



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO. 568 OF 2008**

**TERAZZO ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**PAVEMENT CLUB AND CAFE.....1st DEFENDANT/JUDGMENT DEBTOR**

**BLUE ELEPHANT LIMITED.....2nd DEFENDANT/JUDGMENT DEBTOR**

**SHAILESH PATEL.....3rd DEFENDANT/JUDGMENT DEBTOR**

**AND**

**JAIMINI PATEL ..... 1<sup>ST</sup> INTERESTED PARTY**

**SEEMA PATEL ..... 2<sup>ND</sup> INTERESTED PARTY**

**ARTUR MILDOV ..... 3<sup>RD</sup> INTERESTED PARTY**

**VADIM MILDOV .....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. The Application before now before the Court is brought by the Plaintiff/Judgment Creditor. The Application is brought by Notice of Motion dated 17th September 2015 and filed on 25th September 2015. The Notice of Motion is brought under "**Section 3A of the Civil Procedure Act, Order 22 Rule 35 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of law**). It seeks the following Orders:

*(1) THAT the Directors of the 1st Defendant/Judgment Debtor named in the annexed affidavit be examined on oath as to the Judgment Debtor's means and property and to produce its books of accounts and other documentary evidence showing the same.*

*(ii) THAT the former Directors of the 1st Defendant/Judgment Debtor being Jaimini Rajanikant Patel and Seema Rajanikant Patel be also examined on oath on their dealings in the Company prior to transferring their directorship with effect from 1/12/2008.*

(iii) THAT in default of the 1st Defendant's Directors and Jaimini Rajanikant Patel and Seema Rajanikant Patel complying with the above order such further and/or other order be made against the Directors personally as the Honourable Court may deem fit and just.

2. The stated legal basis of the Application is:

(i) **Order 51 Rule 1 of the Civil Procedure Rules 2010** which provides that:

*1. All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.*

(ii) **Civil Procedure Rules Order 22 Rule 35** which provides that:

*Examination of judgment-debtor as to his property.*

*35. Where a decree is for the payment of money, the decree-holder may apply to the court for an order that—*

*(a) the judgment-debtor;*

*(b) in the case of a corporation, any officer thereof; or*

*(c) any other person, be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents.*

It is noteworthy that the title of Order 22 is "Execution of Decrees and Orders".

3. The Decree that the Judgment Creditor seeks to enforce arises from the Ruling of Hon J Khaminwa J. She awarded the Plaintiff Summary Judgment in the sum of Kshs.16,598,988/= on 13th February 2009 (**Exhibit GP-2**). In her Ruling the Learned Judge said, the burden was on the defendants to satisfy the court that he (it) was entitled to leave to defend the suit. They must show that they have a good ground of defence. She goes on to say "I have perused the exhibits produced and exchanged between the parties. It is clear there is no defence as to the existence of the debt. The Decree was extracted on 16th October 2009 (**Exhibit GP-3**). That seems still to be outstanding notwithstanding proclamation on 22nd December 2009.

4. Clarification as to the Parties firstly to the suit and then this Application is necessary due to the complicated history of this suit. The Plaintiff is a contractor who carried out building works describes as renovation and extension at a premises on Raphta Road (LR 1870/X) operating under the title of Pavement Club and Cafe. The 1st Defendant is referred to as "Pavement Club and Cafe". In fact what the Plaintiff meant was Pavement Ltd trading as Pavement Club and Cafe. The Defendants' then Advocates entered appearance for the Defendant as named and then pleaded a denial of its existence. However, it is clear that it was an intended to be a reference to the limited company all along. The Second Defendant is Blue Elephant Limited. Payments made on behalf of the First Defendant were drawn on the account of the Second Defendant. In relation to the 1st Defendant, the Defence states "*The 1st Defendant is non-existent and therefore any suit against the same does not hold and the Plaintiff is put to strict proof thereof.*" (paragraph 3). In relation to the 2nd Defendant it is averred that "*The 2nd Defendant Blue Elephant ceased its operations on 23rd August, 1999 and therefore does not have the capacity as a legal entity to sue or be sued and the Plaintiff is put to strict proof thereof*". In fact what actually happened was a change of name. It is further stated that it is denied that either of the two companies were legal entities at the time of the signing of the Acknowledgment of Debt. (16th June 2006). On 11th May 2009, the 3rd Defendant swore an Affidavit in which he swore that "*our defence filed herein raises the issue of whether a suit against a party that no longer exists can lie in law*". The

3rd Defendant, a Shailesh Patel of P O Box No 72228 Nairobi describes himself as the "Managing Director" of the 1st Defendant. The documents point to a clear link between the 1st and 2nd Defendants.

