



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 197 OF 2017

YUSSUF ABDI ADAN.....PLAINTIFF

VERSUS

HUSSEIN AHMED FARAH.....1ST DEFENDANT

SAFARILINK AVIATION LIMITED.....2ND DEFENDANT

BLUE BIRD AVIATION LIMITED.....3RD DEFENDANT

RULING

[1] The Plaintiff herein, **Yussuf Abdi Adan**, filed this suit on **9 May 2017** against the three Defendants, **Hussein Ahmed Farah, Safarilink Aviation Limited** and **Blue Bird Aviation Limited**, seeking legal redress in respect of what he alleged to be fraudulent and inequitable acts on the part of the 1st and 2nd Defendants, in collusion with other directors of the 3rd Defendant; which according to him are calculated to systematically strip away assets of the 3rd Defendant. He alleged breach of fiduciary duties on the part of the 1st Defendant, and the particulars thereof were provided in Paragraph 19 of the Plaintiff. Accordingly, the Plaintiff prayed for Judgment against the 1st and 2nd Defendants jointly and severally for:

[a] A permanent order of injunction restraining the Defendants, whether by themselves, their servants, agents and or employees, from disposing, selling, charging, mortgaging, transferring or in any manner howsoever interfering or dealing with 5,640 shares of the 2nd Defendant held in the 1st Defendant's name;

[b] A permanent order of injunction restraining the 1st and 2nd Defendants from disposing off, selling, charging, transferring, leasing, mortgaging or in any other way whatsoever dealing with **Aircraft Registration No. 5Y-SLD** to the detriment of the 3rd Defendant;

[c] An Order directed at and compelling the 1st and 2nd Defendants to render a true and accurate record/account of all dealings between them including rendering accurate accounts of all transactions, payments, dividends and all monies whatsoever and howsoever paid to the 1st Defendant by the 2nd Defendant;

[d] An Order directed at the 1st and 2nd Defendants to render a true and accurate record of all payments made to the 2nd Defendant from the use of the **Aircraft Registration No. 5Y-SLD**;

[e] An Order directed at the 1st and 2nd Defendants compelling them to pay the 3rd Defendant all monies whatsoever that they paid to the 1st Defendant;

[f] A declaration that the 5,640 shares held by the 1st Defendant in the 2nd Defendant Company are held in trust for the ultimate benefit of the 3rd Defendant;

[g] An Order directed at the 2nd Defendant to transfer **Aircraft Registration No. 5Y-SLD** to the 3rd Defendant;

[i] A permanent Order of injunction restraining the 2nd Defendant from making any payment of whatsoever nature either in the form of dividends, profits and or monies to the 1st Defendant;

[j] General Damages for the tort of conversion of **Aircraft Registration No. 5Y-SLD** belonging to the 3rd Defendant;

[k] Any other reliefs as this Court deems fit;

[l] Costs of the suit.

[2] Contemporaneously, the Plaintiff filed, under a Certificate of Urgency, the Notice of Motion dated **8 May 2017** seeking, inter alia, leave of the Court to continue this suit as a Derivative Suit on behalf of and for the benefit of the 3rd Defendant. In response to the suit and the interlocutory application filed therewith, the Defendants filed more or less similar applications, all under Certificate or Urgency, for orders that the entire suit be struck out for offending the *Sub Judice* Rule as expressed in **Section 6** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, and for being an abuse of the process of the Court in terms of **Order 2 Rule 15** of the **Civil Procedure Rules**.

[3] The first of the three applications filed herein is the Notice of Motion dated **24 May 2017**. It was filed herein by the firm of **M/s Oraro & Company Advocates**, on the instructions of the 3rd Defendant. That application was filed under **Section 6** of the **Civil Procedure Act, Order 2 Rule 15(b)** and **(d)** of the **Civil Procedure Rules, 2010**, for the following Orders:

[a] Spent

[b] That the Plaintiff's suit filed on **8 May 2017** be struck out with costs to the 3rd Defendant on an indemnity basis;

[c] That the costs of and occasioned by the application be provided for.

[4] The application, which was supported by the affidavit of **Hussein Unshur Mohamed**, was premised on the grounds that the matters in issue herein, namely, whether the Plaintiff has been unlawfully excluded from the management of the 3rd Defendant as particularized in the Plaintiff; whether the Plaintiff's investigation has unearthed an elaborate scheme to swindle the Plaintiff or aircraft without any consideration and for the sole benefit of the 1st Defendant; and whether the Plaintiff's fellow directors and shareholders have used and/or will use their majority to prevent proceedings being lodged by the 3rd Defendant for appropriate relief, thereby entitling the Plaintiff to institute a derivative action as sought. Accordingly, it was contended that these are issues that are directly in issue in **High Court Civil Suit No. 100 of 2016: Yusuf Abdi Adan vs. Hussein Ahmed Farah, Hussein Unshur Mohammed and Mohammed Abdikadir Adan** (the 1st Suit), also commenced by the Plaintiff as a derivative suit; and which is currently pending before the Court for hearing and determination. It was therefore averred that the 3rd Defendant ought not to be made to incur unnecessary legal expenses in defending the suit herein, when there is in existence a prior suit, and an appropriate forum for ventilation the very issues that concern the Plaintiff herein. Thus, it was the contention of the 3rd Defendant that this suit was instituted in abuse of the process of the Court.

