



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 483 OF 2014**

LITEIN TEA FACTORY COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF

KTDA MANAGEMENT SERVICES LIMITED.....2<sup>ND</sup> PLAINTIFF

Versus

DAVIS KIPLANGAT MUTAI.....1<sup>ST</sup> DEFENDANT

PATRICK KIPNGETICH CHEPKWONY.....2<sup>ND</sup> DEFENDANT

RICHARD K. CHERUIYOT.....3<sup>RD</sup> DEFENDANT

JOSPHAT KIGEN.....4<sup>TH</sup> DEFENDANT

RICHARD KIPKEMOI MIBEL.....5<sup>TH</sup> DEFENDANT

THE REGISTRAR OF COMPANIES.....6<sup>TH</sup> DEFENDANT

**RULING**

**Injunction application**

[1] I have before me the application dated 28<sup>th</sup> October 2014 which is seeking a number of reliefs but which are essentially of the nature of injunctions. The general thread on the reliefs relate to:-

*An order of injunction to restrain the 1<sup>st</sup> to 5<sup>th</sup> Defendants by themselves, agents, representatives or any other persons acting on their behalf and instructions or claiming through them from holding out as shareholders and directors of CHELAL TEA FACTORY COMPANY LIMITED under Registration Certificate No. CPR/2014/162629 or at all,*

*An order of injunction restraining the 1<sup>st</sup> to 5<sup>th</sup> Defendants from trespassing onto or taking over or dealing in any manner with the 1<sup>st</sup> Plaintiffs Satellite Tea Factory as established on L.R No Kericho/Roret/1639 and Kericho/Roret/1641; and*

*A declaration that the Registration and Incorporation of CHELAL TEA FACTORY COMPANY LIMITED under certificate of registration Number CPR/2014/162629 in favour of the 1<sup>st</sup> to 5<sup>th</sup>*

***Defendants was unlawful, illegal, null and void ab initio.***

The application is supported by the Supporting Affidavits of Richard Ronoh and Kennedy Omanga sworn on 28<sup>th</sup> October, 2014 and a Further Affidavit sworn by Richard Ronoh sworn on 3<sup>rd</sup> December, 2014.

### **Preliminary objection**

[2] But a preliminary objection to the application and the entire suit was raised by the Defendants. The Notice of Preliminary Objection discloses the following as the points of the objection, that:-

- a. ***The application as filed and canvassed in the Plaintiffs' Application and Complaint dated 28<sup>th</sup> October 2014 are fatally and incurably defective and as such cannot stand or be ventilated before this Honourable Court.***
- b. ***The suit contravenes the mandatory provisions of the law.***
- c. ***The court has no jurisdiction to hear and determine the application.***
- d. ***The purported annexed exhibits/documents to the affidavit of Richard Ronoh at its paragraph 2 purportedly marked RR 1 pages 1 to 62 both inclusive offend the mandatory provisions of Section 6 of the Oaths and Statutory Declarations Act Chapter 15 Laws of Kenya. They are therefore not exhibits to be referred to before the law and by this Honourable Court.***
- e. ***If the said purported annexures/exhibits are due for expunging from the record, then there is no evidence upon which the application for injunction is sought to enable this honourable court consider it within the principles considered for granting of an injunction; the application therefore fails even on merit and ought to be dismissed and or struck out with costs.***
- f. ***In light of grounds 1 and 6 above, the application is ipso facto an abuse of the court process and ought to be struck out and or dismissed.***

The Defendants made these submissions in relation to the preliminary objection:

***"The gist of the suit against the Defendants is premised upon them being directors of CHELAL TEA FACTORY COMPANY LIMITED. (Hereinafter referred to as "Chelal") an independent entity that can sue or be sued in its own name.***

- ***The suit therefore discloses no cause of action against them, thus rendering it fatally and incurably defective.***
- ***The Defendants are agents of a disclosed principal i.e. Chelal.***
- ***The Plaintiffs have no locus standi to institute the suit against them.***
- ***The Complaint violates mandatory provisions of the law.***

***Since the Defendants are seeking striking out of the entire suit, it is prudent, albeit briefly, to set out the Plaintiffs' claim as against the Defendants as a whole and establish whether the claim discloses a cause of action against them, whether the Defendants are agents of a disclosed principal, whether the Plaintiffs have locus standi, whether the suit violates the mandatory provisions of the law, whether the court has jurisdiction and whether the annexures qualify to be annexures in the eyes of the law".***

[3] I should state here in respect of a preliminary objection; that the shaping of the preliminary objection needs thought, clarity and care as it is intended to invoke the jurisdiction of the court to determine the case *in limine* and in a summary manner. Invariably, the effect of a successful preliminary objection is that the parties' rights in the suit are determined completely. And, therefore, because of the said importance of a preliminary objection in adjudication of cases, courts of law have emphasized on clarity of thought and conciseness of expression in formulating a preliminary objection before any

objection could qualify as a preliminary objection in the sense of the law. Therefore, the art so insisted upon is not intended to give pleasure to a reader, but to properly invoke the jurisdiction of the court to deal with a case summarily and *in limine*. These things I have stated are better appreciated when looked at within the principles of justice enshrined in the Constitution of Kenya, 2010 especially Article 159 on substantive justice. In this case, except ground 3 of the objection, all the other grounds are expressed in loose terms, and are like tangled wool which would require copious explanations and probing of evidence to unravel. This is clear from the above submissions, and indeed the entire submissions by the Defendants. And that trait deprives the objection the character of a true preliminary objection. Here, I am guided by the following rendition of court in the case of *Mehuba Gelan Kelil & 3 Others vs. Abdulkadir Shariff Abdirhim & 4 Others* [2014] eKLR that:-

*I need not re-invent the wheel. It is trite law that a preliminary objection should be based on pure points of law which do not require copious probing of evidence in order to ascertain. See the opinion by Law JA on this point in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 when he rendered himself thus:*

*“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

*Similarly Sir Charles Newbold in the same case stated that:*

*“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”*

*In Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows on preliminary objections:*

*“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”*

[4] In light thereof, I will deal with the issues raised within the application and not as a preliminary objection, for; the points are incapable of disposing the suit or the application completely. I now resume the arguments on the application.

### **The Plaintiff's submissions**

[5] The Plaintiff relied upon the affidavits filed in support of the Application. The Plaintiff submitted that since the 6<sup>th</sup> defendant has neither entered appearance nor filed any response to the application herein, it should be taken that the application is unopposed by the Registrar of Companies. The Plaintiff dismissed the preliminary objection and the reasons given thereto as bare, hollow, unsubstantiated, verbose and ambiguous statements of neither fact nor law which have been made aimlessly and without citing any legal provision(s) which have been violated. The Plaintiff lamented that the objections were incapable of any precise response except it chose to reply to them as a single ground, i.e. attack at annexures to the supporting affidavit of Richard Ronoh marked as **annexure RR1 running from pages 1 to 62**. The Plaintiff scoffed at the Defendants' suggestion that those annexures offended the mandatory provisions of "**Section 6 Rules 9 and 10 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**" and should be expunged so as to render the entire application without evidence and be dismissed. According to the Plaintiff, there is **no legal provision** known as "Section 6 Rules 9 and 10 of the Oaths and Statutory Declarations Act". There is only **Section 6 of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya** which donated power to the Chief Justice to make rules of court with a view to implementing the Act. and the **Chief Justice** has formulated the Oaths and Statutory Declaration Rules. The **muddling** of both the statutory provision and the Rules as one and the same thing in the preliminary objection by the defendants is, therefore, by itself improper and unsustainable as they have ended up quoting a **non-existent law**.