5. The individuals to whom the Application is directed are described as the directors and shareholders of the 1st Defendant, which it appears is still very much in existence, if the affidavits are to be believed. Also before the Court is an Application for two of the "substitute directors" of the 1st Defendant to be joined as interested parties.

6. The Application rests on the Grounds stated therein together with the Supporting Affidavit of Mr Gopal Patel, Managing Director of the Plaintiff. The Grounds on which the Application rests are:

*a) Pursuant to a suit filed in this Honourable court, Summary Judgment was entered in favour of the Plaintiff against the Defendants for the sum of Kshs. 16,598,988.00 plus interest at court rates together with costs on 16/10/2009.*

*b) Warrants of Attachment of the Defendants' movable assets were subsequently issued for execution.*

*c) Efforts to trace the Defendants attachable assets and/or properties have proved futile hence this application*

*d) It is just that this application be allowed.*

*e) The application is made in good faith and after exercise of due diligence showing that:-*

*(i) A Company known as Blue Elephant Ltd was registered on 21/04/1993 under Certificate No 53426 with the following directors (a) Jaimini Rajanikant Patel and (b) Seema Rajanikant Patel having one share each.*

*(ii) The Company later changed its name to Pavement Limited on 23/08/1999 for which the 1st Defendant was trading under as Pavement Club 'n' Cafe.*

*(iii) Jaimini Rajanikant Patel and Seema Rajanikant Patel remained directors/shareholders of Pavement Limited until 1/12/2008 when they transferred their shares to DFT Entertainment Limited and Delart Investments Limited respectively.*

*(iv) Jaimini Rajanikant Patel and SEema Rajanikant Patel resigned as directors of Pavement limited with effect from 1/12/2008 and DFT, Entertainment Limited and De lart Investments were appointed as directors of the Company, Pavement Limited. Vadim Mildov and Artur Mildov were appointed alternate directors for DFT Entertainment Limited and De lart Investments Limited Respectively.*

*(v) The resignation of Jaimini Rjanikant Patel and Seema Rajanikant Patel as directors of the Company and subsequent transfer of their shares took place immediately after the instant suit was filed against the Defendants hence it cannot be said to be a coincidence.*

*(vi) There is nothing to show that the liabilities of Pavement Limited on previous contracts were transferred to the current directors or that the same were to be settled by the previous directors hence the need to examine both the current directors and the previous directors being Jaimini Rajanikant Patel and Seema Rajanikant Patel.*

7. The Supporting Affidavit was also sworn on 17th September 2014 and filed on 25th September 2014. It repeats the Grounds and Exhibits various documents, namely:

(1) **GP-1:** Acknowledgment of Debt

(2) **GP-2:** Ruling of Joyce Khaminwa J

(3) **GP-3:** Decree Dated 13<sup>th</sup> February 2009

(4) **GP-4:** Notification of Change of Directors etc, Copies of transfer of shares forms, the minutes and the returns filed and the letters of resignation

(5) **GP-5:** Copies of Letters dated 3/04/2007 and 17/04/2007 from Pavement Limited t/a Pavement Club 'n' Cafe.

The Supporting Affidavit makes two points that are relevant, firstly that the resignation and transfer from the previous directors to the current directors took place after the suit was filed. The deponent states that it cannot be a coincidence. Secondly, that there is nothing to show existing liabilities were transferred to the new directors. By the same token, it would be necessary to show that the liabilities remained with the retiring directors. Paragraph 12 states "*I therefore pray that this application be allowed and orders do issue to have the aforesaid directors examined on oath as to the 1st Defendants' means and property and to produce its books of account and other relevant documentary evidence....*"

8. The Plaintiff also filed a Further Affidavit on 26th February 2015, where he states that "*it has now been established that the former directors/shareholders of Pavement Limited (which was trading as Pavement Club 'n' Cafe)... undertook to settle all dues owed to the creditors vide the Share Sale Agreement dated 20/11/2008 thus shielding the 1st Defendant and the new shareholders and directors from any claim*". A copy of that Agreement is exhibited as **GP- 6** He asserts that the two Retiring Directors undertook to settle all dues owed to the creditors on behalf of the 1st Defendant. In response the two Retiring Directors have filed a Notice of Preliminary Objection together with a Replying Affidavit. The Notice of Preliminary Objection states that the former Directors will raise a preliminary objection on points of law at the hearing of the objection. In fact they are listed in that document and are:

