REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 325 of 2004

KENYA BRIDGE AFRICA LTD……..……APPLICANT

VERSUS

RAJ THAKKER & 12 OTHERS……..……RESPONDENTS

RULING

There are two applications on the record seeking the same reliefs. One is dated 3rd March 2005, by way of chamber summons, brought under Order 6 Rule 13(1) (a) (b) and or (d) Civil Procedure Rules, and the inherent jurisdiction of the court. It is filed by the 14th to the 18th defendants (both inclusive)

The second application is dated 12th May 2005, and filed the same date, also brought by way of chamber summons under order 6 rule 13(1) (a) (b) and or (d) Civil Procedure Rules, and/or the inherent jurisdiction of the court. It is brought by the 1st to the 13th defendants (all inclusive). There is no consolidation order.

Under consideration is the application by the 14th to the 18th defendants (all inclusive) dated 3rd March 2005 and filed on 4th March 2005. As mentioned, it is brought under order 6 rule 13(1)(a)(b) and or (d) Civil Procedure Rules and/or the inherent jurisdiction of the court. Three prayers are sought namely:-

(i) That the amended plaint dated 14th June 2004 and filed on 15th June 2004 be struck out.

(ii) That the plaintiff's suit be dismissed with costs; and

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

The plaint sought to be faulted is the one dated 14th June 2004 and filed on 15th June 2004. The salient features of the same are as follows:-

(1) In or around June 2000 the then Managing Committee of Nairobi Gymkhana agreed with Kenya Bridge Association exempted from registration under the Registration of Societies Act Cap 108 Laws of Kenya vide certificate No. 1342 dated 18th June 1963. The agreement was for the Kenya Bridge Association to build a bridge hall on Nairobi Gymkhana premises, but no formal agreement was signed between the parties. The hall was constructed at a cost of Kshs. 6 million.

(2) September 14th 2000 the association decided to incorporate itself.

(3) A memo of understanding was written between the Association and Nairobi Gymkhana on 12.3.2001 whereby the rights to use the hall were given to Kenya Bridge Association for their exclusive use.

(4) The plaintiff upon incorporation on 18.9.2001 had the use of the hall until a dispute arose between them and the Kenya Bridge Association over the right to use the said hall.

(5) 30.6.03 Kenya Bridge Association purported to hold an AGM and picked purported officials.

(6) The Registrar of Societies declared the AGM wrongfully convened.

(7) 30th June 2003 the purported elected officials of Bridge Association purported to close the hall.

(8) 25.11.2003 Nairobi Gymkhana unanimously agreed that the plaintiff was the party with rightful entitlement to use the said hall.

(9) In recognition of matters stated in No. 8 above the plaintiff gave an irrevocable undertaking to indemnify Nairobi Gymkhana of all costs, claims, demands, Damages, expenses and or demands, whatsoever arising from any claims or actions instituted against it by the splinter group calling itself Kenya Bridge Association as headed by one Mrs. Samina Esmail as Chairman. The indemnity was meant to be binding on the plaintiffs' successors and assigns.

(10) The plaintiff assumed use of the hall with effect from 25.11.2003.

(11) Following assumption of use of the hall on 25.11.2003, Nairobi Gymkhana asked the plaintiff to reduce the oral understanding as to indemnity into a formal deed of indemnity.

(12) Although the plaintiff was of the opinion that a written indemnity was not necessary, nonetheless went ahead to execute one between it and the Nairobi Gymkhana on 24.3.2004.

(13) On 25.3.2004, the 1st to 13th defendants were elected as officials of Nairobi Gymkhana during an AGM, which elections, legally are disputed by the plaintiffs.

(14) It is contended, that the immediate past chairman of Nairobi Gymkhana was not allowed in the said AGM meeting contrary to clause 6: 11(b) of the Nairobi Gymkhana Constitution on the management committee. By virtue of this, it is contended that the said election was null and void. As a result, the plaintiffs contend that the said decision should be reversed.

(15) Upon assumption of office, the new officials decided that neither the plaintiffs nor the Kenya Bridge Association could assume use of the said hall. The decision was on 29.3.2004 and communicated to the plaintiffs on 31.3.2004.