[6] But assuming the defendants intended to invoke Rules 9 and 10 of the Oaths and Statutory Declarations Rules, the exhibits in question were **annexed as a bundle marked RR1. The said annexure RR1 was paginated and runs from page 1 to page 62. The annexure stamp by the Commissioner of Oaths is embossed on page 1 of the bundle annexure.** The reason for this mode of annexure identification is expressly stated at paragraphs 2 of the said supporting affidavit of Richard Ronoh, same being that it is purposed to achieve orderliness, ease of reference, avoid duplicity of evidence on the court and parties files or records and for convenience of parties. The said deponent was clear that he has presented the annexures in a single paginated bundle as annexure RR1 from pages 1 to 62. To that extent therefore, the plaintiffs' annexure is properly sealed and identified as required under Rules 9 and 10 of the Oaths and Statutory Declarations Rules. **There is no Rule cited by the defendants which stipulates that annexures cannot be referred to an affidavit as a bundle, more so, a paginated one annexure bundle as that of the plaintiffs which has by virtue of the pagination been connected and linked to each from the first cited page to the last one.** The decision of *Kimondo, J*, in the case of *Milimani ELC No. 45 of 2012* stated, that,

***"I have then looked at the letters of allotment annexed to the plaintiff's supporting affidavit. For starters, they are not marked or identified in the affidavit...The documents are just attached to the affidavit and thrown to the court. I would thus strike out the annexures."* (Emphasis is ours).**

The above decision of *Kimondo, J*, is distinguishable from the issue before you. As *Kimondo, J*, noted, the annexures in that case were neither sealed, identified nor marked. In the instant case, the annexures are clearly sealed, marked and identified as a one bundle.

[7] The Plaintiff also accused the **defendants of having annexed documents in their own Replying Affidavit in bundles in a similar manner as the plaintiffs have done.** And they gave example of annexures RKC 1, RKC 36 and RKC 5. Therefore, the Defendants lack moral ground to challenge the Plaintiff's exhibits. According to the Plaintiff, objection on the annexures is premised on a subsidiary legislation and not the substantive or parent Act, namely the Oaths and Statutory Declaration Act, Cap 15. The Oaths and Statutory Declarations Rules are intended to be handmaidens of justice and aid the wheels of justice rather that clog it. These are procedural rules and should not be hindrance to

delivery of substantive justice. To seek to strike out evidence or a pleading premised on a procedural Rule is in the famous words of *Ringera, J*, elevating the Rules to a mere fetish. Indeed, the Kenyan Constitution itself has commanded under **Article 159** that the court should be minded to dispense substantive justice as opposed to technical justice. Sections 1A and 1B of the Civil Procedure Act have also conferred upon the court powers to look at substance and not technicalities. These technicalities should be ignored by the court.

[8] More was submitted by the Plaintiff on Rule 9 of the Oaths and Statutory Declarations Rules, which reads “*all exhibits to affidavits shall be...*” They suggested that the word “*shall*” used on rule 9 should be interpreted in a directory sense and not mandatory sense in view of article 159 of the Constitution. Any violation of Rule 9 of the Oaths and Statutory Declarations Act by the annexures herein is a matter of form and not substance. On this reasoning, they relied on separate work by *Ringera, J*, (as he then was), *Nyamu, J*, (as he then was), and *Bauni, J*, in ***Milimani – HCCC No. 462 of 1997, Standard Chartered Bank Limited Vs. Lucton (Kenya) Ltd (unreported)***; the case of ***Milimani HCCC No. 26 of 2004, Patrick Thinguri & 1, 006 Others Vs. Kenya Tea Development Agency Co. & Another (unreported)***; and ***Geoffrey Makano Asanyo vs. Kenya Agricultural Institute [2004] eKLR*** respectively.

[10] In light of the above separate decisions by *Ringera, J*, (as he then was), *Nyamu, J*, (as he then was), and *Bauni, J* that the word “shall” as used in the Parent Act, Cap 15, Laws of Kenya is directory and not mandatory and that breach thereof is not fatal as it concerned the form and not substance, the affidavits herein are competent and should be so treated. Further, the remedy to a defective annexure would not be to dismiss the annexures but have them correctly separately and sequentially sealed and or stamped.

### **The Plaintiffs submitted on merits of the application**

[11] The 1<sup>st</sup> plaintiff gave brief background information to the suit. It averred that it is a company, whose core mandate is manufacture, buying, curing and processing of tea. It is composed of shareholders, who are tea growers/farmers totaling to over 17, 000. The plaintiffs have engaged the services of the 2<sup>nd</sup> plaintiff as a managing agent who conducts technical aspects on management on behalf of the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> plaintiff herein operates in a zone referred to as Litein Catchment Area, Litein, within Kericho County. The plaintiffs, in a bid to bring services closer to their members establish appropriate Satellite Tea Factories. One such Satellite Tea Factory was established at Roret on L.R. Numbers Kericho/Roret/1639 and Kericho/Roret/1641. A Tea factory was built by the 1<sup>st</sup> plaintiff and it is fully operational to date. Paragraph 12 of the defendant’s Replying Affidavit acknowledges this undisputed fact. The 1<sup>st</sup> plaintiff through the 2<sup>nd</sup> plaintiff did, at the 6<sup>th</sup> defendant’s offices reserve a name for the said Satellite Tea Factory, same being “**Chelal Tea Factory Company Limited**”. The proposed name remained so reserved at all material times herein and of relevance to this suit, up to and including June, July, August, September and October, 2014 (Refer to pages 39 to 46 of the annexures to the supporting affidavit and or pages 36 to 46 of the annexures to the Further Affidavit, Number 4 of the listed reserved names of companies). As the reserved documents from the 6<sup>th</sup> defendant confirms, the name “Chelal Tea Factory Company Limited” (hereinafter referred to as the “reserved name”) remained so reserved and reservation extended from the said time to time at the request of the 2<sup>nd</sup> plaintiff from 17<sup>th</sup> June, 2014 to 30<sup>th</sup> October, 2014, all dates inclusive. This information of names reservation has been communicated to the 1<sup>st</sup> plaintiffs’ members, the 1<sup>st</sup> to 5<sup>th</sup> defendants inclusive.

[12] Further, on or about the year 2011, the 2<sup>nd</sup> plaintiff on behalf of the 1<sup>st</sup> plaintiff did apply for registration of a Trademark in the names of “Chelal Tea Factory”. The Registrar of Trade Marks having been satisfied with the merit of the application did register the said Trade Mark of “Chelal Tea Factory” (hereinafter referred to as the “Trade Marked Name”) in favour of the 1<sup>st</sup> plaintiff vide a registration Certificate Number 70688 dated 30<sup>th</sup> January, 2012 (Refer to page 63 of the Further Affidavit of Richard Ronoh sworn on 3<sup>rd</sup> December, 2014). This Trade Marked Name remains so registered in the plaintiffs favour to date.

[13] But, on 5<sup>th</sup> August, 2014, the 1<sup>st</sup> to 5<sup>th</sup> defendants herein, through their agent, one Onesmus Lang'at, whom they later purportedly appointed as a Company Secretary, did commence the process of reservation and subsequent registration of the names "Chelal Tea Factory Company Limited" as an incorporated company, the 1<sup>st</sup> to 5<sup>th</sup> defendants being the subscribers, shareholders and directors (Refer to pages 7 to 11 of the Replying Affidavit). The Certificate of Incorporation is indeed dated 1<sup>st</sup> October, 2014. The defendants have not denied that they undertook all this process well aware and or ought to have been aware of the already reserved and Trade Marke Name hereinabove. The defendants' justification is the purported receipt of mandate by them from shareholders and farmers to undertake the process of incorporation (Refer to Paragraph 18 of the Replying Affidavit). Upon registration of the names "Chelal Tea Factory Company Limited" as a company, Certificate of Incorporation No. CPR/2014/162629 was issued. Subsequently, the 1<sup>st</sup> to 5<sup>th</sup> defendants initiated steps to take over the 1<sup>st</sup> plaintiffs subject Satellite Tea Factory, among others, as herein below,

- i. At page 36 of the defendants' Replying Affidavit, clause 5 thereof, the defendants demand that the Certificate of Incorporation be framed and hanged at the 1<sup>st</sup> plaintiffs subject Tea Factory on the grounds that that is where it belongs and ought to be.
- ii. At page 39, 40 and 41 of the defendants Replying Affidavit, the defendants confirms holding their 1<sup>st</sup> meeting as purported Board of Directors on 7<sup>th</sup> October, 2014 at Exotic Hotel, Kericho and at Minute CTF/2014/13 (Page 41 thereof) the defendants seek the 2<sup>nd</sup> plaintiff to facilitate the takeover of the 1<sup>st</sup> plaintiff's Satellite Tea Factory, at Minute CTF/2014/14 the defendants seek hand over of 1<sup>st</sup> plaintiffs Satellite Factories assets and liabilities and at Minute CTFC/2014/16, the defendants resolve to organize meetings with 1<sup>st</sup> plaintiffs Tea Buying Centre Committee and later shareholders/tea growers as a step towards the takeover process.
- iii. At page 57 of the defendants Replying Affidavit, the defendants disclose the chronology of events, more importantly, on how they had held a purported Board meeting on 7<sup>th</sup> October, 2014 and intended to hold a meeting on 24<sup>th</sup> October, 2014 at the 1<sup>st</sup> plaintiffs subject Satellite Tea Factory but were repulsed by the Kenya Police.
- iv. At page 68 to 74 of the Defendant's Replying Affidavit, the defendants reiterate the intended take over and more so at pages 72 to 73 thereof, where at clause 34 thereof, the defendants are even seeking the handover of the Title deeds of the 1<sup>st</sup> plaintiff's land parcels wherein the Satellite Tea Factory is situate.

