REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 320 OF 2015

PETER MWANGI KARIUKI...PLAINTIFF

VERSUS

AEROVIEW LIMITED...1ST DEFENDANT

CAKEN INTERNATIONAL LTD.............................2ND DEFENDANT

ALFRED MUREITHI NJEMA...............................3RD DEFENDANT

CHRISANT MULILI KALOKI................................4TH DEFENDANT

JUSTIN IRERI KAMWENDIA..............................5TH DEFENDANT

RULING

1. This matter came before the Court on the Application of the Plaintiff. The Application is brought under a Certificate of Urgency dated 3rd July 2015.

2. The Certificate of Urgency states that the Plaintiff and the 3rd to 5th Defendants namely Alfred Mureithi Njema, Christant Mulili Kaloki and Justin Ireri Kamwendia are all directors " of the 1st Defendant Company which financed and put up a restaurant along Outring Road by the name Parkinn Place" (sic).

3. The Plaintiff complains that Mr. Njema, Mr. Kaloki and Mr. Kamwendia "*have illegally and arbitrarily decided to sideline the Plaintiff and exclude him from running the Restaurant*". It is said they have done this by registering the 2nd Defendant which has taken over the management of the Restaurant to the detriment of the Plaintiff (Peter Mwangi Kariuki). The Plaintiff asserts that the Restaurant is an asset of the 1st Respondent (Aeroview Ltd*)" and therefore any affairs of the same including transfer should be with the consent of the Plaintiff/Applicant"*. It is said that unless the orders are made the Plaintiff will suffer irreparable loss and damage. It is also said that the "Respondents will not suffer any prejudice if the orders are granted".

4. The Application is brought under ***Order 40 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, the Companies Act, Cap 486*** and all other enabling provision of the law.

5. The Application seeks orders that:

> "*1. This Honourable Court be pleased to certify this matter as urgent and to hear in the first instance.*
>
> *2. This Honourable Court be pleased to issue an Order compelling the Respondents to deposit all the proceeds of sale from Parkinn Place Restaurant in AEROVIEW LTD, EQUITY BANK, TAJMALL BRANCH NO. 820298307779, EAROVIEW LTD, FAMILY BANK, DONHOLM BRANCH, 033000005387, P. KARIUKI & OTHERS, TRANSNATIONAL BANK, CITY HALL WAY ACCOUNT NO. 13550/500SGLOO/5 held by the 1st Respondent company pending hearing and determination of this Application inter-partes.*
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> *3. This Honourable Court be pleased to issue an Order to freeze the accounts, AEROVIEW LTD, FAMILY BANK, DONHOLM BRANCH 033000005387, P. KARIUKI & OTHERS, TRANSNATIONAL BANK, CITY HALL WAY ACCOUNT NO. 13550/500SGL00/5. Of the 1st Respondent pending hearing and determination of this Application inter-partes.*
>
> *4. This Honourable court be pleased to issue an Order to freeze the accounts of the 2nd Respondent pending hearing and determination of this suit.*
>
> *5. Costs of this Application".*

6. The Grounds set out in the Application are that

> *a. The Plaintiff and the 3rd, 4th and 5th Respondents opened a company which is the 1st Respondent herein and opened a bank account numbers AEROVIEW LTD, EQUITY BANK, TAJMALL BRANCH NO. 820298307779, AEROVIEW LTD, FAMILY BANK, DONHOLM BRANCH, 033000005387, P. KARIUKI & OTHERS, TRANSNATIONAL BANK, CITY HALL WAY ACCOUNT NO. 13550/500SGLOO/5.*
>
> *b. The Plaintiff and the 3rd, 4th and 5th Respondents opened a Restaurant by the name Parkinn Place which is situated along Outer Ring Road within Nairobi County.*
>
> *c. The 3rd, 4th and 5th Respondents opened another company (the 2nd Respondent) which has now taken over the management and operations of the said Parkinn Place Restaurant and the proceeds of the said Restaurant are deposited in the 2nd Respondents bank account.*
>
> *d. That the said 2nd Respondent was opened with a view to clandestinely deny the Applicant his dues by operating a bank account different from the agreed one.*
>
> *e. That unless this Honourable Court issues the Orders sought herein, the Plaintiff/Applicant stands to suffer irreparable loss and damage.*
>
> f. *If the Orders sought herein are granted, the Respondents do not suffer any prejudice at all.*