[5] The second application was filed by the 2nd Defendant through the law firm of **Wandabwa Advocates** on **31 May 2017**. It was brought under **Sections 3, 3A and 63(e)** of the **Civil Procedure Act, Order 15 Rule 1(a), (b) and (d)** as well as **Order 40 Rule 7** of the **Civil Procedure Rules, 2010**, for orders that:

[a] Spent

[b] Spent

[c] The Court be pleased to set aside Prayers 2 and 5 of the *ex parte* Order granted herein on **9 May 2017**; and that the Orders be varied as the Court deems just in the circumstances of this case;

[d] The Court be pleased to strike out this suit on the grounds that:

[i] No cause of action, or reasonable cause of action lies against the 2nd Defendant herein;

[ii] It is scandalous, frivolous and vexatious;

[iii] The same is an abuse of process.

[e] Judgment be accordingly entered for the 2nd Defendant against the Plaintiff;

[f] The costs of the application be provided for.

[6] The second application was founded on the grounds that Order No. 2, restraining any dealing with the Aircraft, has been overtaken by events given that the subject Aircraft is held as security by **I&M Bank Limited**; and that the Plaintiff totally failed to disclose to, and/or concealed from the Court, that Order No. 2 had also been sought in **HCCC No. 100 of 2016** and expressly denied. With regard to Order No. 5, to the extent that it restrains the 2nd Defendant from making any changes in its shareholding, affected persons are not party to this suit. It was further contended that to the extent that the said Order restrains the 2nd Defendant from dealing in its assets, it is unjustly wide in its scope and will needlessly and adversely affect the 2nd Defendant's commercial operations, yet there is no valid cause of action against it.

[7] It was further posited that, the 3rd Defendant having been struck out as a Plaintiff in **HCCC No. 100 of 2016**, this suit is meant to re-

litigate issues regarding the 3rd Defendant in abuse of process. It was further contended that it had not been alleged herein that the 2nd Defendant has ever been involved in the operations of the 3rd Defendant; or that it has acted in concert with the members of the 3rd Defendant in the running of the affairs of the 3rd Defendant on the basis of which a derivative suit can lie; and further that as a third party, the 2nd Defendant is not, in law, obliged to interrogate and confirm the authority of those holding themselves out as having the 3rd Defendant's mandate to transact on its behalf. Thus, it was the assertion of the 2nd Defendant that whereas the Plaintiff's remedy in respect of the cause of action pleaded herein lies in a derivative suit against the 1st and 3rd Defendant, that remedy has already been sought in **HCCC No. 100 of 2016**; and therefore that there is no basis for the continuation of this suit as a derivative suit. The 2nd Defendant's application is supported by the affidavit of **John Stuart Buckley** sworn on **30 May 2017** and annexed thereto.

[8] The third application was filed by **M/s Archer & Wilcock Advocates** on behalf of the 1st Defendant on **2 June 2017**. It was filed pursuant to **Section 1A, 1B, 3A & 7** of the **Civil Procedure Act**, and **Order 2 Rule 15(b) and (d)** of the **Civil Procedure Rules**, seeking the issuance of the following orders:

[a] Spent

[b] That the interim orders issued on the **9 May 2017** and subsequently extended on **23 May 2017** be discharged forthwith;

[c] That the suit against the 1st Defendant be struck out;

[d] That the costs of this application and the suit be awarded to the 1st Defendant.

[9] The third application was hinged on the affidavit of **Hussein Ahmed Farah** annexed thereto and on the grounds, inter alia, that the Plaintiff has filed a previous suit, namely **HCCC No. 100 of 2016** in which the issues in dispute are similar; and that the Plaintiff is seeking interim orders against the 1st Defendant which are substantially the same orders being sought in **HCCC No. 100 of 2016**. It was further averred that the Plaintiff failed to disclose to this Court the orders made in **HCCC No. 100 of 2016** and therefore that the suit herein is an abuse of the process of the Court.

[10] A perusal of the court record shows that, in view of the cross-cutting nature of the issues raised by the applications, directions were given herein on **7 November 2017**, that the applications be heard contemporaneously with **HCCC No. 182 of 2017: Yussuf Abdi Aden vs. Mohamed Abdikadir Adan & 4 Others**; wherein similar applications were filed by the 1st Defendant therein, **Mohammed Abdikadir Adan** and the 5th Defendant therein, **Blue Bird Aviation Limited**. Additionally, the court record also shows that Plaintiff and the 2nd Defendant entered into a Consent as set out in the Consent Letter dated **17 August 2017**, in the following terms, which was adopted as an Order of the Court on **7 November 2017**:

"Prayers No. 5 of the ex parte Order entered herein on the 9th of May 2017 be varied to exclude its application to the other shareholders of the 2nd Defendant namely; ALS Ltd, Anu Vohora, John Buckley, Deltacom Integrated, Mozart Africa, Mr&Mrs Round-Turner, Fatma Mwendwa."