[14] The plaintiffs continued to submit that after they had discovered that the defendants had discreetly registered the name Chelal Tea Factory Company Limited as their own company, they invited the 6<sup>th</sup> defendant's attention to the subject name having been reserved at the material time of registration (Refer to pages 50 and 51 of the plaintiffs supporting affidavit and or pages 50 and 51 of the plaintiff's Further Affidavit). The 6<sup>th</sup> defendant conceded to the irregularity and in its letter dated 22<sup>nd</sup> October, 2014, the 6<sup>th</sup> Defendant demanded that the defendants do change their name to another one as the subject registration is untenable (Refer to page 52 of the Plaintiffs supporting affidavit and or page 52 of the Plaintiffs Further affidavit). Despite the intervention by the 6<sup>th</sup> Defendant, the defendants' calculated takeover of the 1<sup>st</sup> Plaintiff's tea factory was not diminished. The defendants continued to agitate for take-over (Refer to page 61 of the plaintiffs supporting affidavit and or page 61 of the plaintiffs further Affidavit). The plaintiffs even threatened to use force by themselves and or agents to ensure the takeover process succeeds. This outright aggression and disrespect of rule of law prompted this suit and application.

[15] The Plaintiffs cited the relevant law to be: Reservation of a company name is provided for under Section 19 (I) (a) of the Companies Act (hereinafter referred to as the "Act"). Section 19 (I) (b) of the Act is express that upon reservation, no other company shall be entitled to be registered with that name. At the date of incorporation of the defendants company, the name *Chelal Tea Factory Company Limited* had

already been reserved by the plaintiffs and was therefore not available for registration and or reservation by the defendants. Despite the 6<sup>th</sup> defendant directions on the matter, the 1<sup>st</sup> to 5<sup>th</sup> defendants have remained defiant, on using the name and taking over the 1<sup>ST</sup> Plaintiff's property. Also, "Chelal Tea Factory" is registered as a Trade mark by the plaintiffs. Sections 7 and 8 of the Trade Mark Act gives the registered proprietor of a Trade Mark exclusive right of the use of the registered mark and any use thereof by a person not being the proprietor constitutes an infringement. The 1<sup>st</sup> to 5<sup>th</sup> defendants herein have invoked the registered Trade Mark of the plaintiffs in incorporating their purported company. This court has a duty to apply the law, including the Trade Marks Act provisions. The defendants therefore, the 6<sup>th</sup> defendant inclusive, had no iota of right to purport to register a company using the plaintiffs trade mark, "Chelal Tea Factory". Neither do the defendants have a right to utilize that name for their own benefit whatsoever or at all. The defendants, therefore, by virtue of the Trade Marks Act provisions are without much ado barred from utilizing the protected and exclusive Trade mark name of "Chelal Tea Factory."

[16] On the basis of the above, the Plaintiffs are convinced that the registration of *Chelal Tea Factory Company Limited* is untenable in law. It flouts express provisions of the Companies Act and to that extent it is void and of no legal consequences. They relied on judicial approval in ***Standard Chartered Bank Ltd Vs. Lucton (Kenya) Ltd (supra)*** of the quotation thus;

***"...on the cases of MACFOY V UNITED INSURANCE CO. LTD [1961] 1 All ER 1169 and ASSOCIATION OF MEMBER EPISCOPAL CONFERENCE IN EASTERN AFRICA (AMECEA) V ALFRED ROMANI & OTHERS. [C.A. No. 22 of 2001] (unreported) for the proposition that there was in law a distinction between an irregular and a void act. In the latter case, the Court of Appeal had this to say;***

***"It is perhaps desirable and instructive at this stage to examine the distinction between orders which are nullities or orders in respect of which there has been nothing worse than an irregularity. No definition is to be found in the rules which draws a line between these two classes, and exactly where that line lies may not in certain circumstances, be easy to discover. The existence of the distinction is, however, one which has been recognized in the language of Council decision in the case of MACFOY V UNITED AFRICA CO. LTD [1961] 3 All ER 1169 at pg. 1172:***

***"the defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse "***

[17] And so, the Plaintiffs contended that the interlocutory orders of injunction are to restrain the 1<sup>st</sup> to 5<sup>th</sup> defendants from perfecting their illegal mission pending the hearing and determination of the suit. They have satisfied the threshold of the law on interlocutory injunction as stated in the celebrated case of ***Giella vs. Cassman Brown***, as well as in the decision of the Court of Appeal in the case of ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] eKLR***. by application of the Companies Act and the Trade Mark Act, the plaintiffs have a genuine and arguable case whose chances of success are overwhelming. The defendants have committed an already established wrong conceded by the regulator, the 6<sup>th</sup> defendant herein, and which the defendants are nevertheless determined to pursue and protect unless restrained by this court. Secondly, the plaintiffs herein have injected over Kenya shillings Five Hundred Million (Kshs. 500, 000, 000) in establishing the subject Satellite Tea Factory. The defendants have no iota of right in seeking to take over the plaintiffs' subject property. A certificate of incorporate is not a license to invade another person's property and or ground operations thereon and neither does the certificate confer any proprietorship rights to the Certificate holder. The 1<sup>st</sup> to 5<sup>th</sup> defendants have not at all demonstrated that they have the ability to refund or pay the plaintiffs such colossal amounts of money.

The confrontations, resistance and possible destruction of property and loss of life that may ensue if the defendants were to make good their threat to forcefully take over the Satellite Tea Factory is an eventuality that might be impossible to reverse. That is what results to an irreparable injury which would expose the plaintiffs to colossal losses and damage without recourse. And, in any event, the facts that have been established by the Plaintiffs tilts the balance of convenience towards granting the injunction in order to maintain the *status quo* in the sense that the Plaintiffs shall continue running the Satellite Tea Factory. No prejudice whatsoever or at all shall be suffered by the defendants if the conservatory orders were to be given in favour of the plaintiffs as sought. The Plaintiffs utilized the new ground of public interest, and stated that the 1<sup>st</sup> plaintiff's membership is of persons over 17, 000 tea farmers- compared to only five people, i.e. the 1<sup>st</sup> to 5<sup>th</sup> defendants. The utilitarian principle is applicable in this case; so that greatest number of people should be protected from suffering by granting the injunction. See the holding of the Court of Appeal in ***Civil Application no. 109 of 2007 (UR 71/712007), East African Cables Limited vs. Public Procurement Complaints, Review and Appeals Board & Anor [2007] eKLR*** that;

***“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.”***

The Plaintiffs urged the court to grant the injunction.

#### **The 1<sup>st</sup> to 5<sup>th</sup> Defendant's Written Submissions**

[18] The 1<sup>st</sup> to 5<sup>th</sup> Defendants (hereinafter “the Defendants”) filed a Preliminary Objection to the Plaintiffs' Notice of Motion and Plaint dated 25<sup>th</sup> October 2014 seeking to have the Plaintiffs' Application and Plaint struck out and or dismissed with costs on the following grounds;

- a. ***The application as filed and canvassed in the Plaintiffs' Application and Plaint dated 28<sup>th</sup> October 2014 are fatally and incurably defective and as such cannot stand or be ventilated before this Honourable Court.***
- b. ***The suit contravenes the mandatory provisions of the law.***
- c. ***The court has no jurisdiction to hear and determine the application.***
- d. ***The purported annexed exhibits/documents to the affidavit of Richard Ronoh at its paragraph 2 purportedly marked RR 1 pages 1 to 62 both inclusive offend the mandatory provisions of Section 6 of the Oaths and Statutory Declarations Act Chapter 15 Laws of Kenya. They are therefore not exhibits to be referred to before the law and by this Honourable Court.***
- e. ***If the said purported annexures/exhibits are due for expunging from the record, then there is no evidence upon which the application for injunction is sought to enable this honourable court consider it within the principles considered for granting of an injunction; the application therefore fails even on merit and ought to be dismissed and or struck out with costs.***

[19] I have already held that these grounds do not constitute a preliminary objection and except ground 3, they have been left at very high level of generalization. However, some arguments in support of the objections are valid legal points which will need determination within the facts, evidence and circumstances of this case. I will so proceed.