It is said that the Applicant will also rely on "*such other grounds*". Those Grounds have not been specified

7. The Affidavit in Support is sworn by the Plaintiff/Applicant. It adds very little detail to the Grounds set out in the Application. He repeats that the Bank accounts named in paragraph 4 are where "*all the proceeds of sale are to be deposited*". Again paragraph 6 refers to "*the proceeds of sale*". The salient paragraphs are set out below. They are:-

> *4. The said Restaurant have bank accounts AEROVIEW LTD, EQUITY BANK, TAJMALL BRANCH NO. 820298307779, AEROVIEW LTD, FAMILY BANK, DONHOLM BRANCH,*

*033000005387, P. KARIUKI & OTHERS, TRANSNATIONAL BANK, CITY HALL WAY ACCOUNT NO. 13550/500SGLOO/5 where all the proceeds of sale are to be deposited. Annexed herewith is a copy of the bank account details and assets of the 1st Defendant Company and marked as "**PKM2".***

*5. On or around 4th September, 2014 the 2nd, 3rd, and 4th Respondents opened another company by the name CAKEN INTERNATIONAL LIMITED (hereinafter "the New Company") annexed herewith is a List of Directors dated 29th June, 2015 bearing the names of the 2nd, 3rd and 4th Respondents as the Directors and marked as "**PMK3".***

6. The said Respondents have clandestinely transferred the dealings and running of the Restaurant to the new Company by depositing the proceeds of sale to the new Companies bank account excluding the Plaintiff/Applicant herein and to his detriment.

7. The Plaintiff/Applicant stands to suffer irreparable loss and damage if the Orders sought herein are not granted as prayed.

8. I have been advised by my Advocates on record which advice I belief to be true that the actions of the Respondents are illegal and unprocedural and that this Honourable Court has jurisdiction to grant the prayers sought herein.

9. The Respondents herein will not suffer any prejudice if the said Orders are granted."

8. The Supporting Affidavit exhibits the Certificate of Incorporation of the 1st Respondent showing it was incorporated on 24th January 2007 (Exhibit **PMK-1**) Exhibit **PMK-2** is a letter from the Registration of Companies which sets out the names of the Directors/Shareholders as at the date of the last return, that is 14th January 2009. It shows that the Applicant had the same number of Shares as the 3rd, 4th and 5th Respondents. There is a fifth shareholder, a Stephen Muriithi Mutuambugu who has not been joined to these proceedings. Exhibit **PMK-3** is a further letter from the Registrar of Companies which shows that the 3rd, 4th and 5th Respondents, jointly own the 2nd Respondent.

9. Exhibits **PMK-4** and **PMK-5** contains a partial email exchange between the shareholders of the First Respondent (Aeroview) together with an account for division of the proceeds of the sale of Parkinn Place owned by Aeroview Ltd. That suggests something, that is not set out in the Supporting Affidavit, being that the Shareholders and at least the majority of the shareholders agreed to the sale of Parkinn Place. The Schedules show a plan for winding up the Restaurant business which includes freezing the Bank accounts that the present application is also seeking to freeze. Neither the Grounds nor the Supporting Affidavit explain those documents nor do they inform the Court how far the process which was initiated around 26th June 2015 had progressed. The purport of the origin document entitled "*Bank accounts to be frozen*" is unclear.

10. The Respondents filed their Replying Affidavit on 27th July 2015. It is sworn by the 3rd Defendant, Mr. Alfred Njema. It relates that the Plaintiff, the 3rd, 4th and 5th Respondents together with Stephen Muriithi Mutuambugu have been friends for a long time. He says their business venture began in 2004 and was only formalized into the 1st Respondent in 2007 where all 5 held equal shares. The First Defendant also purchased land that was demarcated and leased to sub-tenants.

11. From paragraph 11 onwards the Deponent sets out the history of the arrangement that allowed members to borrow money from the 1st Defendant (Aeroview Ltd). He relates that the Applicant borrowed large sums of money which he did not repay. He says:

"*(11) In mid 2011, the Plaintiff/Applicant requested for and in October 2011 was advancd a loan of Kshs.1,000,000/- by the 1st Defendant/Respondent on the aforementioned terms however, the Plaintiff/Applicant defaulted on the agreed repayment plan.*

(12) In or about December 2011, the Plaintiff/Applicant made another desperate appeal for a loan of Kshs.1,500,000/- and undertook to pay it within 2 weeks or default with 10% monthly interest as penalty which offer was accepted by the 1st Defendant amount was advanced to him making a total of Kshs.2.5 million but he again failed to pay loan within the expected period (Annexed hereto and marked "AMN2" is the Plaintiff/Applicants email seeking indulgence over the default).