[11] In response to the five applications, the Plaintiff filed Grounds of Opposition herein, pursuant to **Order 51 Rule 14 of the Civil Procedure Rules**, contending that the applications are misconceived and are a clear misapprehension of the applicable law. It was the Plaintiff's assertion that an application to strike out a suit ought to be based on pleadings filed before the Court; and that the Defendants have failed, neglected and/or refused to file defences in the instant matter. It was further averred that the issues in dispute in the instant matter are not directly in issue between the same parties or between parties under whom they or any of them claim, litigating under the same title, in any pending proceeding before the Court, as the 2nd Defendant is not a party in **HCCC No. 100 of 2016**; and therefore that **Section 6** of the **Civil Procedure Act** is inapplicable in the particular circumstances of this suit.

[12] It was further contended in the Plaintiff's Grounds of Opposition that the principles of *res judicata* are inapplicable to the particular circumstances of this matter, as there has been no final determination by any court of competent jurisdiction of any of the issues pleaded in the Plaintiff's dated **8 May 2017**; and that the cause of action pleaded in the said Plaintiff's and the reliefs sought therein are significantly different from what has been pleaded in **HCCC No. 100 of 2016**. It was further asserted that since the Plaintiff herein has disclosed the existence of **HCCC No. 100 of 2016**, the only conclusion for the Court to draw is that the Defendant's applications have been brought with gross *mala fides*; and are solely aimed and designed at suppressing the Plaintiff's constitutional right to have the dispute raised in the instant matter heard and determined on its merits.

[13] Directions having been given on the **8 June 2017** for the canvassing of the applications by way of written submissions by the **Hon. Nzioka, J.** who was previously handling this matter, the 3rd Defendant filed its written submissions on **16 October 2017** together with a List and Bundle of Authorities dated **13 October 2017**. The 2nd Defendant thereafter filed Skeleton Submissions on **7 November 2017** together with a List and Bundle of Authorities dated **16 October 2017**. The Plaintiff's List and Bundle of Authorities dated **30 November 2017** were subsequently filed herein **1 December 2017**; where after Learned Counsel were given an opportunity to make their oral submissions in respect of the five applications.

[14] **Ms. Janmohamed**, Learned Counsel for the 1st Defendant herein adopted the written submissions filed by the 2nd and 3rd Defendants in this matter. She also relied on the Affidavit filed by the 1st Defendant and the annexures thereto in urging the Court to discharge the interim orders made herein. She relied on the Ruling delivered by **Hon. Ogola, J.** on **18 May 2016** in **HCCC No. 100 of 2016**, which was also exhibited at pages 104-129 of the documents annexed to the 1st Defendant's application, and pages 1-26 of the 2nd Defendant's application, wherein the Learned Judge declined certain Prayers under Prayer 3 of the Plaintiff's application in that matter. It was therefore her submission that it was in abuse of process that the Plaintiff thereafter ignored those orders and proceeded to file a similar application in this suit, and without drawing the Court's attention to, or making a full disclosure in connection with that earlier suit or the Ruling

forementioned. **Ms. Janmohamed** postulated that had the Ruling of **Ogola, J.** been brought to the attention of the Court, probably the Court would not have granted the *ex parte* orders of **9 May 2017**. She accordingly prayed for those orders to be discharged on the ground of non-disclosure.

[15] **Ms. Janmohamed** further took issue with the fact that the same relief being pursued herein is the same relief being pursued in **HCCC No. 100 of 2016**. She drew the Court's attention to Paragraphs 11-17 of the Plaintiff, which she argued, contain the exact same matters adverted to in **HCCC No. 100 of 2016**. She urged the Court not to entertain such piecemeal litigation contending that such litigation amount to an abuse of the process of the Court, and therefore ought to be struck out without further ado.

[16] **Mr. Wandabwa's** submissions, on behalf of the 2nd Defendant were in similar lines as the 1st Defendant's. He urged for the setting aside of the *ex parte* orders of **9 May 2017** on the ground that the Aircraft having been charged to **I&M Bank**, the Order has been overtaken by events. He relied on the document annexed at Page 223 of the 2nd Defendant's application. He similarly argued that there was material non-disclosure of the fact that these very orders were denied by **Ogola, J.** in **HCCC No. 100 of 2016** in respect of the shares of the 2nd Defendant. Counsel further attacked the *ex parte* Orders of **9 May 2017** for being too wide in scope and therefore having the adverse effect of needlessly encumbering the 2nd Defendant's business.

[17] The other line of argument taken by Counsel for the 2nd Defendant was that, even assuming that it obtained the Aircraft from the 3rd Defendant without the approval of the Directors and without due compliance with the 3rd Defendant's internal mechanisms for disposal, the **Turquand Rule** would dictate that, as a third party, it was under no obligation to investigate whether or not the 3rd Defendant's internal procedures were complied with in connection with the disposal of the aircraft. He relied on **Sections 33-35 and 135** of the repealed **Companies Act**, which was then applicable. Lastly, **Mr. Wandabwa** echoed the argument by **Ms. Janmohamed** that the same issues that were pleaded in **HCCC No. 100 of 2016** have been pleaded herein; and therefore that this suit was entirely uncalled for.