(16) By reason of what is stated in number 15 above, the plaintiffs contend that the said decision was unlawful because of the following reasons:-

§ The plaintiffs had been recognized as the party entitled to use the said hall on 25.11.2003 by the former Nairobi Gymkhana.

§ The plaintiff had met all the conditions including in the signing of an indemnity both orally and in writing on 24.3.2004.

§ The decision had been implemented with effect from 25.11.2003.

§ Use of the hall was not listed as an agenda but recorded under A.O.B by the Chairman and without appraising the other members, the correct facts surrounding the use of the hall.

§ It is contended that the reversal of the decision of 25.11.2003 was premeditated by the chairman and other office bearers and therefore an abuse of their respectful offices.

§ They contended that the said decision was influenced by instigation of members of the splinter group.

§ It is contended that the plaintiff was not alerted of the holding of the said meeting, neither were they alerted to make representations before their use of the said hall was revoked. The decision was thus taken in breach of rules of natural justice.

§ As at 29th November 2004 the 14th defendant was the only trustee of Nairobi Gymkhana.

§ During the meeting of 29th November 2004 the 1st to 13th defendants appointed the 15th, 16th and 17th defendants as trustees. The validity make the said appointments is disputed by the plaintiffs.

§ As per clause 3:11 of the constitution of Nairobi Gymkhana, all movable and immovable property of the club is vested in the trustees.

§ When the problem arose, the plaintiffs took up the matter with the 14th defendant, who was the then only trustee and later with the 15th, 16th and 17th defendants, after they were brought on board, about the wrongful closure of the hall.

§ It is the plaintiffs stand that the 14th to 18th defendants, vested with power to sue and be sued as trustees, on behalf of Nairobi Gymkhana club, failed to assist hence their action against them.

The reliefs sought in a summary form are as follows:-

(i) That the defendants do abide by the decision of the management committee of Nairobi Gymkhana, made on 25th November 2003 that the plaintiff is entitled to use the said hall in line with the memo of understanding signed on 12th March 2001.

(ii) The defendants' decision to reverse the decision of 25.11.2003 be quashed.

(iii) Alternatively the defendant's decision to reverse the decision of 25.11.2003 be declared null and void.

(iv) The 1st to 13th defendants by themselves, or any of them, their servants and or agents be restrained from denying and or preventing the plaintiffs and its members use of the Bridge hall at the Nairobi Gymkhana.

(v) The 14th to the 18th defendants to order the 1st to the 13th defendants to open the said bridge hall for use by the plaintiffs in terms of the memorandum of understanding signed on 12th March 2001.

(vi) The Nairobi Gymkhana, through the 14th to the 18th defendants to be ordered to pay to the plaintiff damages for breach of contract arising from the defendant's failure to allow the plaintiff to use the said Bridge hall.

(vii) Such further and other orders this honourable court may deem fit to make.

(viii) The defendants to pay the plaintiffs' costs.

The grounds for seeking to strike out the amended plaint are set out in the body of the application, supporting affidavits, written skeleton arguments as well as case law. The major points are as follows:-

(1) the cause of action as pleaded by the plaintiffs in paragraph 14 and 17 of the amended plaint, based

on two agreements one made in June 2000 between the Kenya Bridge Association KBA and the then managing committee (M/C) of the Nairobi Gymkhana club, to allow KBA to build a bridge hall on the Gymkhana premises. The second one was made on 12th March 2001 between the then chairman Nairobi Gymkhana as mandated by the then Nairobi Gymkhana M/C which gave the exclusive rights to use the hall as well as all other concessions to KBA as then in existence and in the process of being incorporated.

(2) By the time the two agreements were made, the plaintiff was not in existence neither was it a party to them.

(3) There is nothing to show that the plaintiff took its body corporate from KBA more so when it is on record that KBA still exists as a society registered under the Societies Act.

(4) By reason of matters stated in number 1,2 and 3 above, they contend that the plaintiff having not been a party to the said two agreements, it cannot sue upon them.

(5) The plaintiffs claim against the 1st to 13th plaintiffs who were members of the Nairobi Gymkhana management committee in 2004 have not been sued in their with representative capacity on behalf of Gymkhana, but in their individual capacity, and yet, it has not been shown or pleaded that they had any link to the two agreements namely, that they were the management committee in 2000 and 2001 when the two agreements were made.

