2nd Applicant denied being guilty of laches and argued that the offensive conduct by the Respondent became manifest when the accounts were closed in December 2018. That in any event, the impugned orders issued on 18th May 2016 lapsed after 12 months by operation of the law as the Respondent neither sought for nor obtained an extension of the same. He has failed to demonstrate what prejudice and/or irreparable harm he will suffer if the subject orders are stayed in the first instance, and subsequently varied, set aside and/or discharged in their entirety.

34. The parties disposed of the Application by filing and/or tendering oral submissions. the 2nd Applicant filed its submissions in which it invited the court to consider the following issues:-

a) *Whether the Plaintiff has abused the interlocutory orders issued pursuant to the Ruling of Justice Ogola, delivered on 18th May 2016;*

b) *Whether the said interlocutory orders have lapsed by operation of the Law;*

c) *What appropriate relief should this court make? and*

d) *Costs.*

35. It was reiterated in the submissions that, the Respondent has weaponized the interim orders to the detriment of the 2nd Applicant. That the Honorable Court has jurisdiction and the inherent power to discharge, vary and or set aside any interim orders where the same have been abused by a party. Reference was made to the procedural provisions of; Order 40 Rule 6 of the Civil Procedure Rules, 2010, and the case of; *Mobile Kitale Service Station -Vs- Mobil Oil Kenya Limited & Another [2004] eKLR,* where the court held that an interlocutory remedy would be discharged, where it is shown the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter.

36. That orders of injunction cannot be used to intimidate and oppress another party. It is meant to protect the fence of the person who obtained the said orders. It is a weapon only meant for a specific purpose; to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking.

37. The Applicant on its part did not file any submissions but relied entirely on the affidavit in support of its application and orally submitted that, its application is not an abuse of the court process, in that, all the Applicant is seeking for is, for the Respondent to sign the

bank documents. That indeed the court should not interfere with the internal affairs of the company, but it suffices to note that the Respondent does not attend the Board meetings, where resolutions are made. The decision to open an alternative account was passed in a board meeting yet, he makes it conditional that, he will only sign the bank documents as long as the account is not used for money laundering and he is given a copy of the bank statement. Hence the need to discharge the impugned orders.

38. The Applicant submitted where the majority shareholders make a decision, then it is binding on the minority. The Respondent does not say why he is entitled to the bank statements, neither is there a provision in law for a shareholder to be given company documents. That a member is only entitled to the company's audited annual financial accounts that are discussed in the Annual general meeting. The Respondent is not acting in the interest of the company by closing the accounts and although he makes scandalous allegations against the Defendants, there is no evidence to back it up. Reference was made to Section 238(1) of the Companies Act,

39. The 3rd Defendant filed skeleton submissions dated 7th March 2019, supporting 2nd Applicant's application. It was argued that under Order 40 Rule 6, an injunction order given by the court on 18th March 2016 lapsed after twelve (12) months, and was not extended within that period. Reference was made to inter alia the case of; *Maria Lwande vs Registered Trustee of Telepostal Pension (2015) eKLR*. It was further argued that, the Plaintiff is weaponizing the orders given by the court to prejudice and cartel and/or interferes with operations of the company.

40. However, the Respondent submitted that the application is defective as it is not hinged upon any pleadings within the meaning of the law, as the 2nd Applicant has no pleadings filed in court in the absence of pleadings; it has no legal substratum to base the present application on. The Plaintiff has no claim and seeks no prayers against the 2nd Applicant and it has no statement of Defence. That, parties are bound by their pleadings upon which a court can determine issues before it.

41. Reference was made to the cases of; the case of; *Nairobi City Council versus Thabiti Enterprises Limited (1995-1998) 2 EA (CAK)*, *Charles Sande versus Kenya Co-operative Creameries Limited, Civil Appeal No 154 of 1992*, and *David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others [2014] Eklr*, where the court held that, its duty is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties, as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them.