[18] On behalf of the 3rd Defendant, who is also the 5th Defendant in **HCCC No. 182 of 2017**, **Mr. Amoko** relied on the written submissions filed by him both in this matter and in **HCCC No. 182 of 2017**. His main argument was that, whereas the Plaintiff has approached the Court herein with a derivative suit against his fellow directors, there is an inevitable overlap in these suits with **HCCC No. 100 of 2016**. He cited the Court of Appeal case of **Parag Bhagwanjibhai Savani vs. Jitu Tribhovanshai Savani & 2 Others, Civil Appeal No. 98 of 2016** in urging the Court to have this suit struck out with costs.

[19] **Mr. Ngacha**, Learned Counsel for the 1st Defendant in **HCCC No. 182 of 2017** relied on the Supporting Affidavit sworn by the 1st Defendant in **HCCC No. 182 of 2017** at page 8-17 of the Notice of Motion dated **11 May 2017** as well as his written submissions filed on behalf of the 1st Defendant in **HCCC No. 182 of 2017**. That application sought orders that the interim orders granted by **Hon. Onguto, J.** on **4 May 2017** be set aside on the grounds of non-disclosure of material facts. **Mr. Ngacha** similarly adopted the submissions of **Ms. Janmohamed**, and reiterated the arguments that the Plaintiff made an application in **HCCC No. 100 of 2016** and that the Court declined to grant prayers 3(h)(i) and (f) thereof. He took issue with the fact that the Plaintiff thereafter chose to file this case as well as **HCCC No. 182 of 2017**, seeking the same prayers without full disclosure. He similarly relied on the Court of Appeal Case of **Parag Bhagwanjibhai Savani vs. Jitu Tribhovanshai Savani & 2 Others, Civil Appeal No. 98 of 2016** that was cited by **Mr. Amoko** and urged the Court to strike out this suit as it simply serves to increase the costs of litigation. He added that the Plaintiff stands to suffer no prejudice whatsoever granted that his entire cause of action is justiciable in **HCCC No. 100 of 2016**. **Mr. Ngacha** also urged the Court to note that, since the Plaintiff opted to file Grounds of Opposition in response to the Defendant's applications, the averments of fact in the respective Supporting Affidavits remains uncontroverted.

[20] **Ms. Kirimi**, Learned Counsel for the 2nd, 3rd and 4th Defendants in **HCCC No. 182 of 2017** associated herself with the above submissions in addition to the Replying Affidavit sworn by **Ahmed Jibril**, the Executive Chairman of the 2nd Defendant and a Director of the 3rd and 4th Defendants and filed in **HCCC No. 182 of 2017**. In her submission, there is no self-standing claim apart from **HCCC No. 100 of 2016**; and that the filing of **HCCC No. 182 of 2017** was therefore unnecessary. She urged the Court to discharge the interim orders which the Plaintiff is currently enjoying, contending that the same are adverse to the interests of the 2nd, 3rd and 4th Defendants.

[21] On his part, **Mr. Ahmednasir, SC**, argued that all the five applications are frivolous and ought therefore to be dismissed accordingly. His submissions in respect of the first set of two applications filed on behalf of the 3rd Defendant herein, who is also the 5th Defendant in **HCCC No. 182 of 2017**, were that **Hussein Unshur Mohamed**, who swore the Supporting Affidavit in support of those applications, is neither a Defendant herein nor in **HCCC No. 182 of 2017**. **Mr. Ahmednasir** further argued that there was no proof by the said **Hussein Unshur Mohamed** that he was authorized by the 3rd Defendant's directors to make the depositions that he made herein and in **HCCC No. 182 of 2017** on its behalf. It was similarly argued that there was no authority by the 3rd Defendant herein sanctioning the filing of the two applications or to instructing the law firm of **Oraro & Company Advocates** to act for the Company as the 3rd Defendant herein and the 5th Defendant in **HCCC No. 182 of 2017**. Reliance was placed, in this regard, on the case of **Bugerere Coffee Growers Ltd vs. Sebaduka & Another [1970] EA 147; Affordable Homes Africa Ltd vs. Henderson & 2 Others [2004] eKLR** and **Kenya Commercial Bank vs. Stage Coach Management Ltd [2014] eKLR**.

[22] It was further the contention of **Mr. Ahmednasir** that the arguments that the Plaintiff herein and in **HCCC No. 182 of 2017** are incompetent from the standpoint of **Order 2 Rule 15** of the **Civil Procedure Rules** are untenable, for the reason that no pleadings in the form of Defences have been filed by the Defendants in these matters. According to him, since the only known way in which a party can raise a cause of action or defence is through a pleading, in the absence of the Defendant's Defences herein and in **HCCC No. 182 of 2017**, the Court is not in a position to judge whether or not the Plaintiff's cause of action in the two suits is frivolous, vexatious or in abuse of the process of the Court. The cases of **Nairobi County Council vs. Thabiti Enterprises Ltd [1995-1998] 2 EA 231 (CAK) ; Sirongo ole Tukai vs. Francis arapMuge [2014] eKLR** and **Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2002] EA 385** were cited in support of the argument that a party cannot raise, in an affidavit, issues which have not been raised in the pleadings.