[20] The Defendants submitted that they needed to set out the entire case by the Plaintiff for them to

prove their preliminary objections. They went ahead to set out the case as follows: In the suit the Plaintiffs inter alia aver that;

1. *(No. 8 of the Complaint) Upon securing the land for the proposed Chelal Tea Factory, the 1<sup>st</sup> Plaintiff resolved to commence construction of the tea factory at an estimated cost of Kshs 480,000,000/= to be financed as follows;*
  - a. *40% of the project cost by the 1<sup>st</sup> plaintiff's tea growers/farmers as equity contribution.*
  - b. *60% of the project cost same being Kshs. 290,000,000/= by way of loan from Barclays Bank of Kenya which loan amount was disbursed with the 2<sup>nd</sup> Defendant as the guarantor.*
2. *(No. 9 of the Complaint) From the money deductions made as equity contributions from the Tea Growers of the 1<sup>st</sup> Plaintiff and the loan amount secured from Barclays Bank of Kenya, the proposed Chelal Tea Factory was constructed and it is now fully operational as owned by the 1<sup>st</sup> Plaintiff. Due to financing arrangements of the proposed Chelal Tea Factory as hereinabove averred, it was resolved as hereunder;*
  - a. *That the proposed Chelal Tea Factory shall not be established as an independent legal entity until such time as the finances utilized in securing and establishment of the proposed Chelal Tea Factory by the 1<sup>st</sup> Plaintiff shall have been fully repaid.*
  - b. *That the proposed name of "Chelal Tea Factory" shall be preserved for registration pending the repayment of the above financing.*
3. *(No. 10. of the Complaint) The 2<sup>nd</sup> Plaintiff in discharge of its duty as the managing agents, did, among others, as herein below;*
  - a. *Applied and successfully reserved the name CHELAL TEA FACTORY COMPANY LIMITED as required under the provisions of the Companies Act and which name preservation has been extended from time by the 6<sup>th</sup> Defendant with such last extension being on 30<sup>th</sup> September 2014 for 30 days.*
  - b. *Applied and successfully reserved the name CHELAL TEA FACTORY COMPANY LIMITED as a Trade Mark under the Trademarks Act.*
4. *(No. 11. of the Complaint) On or about 1<sup>st</sup> October 2014, the 1<sup>st</sup> to 5<sup>th</sup> Defendants purported to and proceeded to incorporate themselves as shareholders of a company under the name CHELAL TEA FACTORY COMPANY LIMITED, under Certificate of Registration Number CPR/2014/162629. The Plaintiffs aver that the purported registration of a company under the name "Chelal Tea Factory Company Limited" is irregular, illegal, null and void and a conspiracy to defraud the plaintiffs of their property.*
5. *(No. 12. of the Complaint) The 1<sup>st</sup> to 5<sup>th</sup> Defendants have persisted in making demands for hand over of the 1<sup>st</sup> Defendant's property to them under the disguise of the registered company name of Chelal Tea Factory and have threatened to forcefully take over the subject Satellite Tea Factory if the plaintiff does not succumb to their take over demands. The Plaintiffs are apprehensive that if the 1<sup>st</sup> to 5<sup>th</sup> Defendants are not restrained by this honourable court, the 1<sup>st</sup> to 5<sup>th</sup> Defendants shall make good their unlawful demands and threats by interfering with the Plaintiffs operations and destroying its property thereon so as to occasion irreparable loss and damage to the plaintiffs, invite chaos and anarchy to the detriment of the Plaintiffs and the public at large.*
6. *(No. 13. of the Complaint) The Plaintiffs claim against the 1<sup>st</sup> to 5<sup>th</sup> Defendants is for an order of injunction restraining themselves, agents, representatives or any other persons acting on their behalf and instructions or claiming through them from holding out as shareholders and directors of CHELAL TEA FACTORY COMPANY LIMITED under Registration Certificate No. CPR/2014/162629 or at all, an order of injunction restraining the 1<sup>st</sup> to 5<sup>th</sup> Defendants from trespassing onto the 1<sup>st</sup> Plaintiffs Satellite Tea Factory as established on L.R No*

***Kericho/Roret/1639 and Kericho/Roret/1641 and an order of declaration that the Registration and Incorporation of CHELAL TEA FACTORY COMPANY LIMITED under certificate of registration Number CPR/2014/162629 in favour of the 1<sup>st</sup> to 5<sup>th</sup> Defendants was unlawful, illegal, null and void ab initio.***

[21] They Defendant further stated that the Plaintiffs accuse them of the following;

- i. Applying for the registration of a company under the name of **CHELAL** while aware that the name has been commonly utilized to refer to the 1<sup>st</sup> Plaintiff's Satellite Tea Factory as situate at Roret.
- ii. Securing and or granting a registration under a name which was not available for registration to a third party without the knowledge and or consent of the Plaintiffs.
- iii. Seeking to take over the assets and management of the 1<sup>st</sup> Plaintiff's Satellite Tea Factory as established at Roret on the basis of the alleged registration of the company name of **CHELAL**.
- iv. Failing to yield and or surrender the registration of the company name under **CHELAL** for cancellation despite such demands from the 6<sup>th</sup> Defendant and the Plaintiffs.

[22] And so, the Plaintiffs have sought the following orders;

- a. ***That a declaration be and is hereby issued that the registration of CHELAL as a company name on 1<sup>st</sup> October 2014 under Certificate of Registration Number CPR/2014/162629 was and is illegal, irregular null and void ab initio.***
- b. ***That a declaration be and is hereby issued that any meetings convened, held and or resolutions passed by the Defendants as shareholders and or directors of CHELAL as registered under Registration Number CPR/2014/162629 are invalid, illegal , ineffectual, null and void.***
- c. ***That an order of injunction be and is hereby issued restraining the Defendants by themselves, their agents, servants, employees and or any other person whomsoever acting under their instructions from convening, holding, presiding over and or effecting any meetings, business, transactions and or passing resolutions as shareholders and or directors of CHELAL.***
- d. ***That an order of injunction be and is hereby issued restraining the Defendants by themselves, their agents, servants, employees and or any other person whomsoever acting under their instructions from encroaching on, remaining on, trespassing onto or in any other way howsoever from interfering with the operations, management, property and or as established elsewhere as Satellite Tea Factories in specific at Roret over L.R NUMBERS KERICHO/RORET/1639 and KERICHO/RORET/1641 and as commonly referred to as CHELAL.***
- e. ***Damages***
- f. ***Any other order or relief that this honourable court may deem fit***
- g. ***Costs of this suit***

[23] According to the Defendants, **CHELAL** as a company name was registered on 1<sup>st</sup> October 2014 through Registration Number **CPR/2014/162629**. Therefore, as a legal person, it should be the one to be sued. There is, thus, absolutely no causes of action that can be directed to the Defendants. They relied on the legal personality of the company amplified in the celebrated case of **Salmon Vs Salmon & Co. Limited (1897) A.C** where **Lord Macnaghten** at page 51 had this to say.