(13) On the 8th May 2012, shareholders of the 1st Defendant/Respondent met with the Plaintiff/Applicant and deliberated on the Plaintiff/Applicant's default and offered to waive the accrued interest on condition the Plaintiff/Applicant paid up the outstanding amount in two (2) installments between April and May 2012, which offer the Plaintiff/Applicant agreed to, but although he repaid Kshs.1,500,000/- he defaulted again on the balance (both loans referred to hereinafter as the "first Loan".

(14) Once again in the year 2013, the Plaintiff/Applicant pleaded with group to advance him a further Kshs.1,000,000/- to pay for outstanding fees for his son's flying lessons, and after deliberations, the group agreed to borrow a sum of Kshs.2,000,000/- from the Wanandege Co-operative Society where Plaintiff, 1st, 3rd, 4th and 5th Defendant/Respondent were also members and to advance to the Plaintiff/Applicant the sum of Kshs.1,000,000/- out of the aforementioned loan while the other Kshs.1,000,000/- was ejected into the company business to shore up its floundering business. (hereinafter referred to as the "second Loan")

*(15) it was also agreed between the Plaintiff/Applicant and the 3rd, 4th and 5th Defendant/Respondents that the Plaintiff/Applicant would pay the 2nd loan directly to Wanandege Co-operative Society Limited in order to take advantage of their 1.5% monthly interest rate over a period of 3 years, rather than the group monthly interest rate of 10% on the 1st loan unfortunately, to date the Plaintiff/Applicant has never paid anything! (**Annexed hereto and marked "AMN3" is a bundle of correspondence exchanged between the parties on the matter)**".*

12. At paragraph 16 the Deponent explains that in February 2014 the 1st Respondent's Shareholders met and felt the Company was no longer viable for a variety of reasons. It was resolved that the 1st Defendant Respondent's business and assets should be sold to offset the debts and the balance shared among the shareholders after debiting each shareholders loan (paragraph 18) On such asset was the business concerns known as Parkinn Place.

13. The Deponent also admits that Parkinn Place was purchased by the 3rd, 4th and 5th Respondents through the Corporate vehicle of the Second Defendant/Respondent (Caken International Ltd). He says they offered Kshs.26,000,000 (twenty six milling shillings only). That appears to be reflected in **PMK-5**.

14. At Paragraphs 25-26 the Deponent states:

25. the aforementioned offer was made inspite of the fact that after debiting the Plaintiff/Applicant's loans to his share of the sale of the Outering road property, and all monies in the bank and stock in trade in the Company business, the Plaintiff/Applicant would still have owed the company the sum of Kshs.9,440,721,50/-

26. The Plaintiff/applicant therefore stood to gain a

(a) A waiver of Kshs.9,440,721.50

(b) Cash payment of Kshs.1,000,000/-

(c) Equal share of 10% deposit on the purchase price for the Outering Road property.

He says that shows the present suit is not brought in good faith is malicious. Paragraph 30 onwards of the Replying Affidavit deals more with the Suit than this Application. It is clear the allegation is that the

Plaintiff lacks clean hands.

15. What the Plaintiff is saying is that none of the Purchase Price that was to go from Caken (2nd Defendant) to Aeroview (1st Respondent) were ever in fact paid. See also Exhibit **ANN -3**. That is an email from the Applicant to Mr. Stephen Mutuambugu calling the 3rd, 4th and 5th Respondents lias. It shows he wishes to reverse the sale through court proceedings. However, both the Application and the Plaint- according to the Copies filed- omit to seek recision of the sale. What is asserted is the sale as the Bank accounts are identified as "*where all the proceeds of sale are to be deposited"*.

16. The Defendants then filed a Statement of Defence and Counterclaim. That raises issues as to borrowing from the Company and its consequences as alleged. The Defence was filed on 28th July 2015. It comes with a counterclaim whereby it is said that the Plaintiff owes the First Defendant a sum of KShs 18,788,033/= and interest at a rate of 10% per month. The Counterclaim prays for payment of the alleged debt and dismissal of the Plaintiff's suit.