42. That if the court were to descend into an arena of litigation, the parties themselves, or at any rate one of them might well feel aggrieved. For a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. That it is the parties agenda that is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice (s*ee Malawi Supreme Court of Appeal in Malawi Railways Ltd Vs. Nyasulu [1998] Mwsc 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings and* ***Adetoun Oladeji (Nig) Ltd Vs. Nigeria Breweries Plc*** *S.C. 91/2002).*

43. The Respondent therefore submitted that, the court can note from its record that the said orders were directed against the 1st, 2nd and 3rd Defendant, as the suit before the Honourable court is a derivative suit ,filed for and on behalf of the Company. That even then the application giving rise to the said orders was heard and determined inter-party and a ruling was delivered. Therefore this court has no powers to set aside/vary or review or sit on appeal, as the said orders were made by a court of concurrent jurisdiction. Reference was made to the case of; *Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & another v City Council of Nairobi [2015] eKLR*

44. The Respondent argued that the 2nd Applicant has failed to satisfy the threshold to be granted the orders seeking setting aside or review and is guilty of laches as observed in *"The principles of Equitable Remedies" by I.C.F Spry, LLD:* and the case of; ***Smith vs Clay [1767] EngR 55, (1767) 3 Bro CC 646, (1767) 29 ER 743*** **that;-**

> *"A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.' Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: "Expedit reipublicae ut sit finis litium', is a maxim that has prevailed in this court at all times, without the help of parliament."*

45. That the 2nd Applicant has not come to this court with unclean hands, due to the money laundering activities. The Respondent referred to the cases of; and *Kenya Pipeline Company Limited v Glencore Energy (U.K.) Limited [2015] eKLR, Holman v Johnson (1775-1802) ALL 98 Holman v Johnson (1775-1802) ALL 98* where it was held that:-

> *"The principle of public policy is this: Ex dolo malo no ovitur actio. No Court will lend its aid to a man who has found his cause of action on an immoral or an illegal act. If, from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff"*

46. However, 2nd Applicant in final response to the Respondent's submissions argued that the suit herein is a derivative suit filed under Section 238 and 239 by the Plaintiff for the benefit of the Company. It is not the Respondent's suit, the Respondent has hijacked it. The pleadings in the plaint filed on 30th March 2016, clearly states that the orders sought for therein, are for and on behalf of the 2nd Plaintiff, now the 2nd Applicant. Therefore the pleadings are on behalf of 2nd Applicant in a representative capacity. The cases cited by the Respondent on the need of pleadings were distinguished as they involved adversarial opposing parties.

47. Further the orders impugned were granted pending the hearing of the application and without the parties being heard on merit. The 2nd Applicant did not respond to the application and that no order can be made against it, without being given an opportunity to be heard as

envisaged under Article 48 of the Constitution. Therefore it is not a party to those orders. It was argued that the application to set aside those orders is guided by Section 89 of the Civil Procedure Act, as such the pleadings are in the application and not the plaint and the same is permitted under Section 3(a) of the Civil Procedure Act and Order 40 Rule 7 of the Civil Procedure Rules, under which the injunction was granted.

48. Similarly, the orders having been given on interim and not final basis, the court has the jurisdiction to review and/or set it aside. Finally, it was argued that the doctrine of laches does not arise as the orders were granted at an interlocutory stage and no one approached to the court to extend them. It was for the Respondent to expedite the suit. That instead of the Respondent is using the orders issued to oppress the other Defendants. He should have moved to court to file contempt proceedings, Instead he has indulged in communicating with the bank using the 2nd Applicant's letter heads and become a single operator of the company.

49. On the issue of alleged money laundering activities, it was submitted that it is a grave claim that is unsubstantiated by evidence and is based on a series of computer printed pieces of paper not admissible under Section 83 of the Evidence Act. Therefore the claim is frivolous.

50. I have considered the two applications, the affidavits in support and/or opposition, the arguments advanced and the submissions tendered, and I find that the following issues have arisen for determination;-

(a) Whether the 1st Defendant/Applicant's application dated 14th December 2018 has been spent;

(b) Whether the 4th nominal Defendant has the locus standi to file and prosecute the application dated 4th February 2019;

(c) *Whether the orders made on 18th May 2016 and clarified on 24th May 2016 were interim orders or final orders;*

(d) *Whether the orders in (c) above should be clarified, stayed, varied and/or discharged; and*

(e) *Who should bear the costs of the application?*

51. In that regard I note that the application dated 14th December 2018, was seeking for two substantive orders under paragraph (2) and (3) as stated therein. The Respondent has conceded to prayer (2) thereof though conditionally. In my considered opinion, that prayer has been spent. The third prayer seeks clarification of the subject orders and will be dealt with alongside the prayers sought for in the application dated 4th February 2019.