*1. THAT a decree cannot be enforced against a person who was not a party to the proceedings in which the decree was issued. This would be contrary to Article 25(c) and Article 50(1) of the Constitution and all notions of justice that the rights of a person ought not to be prejudiced or affected without being afforded an opportunity to be heard.*

*2. THAT Order 22 Rule 35 of the Civil Procedure Rules on which the present application is premised is limited to the oral examination as to whether any debts are owing to the judgment debtor, or whether the judgment debtor has any other property or means of satisfying the decree.*

*3. THAT a decree of a concluded judgment can only be amended and/or varied by way of an Appeal or an Application for review but not through a Further Affidavit as is sought herein.*

*4. THAT a claim predicated on an indemnity can only be commenced by way of a fresh suit in the manner prescribed under the Civil Procedure Rules and not by Affidavit.*

*5. THAT the orders sought in the Application are untenable in law."*

9. The Replying Affidavit is sworn by one of the Retiring Directors, Jaimini Rajanikant Patel. She makes her Affidavit on behalf of both the Retiring Directors. She states that she has read and had explained to her by her Advocates, the Documents filed by the Plaintiff. She swears the Affidavit in Opposition to the Application and in reply to the Affidavits filed. She makes the following points:

(1) That the two Retiring Directors resigned from the Company (Pavement Ltd) by a letter dated 24th October 2008 (that is earlier than the actual date). The resignation related to their role as directors as well as membership. At a later date that was accepted and the shares were transferred to De Lart Investments Ltd and DFT Entertainment Ltd.

(2) It is said that the transfer was approved pursuant to a Special resolutions passed on 1st

November 2008. There is no copy of that Resolution exhibited. In addition the Registrar of Companies was duly notified of the changes. She confirms that the Notification of Change of Directors etc dated 20th April 2009 produced by the Plaintiff as Exhibit GP-4 is a copy of that notification.

(3) The transfers were made pursuant to a Share Sale Agreement which is Exhibited by the Plaintiff as "GP-6".

(4) That as a consequence of those events neither of the Retiring Directors have access to the 1st Defendant's books of accounts or any other documents relating to the 1st Defendant's means and property.

(5) That the debt was guaranteed by Shailesh Patel, "*who was the managing Director of the Company*"

10. The Affidavit then goes on the argue points of law:

(1) That Summary Judgment "*was entered on the basis of an Acknowledgment of Debt made on 16th June, 2006 between Shailesh Patel and Gopal Patel..*".

(2) That the guarantee is univocal (sic) and Shailesh Patel was sued in his personal capacity

(3) "*THAT a cursory look at the Complaint herein reveals that the said Shailesh Patel was sued as the 3rd Defendant on the basis of his own personal undertaking in relation to the debts owed by the 1st and 2nd Defendant Companies. The Undertaking by the 3rd Defendant meant that the liabilities arising out of the Acknowledgment of Debt herein excluded the said debt from the 1st Defendant's liabilities. Accordingly, there is no basis for holding either myself or Seema Rajanikant Patel liable for the decretal sum herein*" (paragraph 10)

(4) The Court lacks jurisdiction to determine any of the issues raised in the Further Affidavit arising from the Share Sale Agreement.

(5) The Plaintiff was not a party to the Share Sale Agreement and therefore there is no basis for invoking that Agreement.

(6) The Suit was filed before the Share Sale Agreement so there is no basis for passing on liability to the Retiring Directors

(7) That she has had legal advice that the Share Sale Agreement constituted an indemnity to the buyers on purchase of shares and that indemnification was limited to the disclosed liabilities.

(8) The Application is made in bad faith and the orders sought are arbitrary as they seek to make the Retiring Directors personally liable for a decree they were not party to.

(9) The Application is an abuse of court process.