[23] It was further the submission of the Plaintiff that the effect of applications by the 3rd Defendant is that the Company is being made to

fight its own interest. In this connection **Mr. Ahmednasir** relied on the **Tatu City Ltd & 2 Others vs. Stephen Jennings and Others, HCCC No 46 of 2015** (annexed at page 33 of Plaintiff's Supplementary List and Bundle of Authorities) on the question as to whether a derivative suit can be terminated by the Board of Directors. As for the 2nd Defendant's application, it was the argument of **Mr. Ahmednasir** that it is a non-starter in view of the Consent Order that was made herein on **7 November 2017** between Counsels for the Plaintiff and the 2nd Defendant.

[24] Arising from the foregoing, it is evident that three issues arise which require determination *in limine*. The first is the question whether the two applications by the 3rd Defendant, one filed herein on **24 May 2017**, while the other application was filed in **HCCC No. 182 of 2017** on **16 May 2017**, are incompetent for want of authority, by way of a resolution of the Board of Directors the Company. As was pointed out by **Mr. Ahmednasir, SC**, there is no resolution exhibited herein by the 3rd Defendant authorizing **Hussein Unshur Mohamed** to depose to the facts set out in the affidavit filed in support of those applications; or to authorize the filing of the said applications. In the same vein, there is no resolution exhibited herein to authorize the appointment of the firm of **Oraro & Co. Advocates** to act for the 3rd Defendant, either herein or in **HCCC No. 182 of 2017**.

[25] Thus, on the authority of **Bugerere Coffee Growers Ltd vs. Sebaduka & Another [1970] EA 147**, Learned Counsel for the Plaintiff submitted that the applications are untenable for want of authority of the Defendant companies. In **the Bugerere Case** (supra) it was held thus:

"When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings."

[26] Similarly, in **Affordable Homes Africa Ltd vs. Henderson & 2 Others [2004] eKLR**, which was also relied on in support of the Plaintiff's submissions, it was held that:

"...this is basically a case of a company against one of its directors for the alleged breach of a fiduciary duty. The Directors owe their fiduciary duties to the company. In the event of any breach of those duties, therefore, the company and the company alone, is the only proper plaintiff that can sue to redress the wrong. This was the decision in the case of FOSS v. HARBOTTLE (1843) 2 Hare 461, one of the landmark cases in corporate management. As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty...It is common ground that in the instant suit, there was no authority from the Board of Directors to institute this suit...in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff."

[27] However, it is noteworthy that in both cases, the authority in issue revolved around the companies' sanctioning the commencement of the suit itself. In this case the 3rd Defendant has been dragged into the suit by the Plaintiff; and the applications in issue are in response to the issues raised in the Plaintiff's Plaint; and whereas **Order 4 Rule 1(4)** of the **Civil Procedure Rules** expressly makes specific mention of situations **"...where the Plaintiff is a corporation..."** there appears to be no indication, either in that provision or elsewhere in the Rules, that such a requirement is applicable to corporate defendants. No authority on this particular point was brought to my attention by the Learned Senior Counsel to support the argument that, a defendant company once sued, is obliged to file a resolution of the company authorizing the appointment of counsel or giving authority to any of its officers to swear any necessary affidavit or to file necessary interlocutory applications. Thus, I would reiterate the expressions of the Court of Appeal in **Saraf Limited v Augusto Arduin [2016] eKLR** thus:

"...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (see Solomon & Solomon [1897] AC 22 (H. L.)) Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law. It has always been the law that directors are the persons who have authority to act for the company but the majority of the members of the company are entitled to decide, even to overrule, the directors. In Shaw and Sons(Salford) v. Shaw [1935] 2 KB 113, Greer LJ reiterated that – *"if powers of management are vested in the directors, they and they alone can exercise these powers..."*.

He also observed what Solomon v. Solomon had much earlier held, namely, that –

"a company is an entity distinct from its shareholders and directors."

[28] Accordingly, in the Supporting Affidavit of **Hussein Unshur Mohammed** filed herein on **24 May 2017**, he averred that he is a Director and Shareholder of the 3rd Defendant and was conversant with the matters pertaining to this suit. Similarly, **John Stuart Buckley** averred in his affidavit sworn on **30 May 2017** in support of the 2nd Defendant's application, that he is the Managing Director of the 2nd Defendant; that he is familiar with the matters the subject of the application, and that he had been duly authorized by the 2nd Defendant to depose to the matters set out in his affidavit. That, to my mind, would suffice for purposes of the Notice of Motion. The question as to whether or not the two directors were indeed so authorized by their respective companies would not only involve an inquiry as to the facts, but would also be an abrogation of **the Indoor Management Rule** as explicated in **Royal British Bank vs. Turquand [1843-60] All ER 435**. It is instructive that the Plaintiff opted, as it was entitled to, to rely on Grounds of Opposition and therefore the facts deposed to by **Hussein Unshur Mohammed** on behalf of the 3rd Defendant are entirely uncontroverted.

[29] In any event, the Bugerere Case has since been overruled and a different path charted by the Court of Appeal thus, in the case of Wanyiri Kihoro vs. Konahauthi Ltd [2017] eKLR:

The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

However, the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court in the case of Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000 where the Court endorsed the decision of the Court of Appeal that the decision in the *Bugerere* case was no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998. The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

Thus, I take the view that the argument by Mr. Ahmednasir that a resolution by the Directors or Shareholders of Blue Bird Aviation Limited was a pre-requisite for the filing of the 2nd and 3rd Defendant's Notices of Motion herein, and the 5th Defendant's similar application in HCCC No. 182 of 2017, is untenable.