52. On the issue of whether the 2nd Applicant has locus standi or not, it suffices to note that, it seeks under prayer (2) of its application to be granted leave to be enjoined in this matter as an interested party for the limited purpose of prosecuting this application. This prayer is informed by the factual background of this matter. That the 2nd Applicant was initially named in these proceedings as a 2nd Plaintiff. Subsequently, on 7th April 2016, it filed a notice of motion application dated 6th April 2016, seeking for orders inter alia that, the court strikes it out from the Plaint dated 30th March 2016 and filed in court on 31st March 2019.

53. The application was heard inter-parties whereupon, the court vide a ruling dated and delivered on 16th February 2017, struck out it from plaint/suit. Hence the leave sought to be enjoined as aforesaid. The reasons informing the prayer for leave are stated to be that, as a result of the subsequent events detailed herein, that occurred after the impugned orders were issued the operations of the company have been prejudiced and therefore it needs to be heard on the same. In my considered opinion, the prayer for leave has been overtaken by events or is spent, as the application has already been heard inter parties, therefore by conduct of the parties, that prayer has been granted and the Respondent concedes to the same in their submissions.

54. However, the other issue closely related to this issue of joinder is the issue of, lack of pleadings by the2nd Applicant. This issue has generated other related issues inter alia; as to the role of the role of that party in this matter and who is the proper Plaintiff in this matter as between the Respondent and the 4th nominal Defendant. Having considered the arguments advanced on these issues, and taking into account the pleadings in the plaint herein, it is evident that, the Plaintiff intends to prosecute this suit as a derivative suit, hence on behalf and for the benefit of the 4th Nominal Defendant.

55. The question that arises then is whether, in the circumstances, the 4th nominal Defendant can file pleadings different from the pleadings on record? In an ideal situation, the interest of the 4th Nominal Defendant should be pursued by the Respondent. That is not the case in this matter. Be that as it were, to put this matter in perspective, one has to consider the informing factors that led to the 2nd Applicant filing the subject application. It is clear is that; the dispute between the four directors herein has spilled to the operation of the 4th Nominal Defendant Bank accounts.

56. Hence the prayer for an order to vary, set aside and discharge the orders of 18th May 2016. In this regard, several issues have been raised as follows;

(a) Whether those orders were interim or final;

(b) Whether they were issued against the 4th nominal Defendant or the 1st to 3rd Defendants only;

(c) If they were not issued against the 4th nominal Defendant, whether it can apply to set them aside, vary and/or discharge with;

(d) whether they have expired by virtue of the provisions of Order 40 Rule 6 of the Civil Procedure Rules;

57. On whether the parties herein were heard on the subject application that gave rise to the impugned orders and/or whether those orders were interim or final, I note from the ruling that the parties were heard as follows, the Learned Counsel Ahmednassir Abdullahi SC, is quoted under paragraph (8) of the ruling as having addressed the court on behalf of the Plaintiff/Applicant while, the Learned Counsel Mr. Kemboy is quoted under paragraph (9) as making a disputed appearance for the 2nd Plaintiff in opposing the application. At paragraph (10) the Learned Counsel M/s. Jan Mohammed is indicated to have appeared for the 1st Defendant and opposed the application, the Learned Counsels Mr. Sagana appeared for the 2nd Defendant and opposed the application, while Mr. Aden Daudi appeared for the 3rd Defendant and opposed the application. Therefore it is evident that all the parties were present including the 4th nominal Defendant before the impugned orders were granted.

58. At paragraph (14) of the ruling, the court states as follows;

> *"further the current application dated 5th May 2016 seeks to have this court look afresh at the application dated 30th March 2016 without the historical baggage aforesaid. I am therefore now ready to apply my mind to the application and base my decision purely on the merits of the case for interim orders and bearing in mind that the Respondents are yet to respond or reply to the application dated 5th May 2016"*

59. It is therefore clear that, at the time the application was considered, the opposing parties had not responded to the same and the court was conscious of that fact. At paragraph (22) of the ruling, the court states as follows;

> *"However, what I do know having read the application is that the 1st Plaintiff's cry for justice from this court is audible and I am satisfied that the 1st Plaintiff's interests in the 2nd Plaintiff Company, and those interest which would be proven to have been held in trust for him by his co-shareholders, require an interim measure of protection as the application progresses to inter-parties stage. The difficulty this court has however, is how to frame that protection given that the orders sought are so extensive, and could also involve request of injunctive orders upon properties whose ownership by the 1st Plaintiff/Applicant would be at best speculative at this stage."*