***“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.***

***“...When the memorandum is duly signed and registered though there be only seven shares taken, the subscribers are a body corporate “capable forthwith” to use the words of the***

*enactments, “of assuming all the functions of an incorporated company”.*

[24] The Defendant asserted that, the company is at law a different person altogether from the subscribers to the memorandum and the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers or members liable in any shape or form except to the extent and in the manner provided by the Act. They reinforced this stand by quoting from para 715 of *Halsbury’s Laws of England/Fourth Edition at page 429* where it is stipulated that;

*“A company, not being a physical person, can only act either by resolution of its members in general meeting, or by its agents. It is not the agent of its member and a member as such is not the agent of the company, the company being a separate entity or legal person apart from its member, who are not even collectively, the company”.*

The principle in **Salmon Vs Salmon & Co. Limited** is embodied in Section 16(2) of the Companies Act Cap 486 Laws of Kenya which provides that;

*“From the date of incorporation mentioned in the Certificate of Incorporation , the subscribers to the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the company in the event of its being wound up as is mentioned in this Act”.*

On the basis of the above, the Defendants are convinced that the Plaintiff discloses no reasonable cause of action against the Defendants and should be struck out. The Defendants are sued as directors of a registered company. It does not matter that the Plaintiffs are not happy with the registration of **CHELAL.**, and since the company has not been enjoined in the suit, the suit is a none starter. The proper Defendant in this case is **CHELAL.**

[25] The Defendants argued that the Plaintiffs suit is fatally and incurably defective and therefore an abuse of the court process. **CHELAL** have been sued for actions by its agents. Therefore, the Defendants have been improperly sued as parties; the suit against them has breached the principle of law that an agent may not be sued where there is a disclosed principal. The defendants were acting for **CHELAL** and could not therefore be sued in their personal capacities or under joint and several-liability, without joining **CHELAL.** See *ELC Case 568 of 2008 James Muriithi Wathingira & another Vs Stephen Muchiri Kariuki & 2 Others (2009) eKLR*, Lady Justice R.N. Sitati stated as follows;

*“As far as the 2<sup>nd</sup> Defendant is concerned, it is not disputed that the 2<sup>nd</sup> Defendant was acting as an agent of a disclosed principal and in the circumstances there can be no case against him by the Plaintiffs herein”.*

Also in *HCCC NO 1221 of 1999 High Court OF KENYA AT NAIROBI (Milimani Commercial Courts) Koda K. (k) Ltd Vs Lyndalian Freighters & Forwarders Limited & 2 Others*, Justice Luka Kimaru had this to say;

*“It is clear from the above articles of Warsaw Convention that the 2<sup>nd</sup> Defendant is deemed to be the agent of the 3<sup>rd</sup> Defendant, a disclosed principal. The 3<sup>rd</sup> Defendant, as a carrier is liable for any breach of the contract committed by the 2<sup>nd</sup> Defendant”.*

[26] According to the Defendant, the Plaintiffs do not also have the “*Locus standi*” sue on behalf of **CHELAL.** From the averments in paragraphs 9, 10, 11 and 13 of the Plaintiff, the Plaintiffs right to sue emanates from the “proposed name of **CHELAL**” which name they allege was reserved for registration and “successfully” registered as a trade mark under the Trade Marks Act the same unfortunately does not give it a corporate or distinct and independent identity as per Section 16(2) of the Companies Act Cap 486 Laws of Kenya. On this, Jenkins L.J in **Edwards Vs Halliwell** (1950)2 All E.R. 1064 at 1066 had

this to say;

***“The rule in Foss Vs Harbottle as I understand it, comes to no more. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of the matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done,, then cadit quastio”.***

The proper Plaintiff could be a registered company or its duly appointed agents, any other body purporting to do so, is likened to a busy and idle body. Such is the case of the Plaintiffs in this case. The proposed company on whose behalf the Plaintiffs purport to act is not lawfully in existence. It would therefore be an abuse of the court process to have a suit pending on behalf of a non-existent entity.

[27] The Defendants did not stop there. They sought the assistance of the decision in the case of ***Speaker of the National Assembly Vs Njenga Karume (2008) KLR 425 Civil Application No Nai 92 of 1992 (NAI 40/92 UR)*** (unreported), where the Court of Appeal ruled;

***“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an act of parliament, the procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear Constitutional and Statutory Provisions”.***

The Notice of Motion is seeking to challenge acts which should be handled under Section 19 and 20 of the Companies Act Cap 486. These provisions are all inclusive and provide for a strict procedure on how any proceedings under the Act can be brought. Under the Companies (High Court) Rules pursuant to Section 344 and the Companies (Winding Up) Rules suits under the Companies Act shall be commenced by way of petition. Therefore, a Plaint has no relevance in the Companies Act. See also the case of ***Raphael Samson Kithika Mbondo Vs Luka Daudi Galgalo & Paul Joseph Ngei Election Petition No. 16 of 1974*** where the court stated as follows;

***“.....What we are saying is that there are special procedures which when it comes to matters of election and those procedures ought to be strictly followed as the court observed in Karume’s case...”***

The Defendants were of the view that they wer raising these issues on jurisdiction in tandem with the case of ***the owners of the Motor Vessel “Lillian S. Vs Caltex Oil (Kenya) Ltd, Civil Appeal No. 50 of 1989, Nyarangi J.A*** that;

***“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to denote the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction, there could be no basis for the continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction...”***

The also cited the case of ***Court of Appeal of Kenya Nairobi Civil Appeal 266 of 1996 Kenya National Examination Council Vs Republic Exparte Geoffrey Gathenji Njoroge and others, Justices R.S.C Omolo P.K Tunoi and A.B Shah; Municipal Council of Mombasa and Umoja Consultants Ltd (A 185/01(2001) KLR 4816;*** to demonstrate that judicial review remedies are available to a party as against a public body which has statutory obligation to perform a duty and it failed to perform this such duty to the detriment of the party. See ***also High Court of Kenya at Nakuru Civil Case 116 of 2002 Grace Wanjiru Munyinyi Vs Gedion Waweru Githunguri & 5 others*** where it was held by **Justice L. Kimaru** that;

**“.....If the plaintiffs were dissatisfied with the way the affairs of the 6<sup>th</sup> Defendant (a company) were being managed, the right procedure that would have followed was to file a petition as provided by Section 211 of the Companies Act. They were not at liberty to file a Plaint to ventilate what they perceived to be the mismanagement on the 6<sup>th</sup> Defendant. A Litigant is not at liberty to choose the Court. He has to approach the Court by duly established procedure by filing a Plaint. The Plaintiffs were not only abusing the form, they were also abusing the established procedure. The Judge further held that the Plaintiffs filed the Plaint without legal capacity. The suit was filed in abuse of the process of the Court. The Plaint did not therefore disclose a reasonable cause of action and was consequently struck out with costs of the application and suit”.**

[28] The suit is seeking to question the process through which the 6<sup>th</sup> Defendant (a public body) performing a public duty issued certificate of Registration Number **CPR/2014/162629**. The Plaintiffs can only do that through Judicial Review where leave must be sought before commencing such action. The Plaintiffs are seeking to quash the decision of the 6<sup>th</sup> Defendant. The court does not in view of the foregoing have jurisdiction to entertain the suit herein. They cited **Lelang vs. Cooper (1965) Q.B 232** where it was held that;

**“Where a suit is without substance or is groundless and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures. To do so would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole purpose or intention of causing the opposite party necessary anxiety, trouble and expense at the expense of deserving cases”.**

A Certificate of Incorporation under the Companies Act Cap 486 Laws of Kenya, the concerned Registrar of Companies under which the company is incorporated issues a “Certificate of Incorporation” to the newly incorporated company, The Companies Act states;

**“A Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with and that the association is a company authorized to be registered and duly registered under this Act”.**

They cited **Cotman Vs Brougham Lord Wrenbury** on this point. They submitted that the existence of the company will remain invariable even if there were some fraud/omission of information/unfulfilled formalities etc at the time of formation/registration of the company and the ending of the existence of the company will only be possible with the Certificate of Incorporation. According to Harpeet on the conclusiveness of the Certificate of Incorporation he had this to say;

**“.....The term conclusive evidence means that the inquiry regarding corrections or in-corrections of any particulars contained in the Certificate of Incorporation is not allowed. This means that the Certificate of Incorporation cannot be challenged by any court or tribunal on any grounds whatsoever.”**

[30] The Defendants submitted that the High Court has no jurisdiction in matters reserved for Registrar. And Art 47(i) of the Constitution requires that no person should be condemned unheard and so Chelal will be condemned unheard thus a direct violation of the constitution. They ended arguments on the objections on a note where they sought the purported exhibits in the supporting affidavit of Richard Ronoh and John Kennedy Omega sworn on 28<sup>th</sup> October 2014 to be **EXPUNGED** from the record. Their contention is that only the 1<sup>st</sup> exhibit which is marked; all the rest are not exhibits within the meaning of Section 6 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya. And, once those exhibits have been **EXPUNGED** from the record, the entire foundation/substratum of the application is gone leaving the application with nothing to stand on. According to them, these are not matters which can be cured under Article 159 of the Constitution or Section 1A, 1B and even 3B of the Civil Procedure Act.