11. On 16th October 2015 (that is more than 12 months after the Application) the 1st Defendant filed a Notice of Change of Advocates (without any application). That was followed by a Replying Affidavit filed on 2nd November 2015 sworn by one of the Substitute Directors, Artur Mildov. In it he sets out the particulars of the Share Sale Agreement Annexed as **GP-6**. He says that under Clause 5.1 under Schedule 2 of that Agreement the Retiring Directors of Pavement Ltd "undertook to settle all dues owed to the creditors and all liabilities outstanding as against the 1st Defendant at that time". It is said that it was agreed that no such liabilities would be passed onto the new shareholders and directors. In addition at paragraph 6 he says that the Retiring Directors under Clauses 3.1 and 3.4 warranted that there were no liabilities etc that were still outstanding and further warranted that there was no dispute with any authority or other official department relating to the affairs of the company and there were no facts which may give

rise to any dispute. The Affidavit states that the provisions of the Agreement clearly show that the 1st Defendant, and the incoming shareholders and directors are shielded from any claims and/or debts and/or liabilities that arose before the last Accounts date being 30th November 2008.

12. The Affidavit goes on to ask the Court to find the Retiring Directors and the 3rd Defendant liable to settle the decretal amount in the event the 1st and 2nd Defendant fail to settle the amount owing (Paragraph 12). That Statement is contradictory, the First Defendant in its current form takes the position that the debts, then existing, belong to the retiring directors under the warranty.

13. About one month later, on 30th November 2015 the 1st Defendant filed an Application by Notice of Motion under **Order 9 Rule 9 and 10 & Order 51 Rule 1 of the Civil Procedure Rules and Section 3 & 3A of the Civil Procedure Act, Cap 22 Laws of Kenya** (sic). That Application seeks an Order and Record that the 1st Defendant is now represented by the firm of M/S Ochieng Onyango Kibet & Ohaga Advocates in the place of the firm of Otieno Arum and Company Advocates. In addition it seeks Orders that the Replying Affidavit and the Notice of Change be deemed as properly filed. That Application displays no indication of any of the other Parties having been served with that Application. The Application on its face indicates that it was listed for Mention of 7th December 2015. In fact, on that date, notwithstanding, that the Registry had given that date for "mention for directions", it was not actually listed. At a previous Hearing (19th October 2015) Mr Arum said he had just been provided with a Notice of Change of Advocates whereby M/S Triple OK claim to have come onto the Record. The Court Ordered the matter to be re-listed after the question of representation had been clarified. The Court File contains no record of the issue of representation having been resolved.

14. The Incoming Directors have also made an Application to be joined to the proceedings as "Interested Parties".

15. As to the Substantive Issues on 8th December 2015, the Parties were Ordered to file written submissions and the matter was listed for Highlighting on 7th April 2016. In fact by 7th April none of the Parties have filed their written submissions. The Plaintiff's complaint was that they were served late. The Advocates for the Retiring Directors had not filed theirs as they were engaged elsewhere. The matter was re-listed for Highlighting on 15th June 2016 and again the Parties were not ready. Currently the Court File contains the following Submissions:

(1) Plaintiff's Written Submissions filed on 8th April 2016;

(2) The First Defendant's Submissions filed by M/S Ochieng, Onyango Kibet & Ohaga for the 1st and 2nd Interested Parties/Incoming Directors

Those Parties that have filed their Submissions have helpfully also attached the authorities on which they rely. The Submissions set out the positions of those that have complied with the Order. S

15. As set out above, the Application made by the Judgment Debtor is clear and succinct. The Judgment Debtor has successfully obtained a money judgment for a liquidated sum against the 1st Defendant. That has proved to be a pyhrric victory as it has been unable to execute. One of the factors that have prevented and/or obstructed execution is the fact that shortly after the suit was instituted the Retiring Directors/ 1st and 2nd Interested Parties had disposed of their interest in the 1st Defendant. The proximity of the two events calls into question the intention behind that disposal. In addition there are issues as to the effect and consequence of the disposal. At this stage, the only orders that the Judgment Creditor is seeking are Orders for examination of books and records as well as cross-examination of the Retiring Directors.

16. The 1st and 2nd Interested Parties/Retiring Directors have filed a Notice of Preliminary Objection. It is a well-known principle that the Court must deal with that first. It is also a well known principle that by filing a preliminary objection the Party filing accepts that the facts alleged are true. In this case the facts alleged are that the 1st Defendant Company through its directors and driving mind have used every device available to avoid payment and after judgment, execution. However, the 1st and 2nd Interested Parties then go on to deny those within the PO and also by way of a Replying Affidavit. As to the merits

of the Preliminary Objection, it is premised on the Judgment Creditor enforcing against them. However, that is not the gist of the Application. At this point in time, the Application is for a different remedy. In the circumstances, the Preliminary Objection as drafted demonstrates a misunderstanding of the Application to which it objects.