(6) They contend that defendants 14 – 18 are sued in their capacity as trustees of the Gymkhana club in whom it is alleged that both the movable and immovable property is vested, and because the trustees, can sue and be sued on behalf of the club, in the circumstances of this case, they are sued on behalf of defendants 1 – 13 who allegedly refused to open the hall for the plaintiff use and yet the plaintiffs does not refer to any agreement between them and the trustee, whereby the trustees allowed them to use the said hall and as a result of, whose refusal to use the said hall by defendants 1 – 13 the trustees can be sued.

(ii) Neither has it been averred and demonstrated that the trustees were parties to the 2000 and 2001 agreements on which the claim is anchored .

(iii) If it is true, that the trustees are sued on account of actions of defendants 1 – 13 and if there is no demonstration of existence of any agreement between the plaintiff and defendants 1 – 13 on whose behalf the trustees can be sued, then there is no basis upon which the trustees can be sued on behalf of defendants 1 – 13.

(7) They further contend that since it is averred in paragraph 14 and 17 of the amended plaint that the agreements were between managing committee of Nairobi Gymkhana for the years 2000 and 2001, the applicants contend that the said managing committee had no authority conferred to it by the Gymkhana's constitution to commit the Gymkhana property in the manner it did as the power to commit Gymkhana property is vested in the trustees only, As such the 2000 and 2001 agreements relied upon by the plaintiffs are null and void.

(8) As per clause 3: 11 of the Gymkhana Constitution, Trustees, can only deal with the property of Gymkhana in pursuance to a power given to them by the management committee as per the 1998 Gymkhana constitution, which governed the agreements of 2000 and 2001 referred to in paragraphs 14 and 17 of the amended plaint, and by resolutions passed by the AGM or special AGM of the club as per the constitution of July 2003.

(9) It is their stand that the plaintiff has not demonstrated in their amended plaint to the managing committee acted on behalf of the trustees in the 2000 and 2001agreements in accordance with the 1998 constitution. They had only demonstrated that the managing committee dated in their own right. No minutes have been exhibited to show how:-

§ The managing committee dealt with the plaintiff and not KBA.

§ No minutes to show that the managing committee gave direction to the trustee to enter into the agreements first with KBA and then with the plaintiff which was waiting incorporation then.

(10) It is also contended that the plaintiff cannot rely on the argument in paragraph 21 of the amended plaint, where it is pleaded that the managing committee unanimously agreed on 25.11.2003 to bide by the agreement referred to in paragraph 17 of the amended plaint to the effect that the plaintiff was entitled to the exclusive use of the hall because:

(i) By 25.11.2003 Gymkhana had a new constitution effective July 2003 which recognized that it is the trustees who had power to deal with the Gymkhana's property, pursuant to resolutions of the AGM or special AGM which had not been given as there is no averment in the amended plaint that there were such resolutions passed.

(11) They maintain that the plea of estoppel is not available to the plaintiff/respondent because it is not pleaded in the amended plaint, more so when it is on record that the plaintiffs never acted on the agreements sought to be relied upon. It is clear that it is KBA which acted on those agreements to construct a hall.

The plaintiff/respondents have opposed the application on the basis of ground set out in the affidavit in reply by Bharat Bhardwaj sworn on 6th day of May 2005, written skeletons arguments and case law. The major points raised by them are mainly a reiteration of the contend of the amended plaint and these are:-

(i) The Kenya Bridge Association agreed with the management committee of the Nairobi Gymkhana to construct a bridge hall for use by members of the Association on its premises as per averments in paragraph 14 of the amended plaint.

(ii) The agreement is signified by content of BB2 and BB3 whose content comprise the averment in paragraph 17 of the amended plaint. The agreement was on 6th December 2000.

(iii) The plaintiff was incorporated on 18th September 2001 and contributed 4.3 million through its members and thereafter the plaintiff was authorized to use the hall until 24th March 2004 when a dispute arose with a divergent group who sought to revive the now defunct KBA.

The move to remove KBA lead to the filing of Misc. App. No. 1133 of 2004.

4. They have knowledge that the Nairobi Gymkhana asked for an indemnity against any claims divergent groups which indemnity the plaintiff gave but nonetheless the defendant proceeded to bar the plaintiff from the use of the said hall thus necessitating the filing of the suit.