## The 1<sup>st</sup> to 5<sup>th</sup> Defendants' Submissions on merits of the Application

[31] The Defendants also filed a Replying Affidavit sworn by **Richard Cheruiyot Ronoh**. They asserted that the thresholds set out in the case of **Giella vs. Cassman Brown** have not been met. On the arguments on the objections, the Plaintiffs' case is bare and without any legal foundation. Without CHELAL as a party; the fact that the Defendants are agents of a disclosed principal; and that the Plaintiffs are purporting to act for a nonexistent entity "a reservation of a name"; there is no prima facie case established to warrant an injunction. In any event, an order of injunction would be in vain in this matter as they act for nonexistent entity. Accordingly, they urged the court to dismiss the suit and the application.

### THE DETERMINATION

#### Issues

[32] From the Pleadings, affidavits and annexures thereto, and the submissions of the parties, these are the issues for determination:

- a) ***Whether the plaint discloses any reasonable cause of action; under this heading, I will also determine whether this suit is incompetent having been commenced by way of plaint rather than a petition;***
- b) ***Whether Chelal Tea Factory Company Limited ought to be a party in these proceedings; here the question of whether the defendants are agents of a disclosed principal shall be discussed;***
- c) ***Whether annexures to the supporting affidavit by Richard Ronoh are incompetent; and***
- d) ***Ultimately, whether an injunction is merited.***

[33] I propose to start with issue (c) above. The matter raised is governed by section 5 and 6 of the Oaths and Statutory Declarations Act, and Rules 9 of the Oaths and Statutory Declarations Rules. The Rules draw from the Act. Section 5 has received extensive judicial commentary and interpretation. I need not multiply them except to cite some of them and state that the section is not cast in mandatory but directory tone and any defect in the *jurat* of the affidavit is taken to be a matter of form and not substance, thus, it is not fatal to the affidavit. See *Ringera, J*, (as he then was in **Milimani – HCCC No. 462 of 1997, Standard Chartered Bank Limited Vs. Lucton (Kenya) Ltd (unreported)**, and **Milimani HCCC No. 26 of 2004, Patrick Thinguri & 1, 006 Others Vs. Kenya Tea Development Agency Co. & Another (unreported)**). But, the Respondents have raised a specific question on the sealing and identifying the exhibits to an affidavit. I wish to answer the question specifically.

[34] Rule 9 and 10 of the Oaths and Statutory Declarations Rules provide as follows:-

**9. All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.**

**10. The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.**

First of all, I have stated that the rules draw from the Act. The word "shall" in the rules is also not to be interpreted to be mandatory but rather directory. This approach is founded on the canons of statutory interpretation of the laws as expounded by *Ringera, J*, (as he then was) in the case of **Milimani – HCCC No. 462 of 1997, Standard Chartered Bank Limited Vs. Lucton (Kenya) Ltd (unreported)**, that:-

***"There appears to be a common belief by many in these courts that the use of the word "shall" in a statute makes the provision under construction a mandatory one in all circumstances. That belief is in my discernment of the law a fallacious one. As I understand the canons of statutory***

*interpretation, the use of the word “shall” in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. As long ago as 1861, in the case of LIVERPOOL BOROUGH BANK V TURNER [1861] 30 L. J. Ch. 379, pp. 380-381, Lord Campbell had laid it down that;*

*“No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered”.*

*And from PRINCIPLES OF STATUTORY INTERPRETATION by Justice G.P. Singh, a former Chief Justice of Madhya Pradesh High Court in India, the following instructive passage appears at p. 242:-*

*“The use of word “shall” raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word “shall” has, therefore, been construed as merely directory”.*

*And also In Milimani HCCC No. 26 of 2004, Patrick Thinguri & 1, 006 Others Vs. Kenya Tea Development Agency Co. & Another (unreported), where the court stated, that;*

*“Turning to the defects concerning the Jurat it is important to consider whether the defect as described is as to form or is fundamental and likely to touch on jurisdiction. Firstly it is not alleged that apart from appearing on a separate page there is any other defect like the name or place of swearing for example. The court finds that this is not a fundamental defect or irregularity and is both curable under the Order on affidavits namely Order 18 rule 7 which reads:-*

*7 “The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the file or other irregularity in the form thereof”.*

*For the avoidance of doubt and in view of the frequent of objections being received by the courts it should be pointed out that S. 72 of the Interpretation and General Provisions Act does give the courts wider powers and discretion to avoid being blinded by technicalities which are now being raised on a daily basis by advocates and give the court time to consider and embark on matters of substance.*

*Section 72 of the INTERPRETATION AND GENERAL PROVISIONS ACT states:-*

*“Save as is otherwise expressly provided, whenever a form is prescribed by a written law an inherent or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead.”*

*In the Court of Appeal case of MWATHI v IMANENE 1982 KLR 323 the court upheld the position as above concerning S. 72. I therefore hold that this Section does give the court authority to overlook the defect concerning the Jurat and to admit the affidavit in evidence...”*

[35] The objection is that only the first exhibit in the Supporting Affidavit of Richard Ronoh which is properly sealed; marked and identified as RR1. All the other annexures running from pages 2 to 62 are not sealed and marked as per rule 9 and 10 of the Oaths and Statutory Declarations Rules, and are, therefore, not exhibits as per the law. I note that the affidavit clearly tendered the exhibits as a bundle and it has referred to the particular exhibits as a bundle. The commissioner, then sealed, marked and identified

the annexures as a bundle. Therefore, where the exhibit is a report or a composite document made of different parts or materials consisting in other inextricable, incidental or accompanying documents, or a bundle of documents, it should be sufficiently described as such in the body of the affidavit, and, the sealing and the marking of only the cover or the first page of the report or the composite document or bundle of documents will be a sufficient compliance with the Oaths and Statutory Declarations Act; and Rules. In any event, at worst, the matter complained of the annexure in question would be a mere irregularity which is a matter of form rather than substance, and such technicalities were depreciated by article 159 of the Constitution. Accordingly, I find that the annexure RR1 was properly sealed and identified as the exhibit in the supporting affidavit herein. The affidavit is thus competent.

[36] I will proceed to the issue (b) for obvious reasons; the decision in (b) will determine whether there could be any cause of action against the Defendants in the first place, and if so, whether the plaint discloses any such cause of action. If I find that the Defendants cannot be sued, of course, the plaint cannot be said to disclose any cause of action against the defendants. I agree with the submissions of the Defendants on the law on legal personality of a corporation as enunciated in the case of **Salomon vs. Salomon**. The principle that a company is a legal person separate from those who compose it is the greatest legal innovation that we have seen in company law. The company sues or is sued on its name; it owns its own properties and bears its liability. The company is not even an agent of its members. And as a general rule, the directors are not liable for omissions and actions of the company. The law that any proceedings relating to a corporation should be in the name of the company was later reinforced in the case of **Foss vs Harbottle**. Except, however, there are two important things which the Defendants did not address in their elaborate rendition on the concept of corporate legal personality of a company and ended up creating a false impression that the Directors of a company could never be sued or that proceedings could never be initiated on behalf of the company by a person other than the company. These things are; one, that there are exceptions to the rule in **Foss vs. Harbottle**; and two, there circumstances set out in statute or in judicial precedents which would cause the court to lift the corporate veil of a company and deal directly with the offending directors. For further elucidation on the exceptions to the rule in **Foss vs Harbottle** see the case of **Prudential Assurance Co. Ltd vs. Newman Industries Limited [1982] Ch. 204**, where the Court of Appeal held:

***“In our view, whatever may be properly defined boundaries of the exception to the rule, the plaintiff ought to at least be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries to the rule in Foss –v- Harbottle.”***

The wrongs which would entitle a minority shareholder to file suit on behalf of the company are mainly acts which are *ultra vires* the company or which amount to fraud. Ultra vires decisions are those decisions which are made without any authority under the Memorandum and Articles of Association or the law. Such decisions cannot even be ratified by the Board or the shareholders in a General or Special Meeting of the company.