[30] The second preliminary point raised by the Plaintiff is whether the Consent Order that was recorded on 7 November 2017 fully disposed of the 2nd Defendant's application. As has been stated herein above, the 2nd Defendant's application prayed not only for the setting aside or discharge of Prayers 2 and 5 of the *ex parte* Order granted herein on 9 May 2017, but also for the striking out this suit on the grounds that:

[a] No cause of action, or reasonable cause of action lies against the 2nd Defendant herein;

[b] It is scandalous, frivolous and vexatious;

[c] The same is an abuse of process.

[31] It is manifest therefore that the Consent Order, which was limited to the variation of Order No. 5 of the *ex parte* Order issued herein on 10 May 2017 to exclude the third party shareholders of the 2nd Defendant, did not effectually compromise the said application. There remains to be determined the residual question, which is a cross-cutting issue herein and in HCCC No. 182 of 2017, of whether the Plaintiff's suit ought to be struck out pursuant **Order 2 Rule 15** of the Civil Procedure Rules. It is similarly manifest that, *vide* the *ex parte* Order of 9 May 2017, the Court granted prayers 4(a), (b), (c) and (d); hence Orders 2, 3 and 4 of the Order issued herein on 10 May 2017. It is manifest therefore that that Order was not confined to the third party shareholders that were affected by Order No. 5 aforementioned.

[32] The third preliminary issue has to do with the contention by Learned Counsel for the Defendants that the suit is *res judicata* in the light of the existence of HCCC No. 100 of 2016 and the Orders made therein by **Hon. Ogola, J.** in the Ruling dated 18 May 2017. In this regard, it was the argument of **Mr. Ngacha**, which argument was echoed by the other Learned Counsel for the Defendants, that, despite being fully aware of the Ruling delivered by **Mr. Ogola** after *inter partes* hearing, the Plaintiff ignored or opted not to seek to amend his Notice of Motion in HCCC No. 100 of 2016 so as to include the prayers to injunct the operations of the aircraft despite having made depositions in that regard in Paragraphs 50(a)-(m) and 51 of his Supporting Affidavit. It was further submitted that the Plaintiff failed to seek review of the Order of 18 May 2016, as he ought to have, to include prayers for such orders if the same were omitted in error, instead of proceeding to file fresh suits.

[33] Section 7 of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, does provide that:

“No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court.”

[34] In an explication of this provision the guiding principles in determining whether or not a matter is *res judicata* were restated in Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others [2010] eKLR thus:

[a] The matter in issue is identical in both suits.

[b] That the parties in the suit are substantially the same.

[c] There is concurrence of jurisdiction of the Court.

[d] That the subject matter is the same and finally,

[e] That there is a final determination as far as the previous decision is concerned.

[35] Whereas the subject matter in the three suits is largely the same; and whereas there is concurrence of jurisdiction of the Court, the parties are not the same. More importantly, there is no final determination in respect of the main suit. Accordingly, I would agree with **Mr. Ahmednasir** that the principle of *res judicata* is indeed inapplicable to the particular circumstances of this matter, as there has been no final determination by any court of competent jurisdiction on any of the issues pleaded in the Plaintiff's Notices of Motion filed in both suits, those applications are yet to be prosecuted; and therefore the Defendants are in effect jumping the gun as it were in raising their *res judicata* argument prematurely. More importantly, the fact that some of the parties in the three suits are different would automatically dispel any argument that the latter suits, or even the applications therein, are *res judicata*.

[36] In the light of the foregoing then, the issues for determination herein, as can be gleaned from the 5 applications are:

[a] Whether a good case for striking out the Plaintiff has been made out by the Defendants;

[b] Is the suit *Sub-judice*?

[c] Should the ex parte Orders of 9 May 2017 be discharged?

On Striking Out of the Plaintiff:

[37] Order 2 Rule 15 of the Civil Procedure Rules, provides that:

At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that:-

- a. ...
- b. **it is scandalous, frivolous or vexatious; or**
- c. **it may prejudice, embarrass or delay the fair trial of the action; or**
- d. **it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

[38] As to whether a good case has been made by the Defendant in terms of the provisions aforesaid, the case of **D.T Dobie & Company (Kenya) Limited Vs Muchina [1982] KLR 1**, sets out instructive applicable principles thus:

"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the Court. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral discovery tested by cross-examination in the ordinary way."

[39] All the five applications have been brought under **Order 2 Rule 15(1)(b) and (d)** of the **Civil Procedure Rules**; and although the 2nd Defendant's application is also expressed to have been brought under **Order 2 Rule 15(1)(a)**, I would overlook that provision for the reason that an affidavit was filed in support of the 2nd Defendant's application, in disregard of the edict in **Rule 15(2)** of the **Civil Procedure Rules**, that:

"No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made."