60. It is thus clear that the orders were granted at an interlocutory stage pending the hearing of the application inter parties. Be that as it were, the subject order that has given rise to the current application was issued under paragraph 24(c) in the following terms;

> *"that an order of temporary injunction hereby issues restraining the Defendants jointly and severally from being the sole/only signatories to all and any of the Kenya Shilling Bank accounts and America dollar accounts held by the 2nd Plaintiff with Commercial Bank of Africa (CBK) in any of its branches, or with any other bank and further that all such bank accounts be operated with the 1st Plaintiff/as an alternate co-signatory with the other Defendants except that no transaction will take place in any of these accounts without knowledge of the 1st Plaintiff/Applicant."*

61. That order was issued against the Defendants who at the particular time were 1st to 3rd Defendants. As such the order was not directed to the 4th Nominal Defendant. It is understandable in that, all that it did was to make the Plaintiff/Respondent an alternate co-signatory with the other Defendants to all bank accounts held by the 4th Nominal Defendant and to be notified of any transactions taking place in those accounts. It does appear that the interpretation of these orders was a challenge to the parties whereupon they sought the court's clarification thereof and on 24th May 2016, the court clarified the orders and stated as follows;

> *"to clarify my said orders, whereof I meant is that, all the four shareholders if they so wish shall be signatories to the bank accounts including the Plaintiff*
>
> *Either all the four signatories can sign the cheques together, or a given number of the four can do that. However, where the Plaintiff is not one of the 4 given signatories on account that he is not available to execute a cheque or on account of the minimum number of signatories has been secured, the Plaintiff shall nonetheless be made aware of any and every transaction to which his signature is not appended."*

62. The 1st Defendant/Applicant has sought for the court's interpretation of the understanding of these orders and in particular, who was to notify the Plaintiff/Respondent of the transactions on the account. It is noteworthy that, in the normal circumstances, and practice of banking the only party entitled to the bank statements is the customer, In this case, the 4th Nominal Defendant. This is informed by the fact that, the relationship between the bank and customer is founded on the duty of confidentiality. A bank has a general duty to keep in confidence what it knows about a customer's affair. Failure to do so, will give rise to a claim of breach of contract. The classic case on this subject is the case of; *Tournier vs National Provincial and Union Bank of England 1924.* The bank can only disclose the information under four major exceptions as follows;-

(a Disclosure under compulsion of the law;

(b) Disclosure in the public's interest;

(c) Disclosure in the bank's interest; and

(d) Express of implied consent of the customer

63. In that regard, the bank can only release the bank statements and/or any other documents to the registered office of the company where then the Plaintiff/Respondent would be able to access information or be made aware of any and every transaction to which his signature is not appended. However, as observed by the court, and it is evident in this matter, based on the affidavits sworn by the parties, there is bad blood between the Plaintiff/Respondent and the 1st and 3rd Defendants to the extent that, the Plaintiff/Respondent is alleged not to respond to the notices calling for the meeting of board of directors and does not visit the 4th Nominal Defendant's premises. However, he alleges that, he was not allowed access when he visited.

64. It is therefore clear that as the order stands the parties are unlikely to comply with it unless the court intervenes. The correspondences that have been displayed by the parties addressed to the Commercial Bank of Africa, which led to the closure of the bank accounts and threatens the closure of the alternative account opened at the I & M Bank are not in the interest of the 4th Nominal Defendant/Company.

65. From the content of the letter dated 18th September 2018, written by the Plaintiff/Respondent's lawyer, it is clear that the Plaintiff/Respondent is aggrieved by the fact that the bank is disobeying the subject court order by colluding with the Defendants and facilitating the wiring of monies out of the 4th nominal Defendant's account to Amazon International FZE. The letter further seeks that the Bank accounts for any money that may have been transferred and refunds the same immediately and provide certified copies of payment slips and invoices to the Plaintiff/Respondent. Obviously, this demand goes to the operation of the bank account of the 4th Nominal Defendant.

66. The question that arises therefore is whether, the subject impugned transactions if at all they took place were brought to the knowledge of the Plaintiff/Respondent in the absence of his signature on any instrument that may have facilitated the transfer If indeed the transactions took place, which remains an allegation subject to proof and the Plaintiff/Respondent was not aware, then they would be in breach of the court order issued on 18th and clarified on 24th May 2016.