And for further illumination on circumstances in which corporate veil may be lifted, see the following work of the court in the case of **Post Bank Credit Limited (In Liquidation) vs. Nyamangu Holdings Limited:-**

#### ***Lifting or piercing the corporate veil***

***[9] The Applicant submitted on the lifting of the corporate veil and urged the court to hold the directors of the Defendant Company personally liable for the decretal sum in case the Company cannot satisfy the same. This issue is not raised as a formal request to the court in the formal applications being considered by the court. It was raised in the submissions of the Plaintiff. Nonetheless, it is worth a discussion. The status of separate corporate personality of a company as a legal person in Salomon v Salomon is the greatest legal innovation in company law. Although artificial person and does not possess the body of natural person, a company is a juristic person; a legal person in law. It exists only in contemplation of law. Because of its artificial nature, a company acts through human persons, namely, the directors, officers,***

shareholders, and corporate managers, etc., for its management and day to day running. But these individuals represent the company and accordingly whatever they do within the scope of the ostensible or authority conferred upon them by the Memorandum and Articles of Association, in the name and on behalf of the company, they bind the company and not themselves. Thus, the Directors, Members or shareholders of a limited liability company are not liable for the debts or liabilities of the company; the company is. Once the shareholders have contributed and paid up the nominal value of their shares, they are no longer liable to contribute anything further. However, it is quite different for companies which are formed with unlimited liability of members, or with members' guarantee to a particular amount.

[10] But there were other developments in law in the nature of lifting or piercing the corporate veil. The chief advantage of incorporation of a company is, of course, the separate legal entity. In reality, however, the business of the artificial person is always carried on by, and for the benefit of, some individuals. In the ultimate analysis, some human beings are the real beneficiaries of the corporate advantages; see *Gallagher v. Germania Brewing Company* that,

‘...for, while, by fiction of law, a corporation is a distinct entity, yet in reality, it is an association of persons who are in fact the beneficiaries of corporate property’.

As a general rule, courts do not interfere with and essentially go by the principle of separate legal entity laid down in the *Solomon's case*, but with the passage of time, courts have come to realize that indeed some promoters and members of companies have formulated and executed fraudulent and mischievous schemes through the corporate vehicle. See the case of *Jones & Another vs. Lipman & Another* [1962] 1 WLR 833 where it was held that whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity. Corporate vehicle has been used to commit serious and mega frauds and corruption. And that realization has impelled the courts, in the interest of the law, the members in general, or in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent, or improper or illegal acts. This act of removing the facade of corporate personality to identify the persons who are really guilty is what is known as lifting or piercing the corporate veil. But, the exercise is strict one and is regulated by statutory provisions or through judicial interpretation; courts have to identify the specific circumstances which warrant lifting of the corporate veil and directly deal with the individuals behind the fraudulent schemes. The statutes may provide expressly the circumstance for lifting or piercing the corporate veil of a company. See such provisions as on Reduction of membership below the statutory minimum; Misrepresentation in prospectus; every director, promoter and every other person, who authorizes such issue of prospectus, incurs liability toward those who subscribed for shares on the faith of untrue statement; Mis-description of name; Where officer of a company signs on behalf of the company any contract, bill of exchange, or any kind of order of money, such person shall be personally liable if the name of the company is either not mentioned, or is not properly mentioned; Fraudulent conduct: Where in case of winding up of the company by members of the company, it appears that any business of the company has been carried on with intent to defraud creditors of the company, or any other person, or for any fraudulent purpose, the court may hold such persons liable personally for any liability of the company; Liability for ultra vires acts: Directors and other officers of a company will be personally liable for all those acts which they have done on behalf of a company if they are ultra vires of the company. See provisions on directors' liability in the Companies Act. Under judicial interpretation, it is difficult to compress an exhaustive list of cases where courts have lifted or might lift the corporate veil. But to mention some few examples where the veil was lifted by courts would help to form an idea as to the kind of circumstances that could permit the court's intervention to pierce the corporate veil. For instance, the court may use Agent-Principal relationship between parent and subsidiary company to find that where a company took over a business and continued it through a subsidiary company, such subsidiary company acted as agent of the parent company. Yet another example, the concept of alter ego of a company: Rule

*of attrition of liability to the person who is the controlling mind of the company. The person may not be a director or officer of the company but he is the alter ego, controlling mind of the company.*

*[12] See what Ringera, J (as he then was) in Ultimate Laboratories vs. Tasha Bioservice Limited Nairobi H.C.C.C No. 1287 of 2000, stated on lifting of the corporate veil that:*

*“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct (See the cases of GILFORD MOTOR CO. VS. HORNE [1933] Ch. 935 and JONES VS. HIPMAN [1962] 1W.L.R. 832).”*

*[12] In light of above discussion, although it is undisputed principle of law since Solomon’s case that a company is an independent and legal personality distinct from the individuals who are its members, it has also been firmly established that the corporate veil may be lifted, and the individual members recognized for who they are in certain exceptional circumstances. Generally, and broadly speaking the corporate veil may be lifted where the statute itself contemplates lifting the veil or fraud, or improper conduct is intended to be prevented. It is neither necessary nor desirable to enumerate classes of cases where lifting the veil is permissible, since that must necessarily depend on relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of element of public interest, the effect on parties who may be effected, etc. in the case before me, even if the request for piercing the veil was made it ought to have met the high threshold of the law. The mere fact that one is a director or shareholder of a corporation does not, ipso facto, make the director or shareholder liable for the actions or omissions of the Company unless the circumstances are such that the corporate veil of the Company can be lifted. The case of Mugenyi & Company Advocates vs. The Attorney General [1999] 2 EA 199 following Palmers Company Law Vol. 1 (22 ed) gave a list of 10 instances in which the veil of corporate personality may be lifted or as is sometimes put, look behind the company as a legal persona and these are:-*

- a) Where companies are in the relationship of holding and subsidiary companies’*
- b) Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;*
- c) In certain matters relating to taxation;*
- d) In the law relating to exchange control;*
- e) In the law relating to trading with the enemy;*
- f) In the law of merger control in the United Kingdom;*
- g) In competition of the European Economic Community;*
- h) In abuse of law in certain circumstances;*
- i) Where the device of incorporation is used for some illegal or improper purpose;*  
*and*

**j) Where the private company is founded on personal relationship between the members.**

[37] Now that I have restated the law, let me now tackle the real issues in controversy. The cause of action is threefold: - One is based on the registration of a company with similar name as the reserved name **Chelal Tea Factory Company Limited**; the second is based on Trade Marks Act; and the third is based on attempts or actions by the Defendants to take over the concerned satellite factory herein. From the outset, the claim of infringement of trade mark will need much more evidence if it were to become a basis for issuance of an injunction and there is not sufficient evidence for the court to dwell on the claim for now. In the circumstances of this case, the perennial problem which courts have lamented over time has shown its ugly head again, i.e. the difficulty that comes about when there is a conflict between the Trade Marks Act and the Companies Act. The following rendition of court in the case of **Webtribe Limited t/a Jambopay vs. Jambo Express Limited [2014] eKLR** clearly depicts this dilemma:

**[13] From the outset, I observe the dispute here lie in two Acts of Parliament which give protection to proprietorship of names and marks. These are the Companies Act, cap 486 Laws of Kenya, and the Trademarks Act, cap 506, Laws of Kenya. The relevant section cited on names of companies is Section 19 of the Companies Act which provides that pending registration of a company or a change of name by a company, the Registrar may, on written application, reserve the name and this reservation shall remain in force for a period of 60 days during which no other company shall be registered under that name. Thus, as long as the Registrar has reserved a name pending registration of a company or change of name by a company, the name is not available for a period of 60 days for use by any person other than the person in whose behalf the name is reserved for purposes of registration of a company or change of name of a company. And after registration by that name, the protection of exclusive use of the name by the company subsists for the entire life of the company. See Section 20 of the Companies Act which provides that in the event of registration of a second company through inadvertence or otherwise, by a name that is too like the name by which a company in existence is previously registered, the Registrar may direct the second company to change its name within a specified period. In effect therefore, a name to which a company is registered is only available upon the death of the company either through winding up, liquidation or otherwise, or upon change of name of the company.**