[40] As set out in the submissions made herein, the Defendants' arguments are hinged on the grounds that the Plaintiffs suits are scandalous, frivolous and vexatious; and that they are otherwise an abuse of the process of the Court. They took issue with the fact that the Plaintiff has opted to file, in instalments as it were, various suits against multiple parties at the same time in respect of the same subject matter. It was therefore submitted that, in the absence of any proof from the Plaintiff, it would be proper to surmise that the issues raised in the instant suit are a result of additional evidence that had arisen from the Plaintiff's investigations; which evidence was not available at the time the earlier suit, being **HCCC No. 100 of 2016**, was filed. The case of **Kivanga Estates Limited vs. National Bank of Kenya [2017] eKLR** was cited in support of the submission that a good case has been made out herein for the striking out of the Plaintiff.

[41] In the **Kivanga Estates Limited Case** (supra) the Court of Appeal had the following to say in elucidation of **Order 2 Rule 15(1)(b) and (d)** of the **Civil Procedure Rules**:

"...although none of the previous suits were determined on merit, the fact that they were abandoned before determination and fresh ones brought was in itself an abuse of the process of the court sufficient under Order 2 rule 15(1)(b) and (d) to justify striking out. The appellant also relied on rule 15(b), that the application was scandalous, frivolous and vexatious. A pleading is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and

raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action..."

[42] It is indubitable that the Plaintiff filed **HCCC No. 100 of 2016, HCCC No. 182 of 2017** as well as this case. Having perused the Plaints in all these files, it is evident that there are significant overlaps in the causes of action as pleaded and the prayers sought. The significant ones are as shown hereunder:

[a] In **HCCC No. 100 of 2017**, the Plaintiff sued **Hussein Ahmed Farah, Hussein Unshur Mohammed and Mohammed Abdikadir Adan** vide a Complaint dated **30 March 2016**. In paragraph 9 of that Complaint, it was expressly stated that the suit was brought on behalf of **Blue Bird Aviation Ltd** (then the 2nd Plaintiff until it was struck out by the Court's Ruling dated **16 February 2017**) for breaches of duty of care, conversion, theft, misappropriation, prejudice, abuse of office on the part of the Defendants and the recovery of all assets and properties bought by the Defendants using monies belonging to the 2nd Plaintiff by the Defendants without authority. In particular, the Plaintiff claimed specific sums of money as set out in Prayer 1; Permanent Injunction in respect of the immovable properties set out in Prayer 2 and shares as set out in Prayer 9. There are other prayers set out therein to do with accounts, inventory and the appointment of new management.

[b] In **HCCC No. 182 of 2017**, the Plaintiff sued **Mohammed Abdikadir Adan, 748 Air Services (K) Limited, 748 Air Services Barbados Limited, Rollscourt Investment Limited and Blue Bird Aviation Limited**. However the prayers are, in the main, the same. Prayers (a) to (d) are in connection with the parties' share portfolios and the need for accountability. Prayer (e) asks for a permanent injunction to restrain the 2nd and 3rd Defendants therein from disposing of any aircraft or real property to the detriment of the 5th Defendant, **Blue Bird Aviation Limited**.

[43] In paragraph 10 of the Complaint filed in **HCCC No. 100 of 2016** it was averred that:

"The 1st Plaintiff brings this suit as a derivative suit in which he seeks legal redress against the fraudulent, inequitable and total breach of trust and breach of fiduciary duty on the part of the Defendants against the 2nd Plaintiff company on the following grounds among others: (i) The Defendants don't and won't call any formal Board of Directors' meetings with a view to address their transgressions against the 2nd Plaintiff. They instead make decisions in informal and family like meetings that the three defendants hold, (ii) The Defendants are not just the majority shareholders (75%) of the 2nd Plaintiff Company but also exercise total and exclusive control over the management of the 2nd plaintiff company."

[44] The aforesaid paragraph was replicated in paragraphs 11 and 12 of the Complaint in **HCCC No. 182 of 2017** and paragraphs 6 and 7 of the Complaint herein. It is also noted the Aircraft that is the subject of this suit, **Dash 8-106, Model 31, Registration No. 5Y-SLD**, in respect of which an injunction has been sought, has also been mentioned in Paragraph 19 of the Complaint that is the subject of **HCCC No. 100 of 2016** as one of the properties of **Blue Bird Aviation Ltd** and comprise the properties the subject of Prayer (e) in the Complaint filed in **HCCC No. 182 of 2017**. Likewise, the 5640 shares of **Blue Bird Aviation Ltd** held in the 2nd Defendant, that were pleaded in Prayer 9 of the Complaint in **HCCC No. 100 of 2016**, are also the subject of Prayer (a) of the Complaint filed herein (in **HCCC No. 197 of 2017**).

[45] In the light of the foregoing commonalities, I am satisfied that the Defendants have demonstrated that the filing of this suit, as well as **HCCC No. 182 of 2017** was completely unwarranted; and that the suits have the effect of vexing the Defendants by inflicting on them unnecessary expense when there were extant prior proceedings undergoing due process before a court of concurrent jurisdiction. It is therefore immaterial that the parties are different if the subject matter is the same. The Plaintiff must be put to election as to which party to pursue, or otherwise opt for joinder. Indeed, in **Savani vs. Savani & 2 Others Civil Appeal No. 98 2016**, the Court of Appeal affirmed the position that it is an impermissible abuse of process for a party to file several suits over the same subject matter.