17. On 13th October 2015, the Plaintiff filed a Second Application under the guise of an Amended Notice of Motion. The prayers sought are not amendments but new prayers (save for Certification of Urgency). The prayers now sought are:

> "*(2) That pending hearing and determination of this suit, the 2nd , 3rd and 4th Defendants..........*
>
> *(3)*
>
> *(4)*
>
> *(5)*
>
> *(6) That the costs of this Application be provided for"*.

18. The Supporting Affidavit now recognises that a sale of Place Inn Restaurant was agreed around September 2014. He also admits – as stated by the 3rd Respondent at the purchasers were to be the 3rd, 4th and 5th Defendants. From paragraph 7 it seems there was an Agreement for that purposed, signed by the Parties. He also confirms that the purchase price was to be Kshs.26,000,000 (Twenty six million shillings). The complaint now is that the 3rd, 4th and 5th Defendants purchased through the 2nd Defendant and the 2nd Defendant failed to complete within 90 days. A copy of the Sale Agreement is not specifically exhibited to this Supporting Affidavit. The Plaintiff asserts that is from his own knowledge that he knows there has been no payment of the purchase price. The Plaintiff complains he has been dispossessed from the business by the Respondents' actions.

19. Paragraph 17 seems to suggest that the Plaintiff has been advised that the Defendants should be compelled to provide an account of the monies they are collecting from the business <u>because</u> they have "unclear hands". The legal basis for that proposition has not been set out and seems dubious at best.

20. The Plaintiff has also now exhibited a raft of new documents. These include that Articles of Association of Aeroview Ltd. Also Exhibited as a Second ***"PMK-3"*** is a copy of the Agreement for sale between Aeroview and Caken International Ltd for the sale of Land Registration Title No. 97/10 for the pride of Kshs.26,000,000 (twenty six million only). As to payment clause 3(a) of the Agreement of Sale provides for 10% of the purchase price to be paid immediately on execution. Clause 3(b) provides that the balance of the purchase price "*shall be paid to the vendor on or before ninety (90) calendar days completion date*" (sic) Clause 5 states that *the date of completion shall be on or before Ninety (90) Calender Day from the date of execution of this Agreement or such other date of execution of this Agreement or such other date of execution of this Agreement or such other date as the parties may agree in writing (the "Completion Date").* The front page of the Agreement says it was made on 8th September 2014. The signatures are not dated. Given that the Agreement allows for dates that may or may not be

fixed together with extensions in writing, there is need for an explanation as to when and how the 2nd to 5th Defendants failed to comply. The Plaintiff has omitted to provide such explanation together with dates relied upon.

21. For the "*Amended"* Notice of Motion the Plaintiff now relies on Section ***3, 3A and 63(c) and (e) of the Civil Procedure Act Cap 21 and Order 40 Rules 1(a) and 2(1) and 3 and Order 51 Rules 7 of the Civil Procedure Rules.***

22. The Defendants filed a further Replying Affidavit on 16th December 2015. In it Mr. Njema avers that in addition to the Property LR No. 97/10 the business was sold. I assume he means Parkinn Restaurant. He fails to exhibit a copy of that agreement to his Affidavit. At paragraph 6(c) he says, under the terms of Clause M of the Sale Agreement is to be referred to arbitration. He goes on to say "Any *issue in that regard cannot be brought before this Court"*. It should be mentioned that the Replying Affidavit also refers to the Defence and Counterclaim filed by the Defendants. It seems that the Further Replying Affidavit admits that the purchase price was not paid. Paragraph 6 (e) says that the 2nd Defendant took possession pursuant to a resolution to release by only 3 of the 5 directors who had an interest in the outcome and to the income and assets of the First Defendant.

23. Therefore, the undisputed facts are that the Plaintiff and the 3rd to 5th Defendants together with Mr Mutuambugu incorporated the First Defendant as a vehicle for investment. Each member had an equal shareholding of 200 shares each. The First Defedat was used to buy and sell property but also to operated the Restaurant called Park Inn on the Outer Ring Road. The shareholders were also directors. At some pint between 2012 and 2014 they fel out. It is clear the dispute related to the income and assets of the First Defendant. The Plaintiff argues that the Third to Fifth Defendants are misstating the accounts. The Defendants argue that the Plaintiff drew a director's loan and failed to repay it financially viable. Those are issues for trial.