#### Attendance at Hearing

17. In any event, the Plaintiff in its Written Submissions has dealt with the points raised. It is trite law that a limited company has a separate identity from its shareholders and directors (**Salomon vs Salomon 1897 AC 22**). In the right circumstances, the Court can pierce the corporate veil. I will deal with that below. Under Order 22 Rule 35 the Court has wide judicial discretion. "*That judicial discretion must be exercised judicially and not capriciously. It must be exercised upon reasons and not on the whims of the court or on sympathy or sentimental aspects.....*" (**Rose Detho v Ratilal Automobiles Ltd and 6 Others [2007] eKLR**). In the normal course of events, the debts of a corporate entity, recognising its separate personality would remain with that entity. However, in this case, there is the added complication of the sale of the 1st Defendant. On the evidence currently before the Court, it is unclear exactly the terms and effects of that transfer. It is correct that it was achieved by the sale of Shares, however, the timings of that sale raises questions as to what was said and done at the time. In addition, it seems the buyers were given warranties as to the financial position of the 1st Defendant. It is inconceivable that such warranties could be given without the benefit of the books and records of the company. The books of records relevant to this suit would be relating to the Works done by the Plaintiff Company, the acknowledgment given by the Managing Director and the Judgment and how those were recognised in the accounts.

18. That, inevitably gives rise to the question of who were the natural persons running the 1st Defendant at all the relevant times. The pleadings show that the 3rd Defendant Mr Shailesh Patel put himself forward as the Managing Director of the 1st Defendant. That position is adopted by the 1st and 2nd Interested Parties. That suggests an admission that he was the Managing Director. However, he is not named as a Director on the documents now being produced. There are a number of interpretations that could be placed upon that omission ranging from his retirement to concealment to production of documents that do not present a true picture. At this stage any conclusions could only be conjecture.

19. The Plaintiff has a Judgment. The Plaintiff is entitled to enforce that Judgment. In consequence, the Plaintiff is entitled to the factual information that facilitates that process. In the face of inconsistent and conflicting statements, albeit on oath, given by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties and the 3<sup>rd</sup> Defendant (Shailesh Patel), further inquiry cannot be avoided. It is noteworthy that those three persons all use the same postal address and at the very least that establishes a nexus between them. The Retiring Directors seem to be relying on an earlier date for their retirement. In fact the Return filed with the Registrar of Companies shows clearly that it was effective from 1<sup>st</sup> December 2008. The Replying Affidavit says nothing about Shailesh Patel, however it seems he retired at the same time and his retirement is recorded on the same date in the same form suggesting some concerted action, in other words that they were acting together.

#### Authorities

20. The Authorities relied upon by the Plaintiff are:

- **Civil Appeal No 304 of 2006 (1717/2006 UR) Rose Detho vs Ratilal Automobiles and 6 Others**
- **Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors 1969 EA 696**
- **NRB HCC N 3664 of 1995 Euphrasa WAriaraMukui vs Naken Motors Ltd [2008] eKLR**
- **NRB HCC No 2285 of 1996 Post Bank Credit Ltd (In Liquidation) vs Nyamunga Holdings Ltd [2015] eKLR**
- **NRB HC Misc App 719 of 2003 (OS) Ernie Campbell & Co Ltd vs Githunguri Dairy Plant Co**

Ltd [2008] eKLR

- NRB HCC No 623 of 2004, *Merchantile Life & Geenra Assurance Company Ltd vs Pinnacle Tours and Travel Ltd.*
- *Ultimate Laboratories vs Tasha Bioservice Ltd* HCC 1287 of 2000

The 1<sup>st</sup> Defendant relied upon

- *Winding Up Case No 31 of 2010 RE: Adopt-a-Light Ltd*

21. The information the Plaintiff seeks will be contained in documents and oral testimony. The principal of separate corporate personality and identity means that a company is separate from its members and directors. It endures despite changes in the aforesaid. The Books and Records both statutory and otherwise belong to the Company. It is the reasonable expectation that they remain with the Company pursuant to its duty and responsibility to keep and maintain records. Therefore, the logical first “port of call” must be the company”, in this case the 1<sup>st</sup> Defendant and/or the 2<sup>nd</sup> Defendant in so long as its records are maintained. Although the Court is not at this stage, being asked to allocate liability, the issue of the sale of shares etc makes the situation a little more complicated. It is possible that Retiring Directors would have some records as well as the Company and as a consequence the incoming directors. We also have the added complication of the warranties and indemnities given by the Retiring Directors. Such indemnities etc can and do relate to liability, but do they relate to record keeping.