**[14] If I understood the arguments by the Defendant are that in view of the provisions I have cited above, the Plaintiff should have moved the Registrar of Companies for appropriate relief in the first instance and thereafter in the High Court under the relevant provisions of the Companies (High Court) Rules. But, my understanding of the Plaintiff's claim is not merely in the name of the Defendant Company under the Companies Act but that the registration of the Defendant Company and its essential business undertakings breached and continue to breach the Plaintiff's trademark "Jambopay". The argument, in my view, brings the Trademark Act Cap 506 laws of Kenya into direct focus of this suit. This case is not therefore, purely one on the name of the company which could be cured by a change of name. It is a much wider cause of action of infringement of a trade mark albeit partly, the registration of the company is claimed to be an incident of infringement in itself. I should state also that, the fact that a change of name or deregistration of the Defendant company is one of reliefs the Plaintiff has sought in the plaint does not preclude the Plaintiff from seeking the relief for infringement together with that for deregistration of the company from the High Court. The linchpin claim that confers jurisdiction is the trade mark infringement and this court has jurisdiction over this suit. Consider Section 7 (1) of the Trademarks Act which provides that the registration of a person as the proprietor of a trademark if valid gives to that person the exclusive right to the use of the trademark in relation to the goods or in connection with the provision of services and that such right is infringed by a person who not being a proprietor of the trademark or a registered user of the trademark uses a mark identical with or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade or in**

*connection with the services in respect of which it is registered.*

*[15] I need not overemphasize that Trademark law deals with the identification of goods or services with a distinctive sign or combination of signs. The protection afforded to a trademark is territorial but buttressed by various international instruments which offer international protection. But, whereas the Companies Act deals with the registration of companies and the responsible office is the Registrar of companies, the Act is often to find itself in conflict with the Trade Marks Act for as long as there is no interlink between the two Acts of Parliament in practical sense. The conflict arises this way. For instance, a trademark is registered in respect of a class of services may conflict with a trade name of a company or company with similar activities or services. This lack of coordination between registering authorities has caused and will continue to cause extreme anxiety to consumers of the two services as well as judges who will be called upon to resolve those conflicts which would otherwise have been avoided were it not for the unhealthy state of institutional operations. See what Mutava J said in a masterly fashion in the case of Nairobi High Civil Case 840 of 2010 Agility Logistics Limited & 2 Others v. Agility Logistics Kenya Limited that:-*

*“On the outset, my take on the present application is that the dispute before the court is an indictment of two Acts of Parliament that give protection to proprietorship of names in a manner that suits one legislation a villain and a victim of the other and vice versa. These are the Companies Act, cap 486 Laws of Kenya, on the one hand and the Trademarks Act, cap 506, Laws of Kenya, on the other hand. The present dispute brings into sharp focus the competing interests served by the two Acts vis a vis each other and the gaping lacuna in harmonizing the said interests in such a manner as would smoothen the inherent conflict in the operation allocation of the two legislations. This position is not helped by the appalling lack of coordination in the institutions charged with the implementation of the respective legislations.”*

*[16] In another sense, I note that none of these Acts, the Trademark Act and the Companies Act, offer a reconciliation of the apparent source of conflict between the two Acts. And when such conflict arises, rights of persons are involved, which is exactly the case here, and that makes it imperative that the dispute should be resolved by the court. The Registrar of Companies or the Registrar of Trademarks in their lone capacity; none is in a better position to resolve such issues; only a court of law would by bringing all the parties before it and applying both Acts of Parliament. This court has unlimited jurisdiction to hear and determine this suit. I will now proceed to examine the Plaintiff's grievances and the rejoinder by the Defendant.*

[38] I do not agree with the Defendants that the Plaintiffs purport to sue on behalf of a non-existent entity. The Plaintiffs claim is based on the reservation of a name under section 19 of the Companies Act which entitles the promoters of the proposed company to a remedy against the registered company and or the Registrar of companies. The 1<sup>st</sup> Plaintiff is the promoter of the proposed company and reserved the name **Chelal Tea Factory Company Limited** which had been renewed from time to time. I should state also, because this has been hotly argued, that, if these proceedings were solely on that cause of action, then the appropriate procedure to adopt would have been judicial review. However, this suit carries more than a claim on registration of company name. It alleges infringement of trade mark under the Trade Marks Act and other tortious acts by the Defendants. In a situation where a person has more than one relief against the same person, he is entitled to bring forward all his reliefs in one cause unless the causes of action are such that they cannot be dealt with in one cause or are completely irreconcilable. All the causes of action herein emanate from related circumstances and are capable of being dealt with in the same cause. The matter of trade mark and tortious acts may be commenced by plaintiff. And therefore, there is nothing wrong for the Plaintiffs to house all these claims against the Defendants in a plaintiff. The law has always abhorred multiplicity of suits which could be tried together. Accordingly, I do not accede to the arguments by the Defendants that the suit is incompetent having been commenced by way of plaintiff. I dismiss the argument and hold the suit is competent.

[39] The other related argument is that the company **Chelal Tea Factory Company Limited** ought to have been made a party. I agree the company is a necessary party especially because of that aspect of the suit on its registration. That omission does not, however, render the suit wholly defective as shall become apparent shortly. But, for purposes of determination of the real issues in controversy completely and effectually, I hereby order on my own initiative that **Chelal Tea Factory Company Limited** be made a party in these proceedings. The Defendants have confirmed under oath that they are the directors of the company and were served with all papers filed herein. However, for good order, the company should be served with the court papers within 7 days of today, and the company shall file its responses within 7 days of service. The said responses will be limited to the claims made against the company only. Meanwhile, I note the inextricable nature of the facts of this case, and for that I may issue orders against the company on interim basis as they file their papers.

[40] The 1<sup>st</sup> Plaintiff reserved the name **Chelal Tea Factory Company Limited** and as I have stated, it has locus standi to file this suit. The reservation was effective at the time **Chelal Tea Factory Company Limited** was registered and this fact was brought to the attention of the company but it chose to ignore the directions by the Registrar of companies. The law is also clear and section 19 of the Companies Act places an express prohibition for registration of another company in the reserved name when the reservation is in effect. Accordingly, on *prima facie* basis, in such circumstances, an injunction would ordinarily issue against such company. But I will revisit this later and give my pronouncement on injunction against the operations of the company.

[41] The Plaintiffs contended that the satellite factory in issue was established and constructed by the 1<sup>st</sup> Plaintiff in accordance with the resolution of the 1<sup>st</sup> Plaintiff. The Plaintiffs have stated how they obtained the suit lands and established the satellite factory at a cost of Kshs. 480,000,000. The 1<sup>st</sup> Plaintiff also made a resolution that **Chelal Tea Factory Company Limited** will be registered to take over the running of the satellite factory once the entire loan borrowed to construct the factory is repaid in full. The 2<sup>nd</sup> Plaintiff also guaranteed the repayment of the loan and a bank guarantee was issued thereto. From the record, **Chelal Tea Factory Company Limited** did not establish or construct; it has not even claimed or shown it acquired the satellite factory in accordance with the resolution of the 1<sup>st</sup> Plaintiff. The Replying affidavit only makes generalized statements in paragraphs 12, 13 and 14 that; the Defendants are bona fide and true shareholders and tea growers of the Company; and acknowledged that the satellite factory was established through some loan arrangement with the Plaintiffs. They then in a loose sense averred in paragraph 13 that *the ownership of the land being L.R NO KERICHO/RORET/1639 and KERICHO/RORET/1641 is neither here nor there as the same is part of the financial arrangement referred to in paragraph 12.* In addition, the registration of **Chelal Tea Factory Company Limited** is disputed and is one of the issues in controversy here. The facts disclosed by the parties does not suggest that the Defendants are the directors of the Plaintiffs or that they registered **Chelal Tea Factory Company Limited** pursuant to the resolutions of the 1<sup>st</sup> Defendant. Therefore, in the circumstances of this case, the activities by the Defendants to take over the satellite factory on behalf of **Chelal Tea Factory Company Limited** are ultra vires acts the company and personal ventures. These acts are tortious in nature and are personal acts of the Defendants. It is worth repeating that, there are many unanswered issues surrounding the registration of **Chelal Tea Factory Company Limited** and the attempted take-over of the satellite factory. And, since **Chelal Tea Factory Company Limited** is not the owner of the satellite factory, the balance of convenience tilts in favour of granting an injunction to restrain the Defendants or any other person from taking over or dealing with the satellite factory. I also restrain any resolutions by **Chelal Tea Factory Company Limited** purporting to enter, take over or control the satellite factory herein. Again, as the registration of **Chelal Tea Factory Company Limited** is in dispute, I will restrain the said company from doing any business in relation to the suit property herein. The upshot is that I allow the application dated 28<sup>th</sup> October 2014. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 2<sup>nd</sup> day of March 2015**

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**F. GIKONYO**

**JUDGE**