24. The Third to Fifth Defendants do admit through the Further Replying Affidavit of Mr. Njema that they have converted the assets of the First Defendant to the Second Defendant without payment of any sort. That is in effect what the Plaintiff complains of at Ground 4 of the Application dated 13th October 2016 and,

25. The issues then arise as to which of the Orders sought by the Parties ought to be granted.

26. The Parties have in addition to their respective Applications and Replying Affidavits filed Written Submission. The Plaintiff Application was filed on 13th January 2016. The Applicant is seeking determination of the Amended Notice of Motion filed on 13th October 2015. The Defendants oppose the Application. They assert that Judgment in default has been awarded against the Plaintiff in the sum of Kshs.18,788,033.00 plus costs and interest.

27. Therefore the Applications that have been filed in these proceedings are:

i. The Plaintiff's Application dated 3rd July seeking the Orders set out above brought under a Certificate of Urgency.

ii. The Defendant's Application for Judgment in default.

iii. The Plaintiff's Oral Application for leave (granted).

iv. The Plaintiff's Second Application for Orders set out above filed on 13th October 2015.

28. In relation to the First Application, the Plaintiff has not made his position clear. Is he pursuing it or abandoning it? The Written Submissions are silent it on the subject. The Defendant complains that the Application lies on the file and is not being pursued. That Application is properly before the Court. The

Respondents have filed their Responses and directions have been given. The Plaintiff has been given adequate opportunity to argue the matter both in Written Submissions and Highlighting and has decided not to do so. The Court therefore being convinced of the fairness of the process, the Court will adjudicate upon that application.

29. Therefore, on the First Application, prayer 1 that has been dealt with. The Application failed to demonstrate any urgency and directions were given. As to Prayer 2, a Plaintiff seeks a mandatory Order that all the Defendants be compelled to pay the proceeds of sale of Park Inn Restaurant be paid into the account of the First Defendant. That Application shows signs of not being thought out properly. In relation to the First Defendant, that means an Order that it as a Company should pay the sale monies into its own bank accounts. If it has the monies available, the Plaintiff has not shown any grounds why those monies cannot remain with the 1st Defendant in a different account or accounts. In relation to the 2nd Defendant, that is the admitted purchaser of the Land at LR NO.97/10 on Outer Ring Road together with the restaurant. If the Plaintiff is alleging the purchase price has been paid- which must be the case for it to transfer into another account, the sale proceeds- how is the purchaser supposed to be able to move the money between the Bank accounts of the receipient. If the purchase price has not been paid, the appropriate application would be to seek our Order for payment. In fact the monies have not been paid by the Purchaser. That application has not been made. In relation to the Third – Fifth Defendants, the only way they could be ordered to move the purchase price between accounts would be in their role as directors. However, as in this case when the legal entity purchasing is a company and there is an admission that payment is not yet made, where are "the proceeds of sale"? and how should the directors – a separate legal entity from the vendor and the purchaser be compelled to deposit monies. There is no subject to the Order. The Court will not make an Order in vain. The appropriate prayer, in the right circumstances would be an Order to pay the purchase price. No such application has been made. That prayer is therefore dismissed.

30. Prayer 3 seeks an Order for the freezing of the First Defendant company at Family Bank, Donholm Branch as well as the Account held in the Applicant's own name at Transnational Bank, City Hall way. There is no evidence before the Court that the actions of the Defendants are such as to justify a freezing Order and therefore an effective stop on the Company's activities. In the circumstances prayer 3 is dismissed.

31. Prayer 4 seems to be premised on Grounds (c) and (d), in other words that the Third, Fourth and Fifth Defendants set up a company and opened a bank account with a view to ....deny the Applicant his dues". There is no evidence of what the "Applicant's dues" are meant to comprise. The Third to 5th Defendants have admitted diverting an asset of the First Defendant to the Second Defendant. It seems that was done without payment. In the circumstances, the correct party to seek remedy is the First Defendant. The Plaintiff Applicant has no locus. In the circumstances I dismiss Prayer 5.