5. They maintain that the 1st to the 13th defendants are joined to the suit as members of the management committee. Whereas the 14th to the 18th defendants are trustees. The two categories are sued because as per the provision of the Gymkhana constitution, the two categories are the ones vested with the movable and immovable property of the Gymkhana. This is confirmed by the fact that the 14th to 18th defendants have applied vide the application dated 3.3.2005 to have the entire suit struck out not as against them but as a whole.

6. They contend the plaintiff was entitled to seek the relief sought vide the plaint sought to be struck out because:-

(i) Its shareholders contributed Kshs.4.3 million towards the construction of the said hall.

(ii) The agreements were entered into in anticipation of the incorporation of the plaintiff.

(iii) The plaintiff upon incorporation used the hall upto March 2004.

(iv) At the request of Nairobi Gymkhana the plaintiff provided an indemnity.

7. It is their stand that once, it is proved that the plaintiff dealt with Nairobi Gymkhana after incorporation, it is not the business of the court, to embark on a trial at this stage whether a contract was thereby created between the parties after the incorporation.

8. As regards capacity to sue the defendants, they contend they have properly sued the 1st – 13th defendants, as the management committee, as agents of the club, with ostensible authority and whether they could bind the club is a matter for the trial, and as such it can not be a basis for supporting an application to strike out a pleading.

(ii) As per the relevant constitution, the moveable and immovable properties of the club is vested in the trustees. Whereas the management of the same is vested in the management committee, who have the power to enter into contract. As such whether the management committee, had the power to bind the Nairobi Gymkhana, is a matter for the trial Court.

(iii) The rules set out annexture BB2 spell out clearly that, Acts, done by the authority of the managing committee, in good faith and without the authority of the club expressly or impliedly are binding on the club.

9. As regards the plaintiff's claim that there is no cause of action, the grounds relied upon by the applicant in support of this claim namely:-

§ Lack of agreement between the plaintiff and the trustees;

§ Lack of authority on the part of the management committee to enter into any contract with the plaintiff;

§ No role was played by the trustees as regards the entering into, the said contracts between the plaintiff and the management committee;

§ Lack of the trustees participation during the AGM; and minutes being inclusive as a matter of internal arrangement management of the Nairobi Gymkhana, over which the plaintiff has no control and as such whether such, action bound a 3rd party are a matter for the trial to determine.

10. On their assertion of their plea as regards estoppel not being maintainable they still maintain it is available to the respondents because they (respondents) were led to believe that the Gymkhana M/C had no objection to the rights given to the plaintiff, by the memorandum of understanding that the plaintiff would have the exclusive use of the hall formerly used by the defunct KBA. It is confirmed by the fact that the Gymkhana asked for an indemnity against claims by 3rd parties and the plaintiff willingly and voluntarily gave the same.

§ The fact that the said plea is not currently incorporated in the current pleading as it stands does not rule out the possibility of the same being incorporated subsequently through an amendment.

11. On the allegations that their pleading is vexatious, or offensive, an abuse of the process of the court, they assert that the pleading does not fall into any of those categories for the reasons given.

On case law the defendant/applicant referred the court, to a text on company law by Pannington 6th edition page 87. The relevant extract highlighted for the benefit of this court, reads thus:-

"*A company cannot enter into a contract before it is incorporated, because it does not yet exist as a legal person. That for the same reason, is it bound by contracts made by agreements purporting to act on its behalf before its incorporation. By a strict application of this rule it has been held that, a company, may not after its incorporation ratify such a contract, made on its behalf, before it is incorporated. The*

creation of a contract by rarification presupposes purposes that the only element lacking when the pretended agent purported to make the contract, was the actual authority of his principal, but in the case of a company which was incorporated at that date, actual authority could in no way, have been given to the agent, because the company did not yet exist. If a company is to acquire rights or liabilities in consequence of negotiations before it was incorporated, it must be shown that a fresh contract has been made with it, since its incorporation. It is not sufficient that the company's memorandum shall provide that it carry out the pre-incorporation contract, nor that the company has acquiesced in the other contracting party, treating it as liable to him. For example by sending invoices to the company for amounts owing under the pre-incorporation contract, only the company's express agreement or acts are done by it which are necessarily referable to the making of a new contract will be sufficient to bind it.