22. The Incoming Directors have asked to be joined to the Suit. The Court accedes to that Application and they therefore become the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties. They have filed an Affidavit and Written Submission even though their preferred Advocates have not yet come on the record through the appropriate procedure. In the interests of justice, the Court has taken into account the written documents filed notwithstanding that the position in relation to representation will need to be regularised. The Constitution provides for access to justice by the lay parties/litigants.

23. The Incoming Directors raise the issues relating to the Indemnities and Warranties given and the terms thereof. Given that there is a statutory duty and obligation to keep records, the indemnities may or may not apply. However, should that been the case both the 1<sup>st</sup> Defendant and the Incoming Directors will have recourse to the those promises and obligations. They do not raise any reasonable or plausible impediment to the Plaintiff’s access to the necessary information. Naturally, any information requested and/or provided would be limited to the timescales relevant to these proceedings. In other words they will be limited to the times material to the Building Works, the Acknowledgment of Debt, the proceedings in this suit and the attempts at execution and current status of pre-existing assets. What comes before or after that, cannot be considered relevant, without additional and better explanation.

24. Any documents and cross-examination must be relevant and limited to the issues that require resolution. The First issue that arises for eventual resolution is; who should satisfy the judgment. Should the Company be liable or its members and/or delinquent directors? I am sure that in principle the Judgment Creditor does not mind who settles the debt provided it is satisfied. However, as stated, in the face of evasion, inconsistent statements on oath and dissembling by the purported Managing Director further inquiry is both justified and justifiable.

25. As far as the Current Shareholders and/or Incoming Directors are concerned, they are the beneficiaries of the indemnities and warranties set out in the Share Sale Agreement. Therefore, if those indemnities etc are applicable, it is they who would enforce them. However, under **Section 3A of the Civil Procedure Act (Cap 21)** and the Overriding Objective, it would be in the interest of justice for the Court to exercise its discretion to allow the Plaintiff to obtain the evidence that it needs to enforce its judgments.

26. As stated above any inquiries must be limited to the relevant issues and not descend into a general trawl of the books and records. The issues that arise on first reflection seem to be:

- (a) With whom does the liability to satisfy the debt rest?
- (b) What is the effect of the Acknowledgment and/or Surety given by Shailesh Patel?
- (c) What are the terms of the Judgment
- (d) Is it necessary to pierce the Corporate veil?
- (e) What are the periods relevant to the inquiry?
- (f) What is the effect of the sale and transfer vis a vis the Indemnity?
- (g) How should the Court exercise its discretion?

27. At this point in time, the question of wrongdoing does not arise. The information is within the knowledge, power and control of known persons before the Court and/or Parties to the proceedings.

28. In the circumstances, the Court allows the Application on the following terms:

- (1) The Preliminary Objection is dismissed;
- (2) Leave is granted for the cross-examination of (i) Shailesh Patel, Jaimini Patel and Seema Patel on a dates to be fixed. In they even they fail to attend, Summons shall issue.
- (3) The First Defendant, the 3<sup>rd</sup> Defendant and 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties shall file and serve copies of all documents in their power custody and control pertaining to the issues and the time periods set out above.
- (4) In particular, the Defendants and the Interested Parties shall produce the audited accounts for the period up to 30<sup>th</sup> November 2016.
- (5) The Interested Parties to pay the costs of the Application to be shared equally and giving rise to joint and several liability.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**DATED 3<sup>rd</sup> October 2016**

**SIGNED AND DELIVERED AT NAIROBI ON THIS 3<sup>rd</sup> DAY OF OCTOBER 2016.**

In the Presence of :

Isaiah Otieno - Court Clerk

No Appearance - Plaintiff

Miss Barasa for 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties

Miss Barasa HB for Mr Maende - 1<sup>st</sup> Defendant