32. As to the Defendant's Application, which was for Judgment in default of defence to the Counterclaim. The Defence and Counterclaim was filed on 28th July 2015 and served on 30th July 2015. The Affidavit of Service does not specify the time day when service was effected. The receipt says it was received at 1:47 pm. There is no summons or notification attached setting out the date on which "an appearance and/or defence should be filed. **Order 10, rule 3 of the Civil Procedure Rules** provides;

> "*3. Where a defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such order as it deems fit in the circumstances.*"

> ***Order 10, rule 4*** provides:

> *(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit,*

at such rate as the court thinks reasonable, to the date of the judgment, and costs."

33. That rule applies to a Plaint. There does not appear to be an equivalent rule in relation to a counterclaim. In that case, it is not necessary for a defendant to a counterclaim to enter an appearance they would already be on the record. In this case the Plaintiff had already entered an appearance. The purported application entitled "*Request for Judgement"* is said to be brought under Order 10 rule 6 of the Civil Procedure Rules. That provides:

"*6. Interlocutory Judgment*

"Where a plaint is drawn with a claim for pecuniary damages, and any defendant fails to appear, the Court shall, on request in Form No. 3 of Appendix A, enter interlocutory Judgment against the defendant failing to appear, and the damages or the value of the goods and damages, as the case may be shall be assessed as the hearing of the suit against the other defendants, unless the Court Orders otherwise.".

34. Furthermore, on the Defendant's "Request for Judgment" had the Plaintiff been given sufficient or adequate time to respond? The Defence and Counterclaim was served on 30th July 2015. The Request was dated 12th August and filed on 13th August. Therefore it is very clear that the Plaintiff had not been allowed 14 clear days to respond, between service and Request. The endorsement of the Deputy Registrar denotes that Judgment was entered for the Defendants in the full sum claimed. Deputy Registrar has misdirected herself. Firstly, in the time lines between the Defence and the Application.

35. The Request is made on the grounds that the Defendants requests for Judgment against the Plaintiff…. Who has failed to appear or file a Defence to the Counterclaim within the stipulated time. The Statement in relation to entering an appearance is incorrect as an appearance had in fact been entered on filing the Plaint. As to whether the Plaintiff failed to respond within "the stipulated time". In fact no time scale was stipulated. Therefore applying the default of 14 days the Application was premature. Further Rule 6 provides that the Court shall <u>assess</u> the damages. That was not done. Although there is an affidavit of Service stating that the Defence and Counterclaim was served, there is nothing to demonstrate that the request for Judgment was served on the Plaintiff.

36. Therefore, it is abundantly clear that the process by which the Judgment in default in the sum of Kshs.18,788,033/- etc is fundamentally flawed and in the circumstances that Judgment is set aside.

37. Coming now to the Plaintiff's Second Application on 5th October 2015 the Plaintiff was given leave to file and serve on Amended Application by notice of motion. That was not done. Instead the Plaintiff filed a new application. The Defendants object to that. In fact the Application was served and the Defendants filed a Replying Affidavit. Any party is entitled to bring whatever application it wishes to, provided the Rules of procedure are complied with. In this case, the Application brought exparte was served. The Defendants have responded and both Parties have dealt with the issues arising in their submissions. In the circumstances the Defendants have not suffered any prejudice in relation to an opportunity to consider and respond. The Applications seeks the following Orders:

1. Pending the hearing and determination of this suit, the 2nd, 3rd and 4th Defendants by themselves or their agents be restrained from alienating, managing and/or in any manner interfering with the management of Park Inn Place Restaurant situate on the suit property being known as L.R.No. Nairobi/Block 97/10.

2. Pending the hearing and determination of this suit, the 2nd, 3rd and 4th Defendants be compelled to provide an account of all proceeds of the daily sales from Park Inn Restaurant for the period 1st June 2015 to date.

3. In the alternative, pending the hearing and determination of this suit, this Honourable Court does issue an order directing Equity Bank Limited to provide a Statement of Account for Caken

International Limited Account Number 0470263888560 Embakasi Branch.

4. Pending the hearing and determination of this suit the 3rd, 4th and 5th Defendants be compelled to refund the sum of Kshs.2,306,453/- withdrawn from Equity Bank Account Name Aeroview Limited Account No.0820298307779 Taj Mall Branch from 1st June 2015 to 31st July 2015.