On the Subjudice Rule

[46] It is a peremptory requirement of **Section 6** of the **Civil Procedure Rules** that:

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

[47] Given my findings herein above, there is good reason to conclude that the subject matter herein is the same, or substantially the same as in **HCCC No. 100 of 2016** and **HCCC No. 182 of 2017** which were both filed prior to the filing of this suit. Thus, it is not far-fetched to surmise that there does exist the potential for conflict in the outcomes that may flow from the decisions of the concurrent courts handling the matters. Indeed, the mischief that is the object of **Section 6** of the **Civil Procedure Act**, as was well explicated by **Mabeya, J.** in **Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 Others [2012] eKLR** is:

"...a likelihood of two different courts adjudicating a similar matter, with similar issues between the same parties and yet arrive at different positions..."

[48] In the premises, to avoid embarrassment in the administration of justice, it would only be fitting to stay the latter suit. Thus, I would share the position taken by **Odunga, J.** in **Kiama Wangai vs. John Mugambi & Another [2012] eKLR** that:

"...where the Court finds that the suits in question fall within the four corners of section 6 aforesaid the Court has no discretion in the matter but has to stay the subsequent suit or suits..."

On whether the exparte Order of 9 May 2017 should be discharged on account of non-disclosure:

[49] As has been pointed out herein above, the Plaintiff filed, under a Certificate of Urgency, the Notice of Motion dated **8 May 2017** seeking orders, inter alia, that the Court be pleased to grant the following orders *ex parte*, in terms of prayer 4 of the application, pending the hearing and determination of the application *inter partes*:

[a] A temporary order of injunction restraining the 1st and 2nd Defendant whether by themselves and their servants, employees, agents and or proxies from selling, leasing, disposing or in any manner whatsoever from dealing with an aircraft namely **Dash 8- 106 Model 331, Registration Number 5Y-SLD**;

[b] A temporary order of injunction restraining the 1st and 2nd Defendants whether by themselves, their agents, servants and or employees, from disposing, selling, charging, dealing, mortgaging, transferring or in any way interfering or dealing with 5,640 shares held by the 1st Defendant in the 2nd Defendant Company;

[c] A temporary order of injunction restraining the 2nd Defendant from making any payment of any kind whatsoever, whether as dividends, profits, loan repayment, allowances, disbursements and of whatever nature to the 1st Defendant;

[d] The Court do issue an injunction restraining the 1st and 2nd Defendants from making any changes in the shareholding of the 2nd Defendant Company, and selling, disposing, charging, mortgaging, leasing, transferring any assets belonging to the 2nd Defendant.

[50] The file was, on the **9 May 2017**, placed before **Onguto, J.** who was persuaded to grant, and did grant, interim orders the following terms:

[a] The application dated **8 May 2017** certified urgent;

[b] Orders in the interim issued in terms of Prayer No. 4(a), (b), (c) and (d) of the application dated **8 May 2017**, granted until **23 May 2017** when the application will be heard *inter partes*;

[c] Application to be served forthwith;

[d] Costs reserved.

[51] Learned Counsel submitted that when a party comes to Court on an application for an injunction supported by an affidavit under oath, such a party has a duty to make full and truthful disclosure of all facts which are material for the Court dealing with the application to make a fair decision; and that where it is shown that such a party did not make full disclosure, then the interim orders ought to be vacated. It was further argued that the Plaintiff having failed to disclose, or disclose fully, material facts in respect of the proceedings in **HCCC No. 100 of 2016**, the *ex parte* orders ought to be vacated forthwith.

[52] **Order 40 Rule 7** of the **Civil Procedure Rules** does provide that:

"Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

[53] It is however instructive that the Plaintiff did disclose, vide paragraph 37 herein that he had filed **HCCC No. 100 of 2016 and HCCC No. 182 of 2017**. More importantly, it is noteworthy that the parties in **HCCC No. 100 of 2016** are not the same as the parties herein or in **HCCC No. 182 of 2017**. In the premises, although the prayers are similar, it is significant that the orders sought are in respect of different parties. I therefore find no merit in the argument that the *ex parte* orders ought to be discharged on account of non-disclosure.

[54] In the result, I am persuaded that the interests of justice herein would dictate that, rather than strike out these suits, the same ought to be stayed pending the hearing and determination of, or consolidation with, **HCCC No. 100 of 2016**. Accordingly, the orders that commend themselves to me in the circumstances are, in the main, those proposed by the 1st Defendant in **HCCC No. 182 of 2017**. Accordingly, it is hereby ordered that:

[a] That the proceedings herein be stayed pending the hearing and determination of **HCCC No. 100 of 2016**; or further orders as to consolidation or otherwise; and that the interim orders issued herein be maintained pending further orders.

[b] That the costs of the three applications herein and the 2 applications in **HCCC No. 182 of 2010** be borne by the Plaintiff.

[c] That there be liberty to apply, if need be.

[55] It is so ordered herein and in **HCCC No. 182 of 2017**. A copy of the Ruling to be filed in **HCCC No.182 of 2017** for completeness of the record.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH 2018

OLGA SEWE

JUDGE