67. Assuming there is breach of the order, what cause of action then was available to the Plaintiff/Respondent. Was it to write to the bank and make the demand, as indicated in the subject letter, or approach the court under contempt proceedings. In my considered opinion, the only way the court would have intervened in the alleged disobedience of the court order (if any), would have been through a formal application of contempt proceedings or otherwise. The subsequent events that followed after this letter are unfortunate and should not have occurred.

68. In the same vein, if the 2nd and 3rd Defendants allege that the Plaintiff/Respondent is weaponizing the orders to the detriment of the company, if they felt that the Plaintiff/Respondent was in breach thereof, then they should have approached the court as did the 1st Defendant/Applicant and sought for the court's intervention.

69. Before I around up on this issue, the Defendants have argued that, even then, the court orders that were given have expired. To revert back to the said orders, I find that though they were given at an interlocutory stage, none of the parties and in particular the Defendants who had not filed response to the application moved the court thereafter to canvass the application to finality. The orders were issued in cognizance of the fact that, that there were several bank accounts allegedly being operated, by the2st to 3rd Defendants without the Plaintiff/Respondent's knowledge, it was necessary to make the Plaintiff/Respondent a signatory to the accounts. In my view the orders cannot have expired taking into account the purpose for which the orders were given. Even then, it is argued that the said orders are a subject of an appeal in the court of Appeal.

70. The parties have delved into many other issues that includes inter alia, money laundering activities, interference in the internal management of the company, the fact that there is no prayer in the application by the 2nd Applicant for the opening of a bank and that the court does not have power to grant the orders sought as it will amount on sitting on appeal on a decision of a court of concurrent jurisdiction. If the court were to delve into some of these issues, in particular the issue of money laundering, it will go into the substance of the main suit.

71. To conclude this matter, I find as follows;

(a) The suit herein is filed for the benefit of the 4th Nominal Defendant as envisaged under Section 238 and 239 of the Companies Act;

(b) Indeed no orders were made against the company on 18th May 2016 and therefore generally the company cannot seek to set aside the subject orders;

(c) Although both the Defendants and the Respondent allege that either party has breached the subject orders, other than the 1st Defendant who has sought the court's intervention, the others have not and therefore the court cannot grant what has not been sought for;

(d) *The subject orders have been existence for over three (3) years and it does appear what has caused the dispute between the parties is the alleged illegal activities being transacted through the bank accounts*.

72. In view of the fact that, the Plaintiff/Respondent has conceded to signing of the necessary documents to facilitate the opening and operations of the 4th Nominal Defendant's bank accounts, in my considered opinion it will serve the interest and the concerns of the 4th Nominal Defendant. To discharge the alleged orders, would be a recipe for anarchy and defeat the purpose for which they were granted.

73. However, the Plaintiff/Respondent should be allowed to access the company premises and have access to any bank documents that would have been signed and/or transacted by the co-directors/shareholders without his knowledge. No documents will leave the company's premises and/or served outside the premises. If the Plaintiff/Respondent is not allowed access, then he should move the court for the

necessary orders to enable him access the premises.

74. In that regard, I decline to grant prayer (4) of the notice of motion application dated 4th February 2019, as prayed and allow prayer (2) of the notice of motion application dated 14th December 2018 unconditionally. Finally, if the parties do not co-operate in execution of the court order, then the court will have no choice but vary the same to make all the four directors mandatory signatories to the account which is unlikely to serve the interest of the parties taking into account the bad blood between the directors.

75. It should also be noted that, the issues arising here are informed by the delay in prosecuting the original application that was filed alongside the main plaint. The parties should embark on the prosecution of the same expeditiously. The orders on costs will abide the outcome of the main matter.

76. Those are the orders of the court.

Dated, delivered and signed in an open court this 3rd day of October 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Ahmednassir SC & Ms. Ngugi for the Plaintiff/Respondent

Ms. Jan Mohamed for the 1st Defendant/Applicant

Mr. Biriq for the 2nd Defendant

Mr. Wanjohi & Mr. Mohamed for the 3rd Defendant

Ms. Okonji for the 4th Defendant/Applicant

Ms. Onyango for the Interested party

Dennis -Court Assistant