5. Costs of this application be provided for.

38. The Defendants now raise the issue of Arbitration. It is correct that the Shareholders Agreement contains and Arbitration Clause. However, the Defendats firstly entered an appearance. That was the stage of the proceedings when the arbitration clause should have been raised – had they wished to go to arbitration. They did not raise the issue or seek as stay. Instead they filed a Replying Affidavit as well as a Defence and Counterclaim. By doing so they have submitted to the urisdiction. Further, they then applied for Judgment in default. No mention was made of the arbitration clause. When the 3rd to 5th Defendants thought themselves to have the upper hand. They have submitted to the jurisdiction of the Court and are therefore precluded by the ***Arbitration Act (Section 6(1))*** from seeking to revert to arbitration at this stage, without mutual agreement.

39. Prayer 1 is superseded by events. In relation to prayer 2, it seeks, in effect to preserve an asset belonging to a limited company. That means that, it is a separate entity from its directions and shareholders (***Salomon vs. Salomon Ltd***). Although the Affidavits speak of assets including real property (LR No. Nairobi/Block 97/10) and businesses (the Park Inn Bar and Restaurant) as well as loans outstanding, it seems that some of the Directors and Shareholders have behaved as if they are the legal owners of those assets and have moved them out of the First Defendant suggests that there was an intention to wind-up the Company. That was never done. The Replying Affidavits do not Exhibit a resolution to wind up the Company nor a winding up petition. Therefore any disposal of the First Defendant Company's assets could amount to intermeddling and at the least is questionable. The Third Defendant on behalf of the 2nd to 5th Defendants has admitted that land and the business owned by the 1st Defendant has been transferred to the 2nd Defendant at the visitation of the 3rd to 5th Defendants) without paying the purchase price. That is questionable at best. Given that the instigations of this arrangement seek to benefit it could, in certain circumstances amount to fraud. Therefore the Plaintiff has demonstrated to the satisfaction of the Court that property belonging to the First Defendant will be dissipated and last without the appropriate orders pending trial of the issues.

40. However, the Orders sought by the Plaintiff are not the appropriate Orders. In the First instance there is the question of loans. The Plaintiff is a director and shareholder of the First Defendant. He does not represent or speak for that Company. Even the purported sale may be a sale at an undervalue.

41. The Plaintiff's claim is a purely monetary claim for "*his share in the business*". He does not say he wishes to run the business or there is some or same part of the goodwill which is directly referable to him or his particular efforts therefore he has not demonstrated any entitlement to the interlocutory Orders sought under the principles of ***Giella v Cassman Brown*** ***(1973) EA LR 358, 360 D-F***. The loss he relies upon is pure economic loss and can be compensated for by an award of damages, whether that is the value of his shares and/or the assets of the 1st Defendant.

42. The conduct of the 3rd to 5th Defendants in relation to the 1st Defendant is questionable at the very least. It is abundantly clear that they have and a real risk they will continue to strip the assets from the First Defendant and dissipate them if not restrained. They did so in breach their fiduciary duties as directors. In the circumstances orders are justified for the protection of the 1st Defendant. Therefore the following Orders are made:

(1) The 3rd, 4th and 5th Defendants shall within 28 days jointly and severally cause to pay into a joint account held in the respective names of the Parties Advocates the full purchase price of Kshs.26,000,000 with interest at 14% from the date of transfer to the date of payment.

(2) The Second, Third, Fourth and Fifth Defendants whether themselves or through their agents, servants assigns, or howsoever are forbidden from transferring, alienating or selling the property known as LR No. Nairobi/Block 97/10 until hearing and final disposal of this suit.

(3) The second, Third, Fourth and Fifth Defendants whether by themselves, their servants or agents or assigns or howsoever are forbidden from disposing of the business known as Park Inn Bar and Restaurant or carrying out any acts that either (1) Causes it to cease to be a viable going concern and/or (2) place it beyond the reach of the Court pending final disposal of this suit.

(4) The Second, Third, Fourth and Fifth Defendants shall produce and full in Court monthly accounts showing the income, outgoings on profits of the Park Inn Restaurant. Such accounts to be audited at the expense of the Second to Fifth Defendants at the First instance. The Accounts to commence from the date of transfer to the Second Defendant until hearing and final disposal of the suit.

(2) Further Orders.

1. Plaintiff's Application dated 3rd July 2015 is dismissed.

2. Default Judgment dated 18th August 2015 is set aside.

3. Plaintiffs Application dated 13th October 2015 is dismissed.

4. Each Party to pay its own costs.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS14th day of April 2016.

In the Presence of:

Clerk: Isaiah Otieno

Applicant in Person for Applicant

No Appearance for Respondent