There is the case of ***TREUOR PRICE & ANOTHER VERSUS RAMOND KELSALL [1957]7] EA 752*** *where it was held inter alia that a company cannot ratify a contract made before its incorporation. But there maybe circumstances from which it can be inferred that a company, after incorporation, has made a new contract to the effect of the previous contract."*

The above holding flowed from the arguments in the body of the judgment. Sir Kenneth O'Çonnar. P at page 762 paragraph F – H the following observations were made. "*Mr. Lockhart–Smith for the respondent argued that a company cannot ratify a contract purporting to be made by someone on its behalf before it is incorporation, but conceded that there maybe circumstances from which it may be inferred that the company, after its incorporation has made a new contract to the effect of the previous agreement. This seems to me to be a correct statement of the law, and I did not understand Mr. Troughton to challenge it. The mere adoption and confirmation by directors of a contract, made before the formation of a company, by persons purporting to act on behalf of the company creates no relation whether between the company and the other party to the contract. But it does not follow from that, that acts may not be done by the company after its formation which make a new contract, to the same effect as the old one. The question whether there was a new contract or not, is one of fact, and each case must depend on its own facts".-*

Reference was made to the supreme court practice, 1997, volume 1 part I London, Sweet & Maxwell 1996 page 330 paragraph 11/19/11 under the sub heading "*no reasonable cause of action or defence*

"*(1) Principle – a reasonable cause of action means a cause of action with some chance of success, when only the allegations in the pleadings are considered – so long as the statements of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."*

Reference was also made to the case **of LAW VERSUS DEARNTEY [1950] 1 AER 124** where it was held inter alia by the court of appeal that if the action was not maintainable and that, to allow it to proceed would be an abuse of the process of the court, the court was bound to say so even if there were no effect….."

The respondents cited the case of PRICE – VERSUS – KEISAL (supra) which had also been cited by the applicants whose observations and holding is already set out above. Then there is the celebrated case of D.T. DOBIE & COMPANY (K) LTD VERSUS MUCHINA [1982] KLR 1 in which the Court of Appeal, of this jurisdiction, set out guiding principles on striking of pleadings. A summary of then are as follows:-

(i) A reasonable cause of action is an action with some chance of success when the allegations in the plaint are considered.

(ii) A cause of action cannot be considered reasonable if it does not state such facts as to support the claim prayer.

(iii) A cause of action means an act on the part of the respondent which gives the plaintiff his cause of complaint.

(iv) As the power to strike out pleadings is exercised without the court being fully informed as the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.

(v) The power to strike out should be exercised only after the court, has considered all facts but it must embark on the merits of the case itself as this is solely reserved for the trial judge.

(vi) On an application to strike out pleadings, no opinion should be expressed, as this would prejudice the trial and would restrict the freedom of the trial judge.

(vii) The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment.

(viii) As long as a suit can be injected with life by amendment it should not be struck out.

The plaintiff/respondent also referred to the case of **MPAKA ROAD DEVELOPMENT VERSUS KANA [2004] I EA 161**. The case dealt with striking out of pleadings as being frivolous, scandalous and vexatious. Ringera J. (as he then was) held *inter alia* that "a matter would only be scandalous, frivolous and vexatious it court would not be admissible in evidence to show the truth of any allegation in a pleading which is sought to be impugned for example

- Imputation of character where character is not in issue (2) A pleading is frivolous if it lacks seriousness. (3) It would be vexatious if it annoys or tends to annoy. (4) It would annoy or tend to annoy if it is not serious or contains scandalous matter; irrelevant to the action or defence. A scandalous or frivolous pleading is ipso facto vexatious.

There was reference to a text on company law and clubs whose full citation was not given and as such no reference will be made on the same herein

This court has given due consideration to the arguments put forward by each side, in the light of relevant law, and case law relied upon by each side, and in this courts opinion there are certain facts which form common ground on both sides and which will generally have a bearing on the final determination of the point in controversy which the court proceeds to examine hereunder:-

(1) It is common ground that the first entity to step into the are nations setting in motion the chain of events culminating in these proceedings the Nairobi Gymkhana. The court has been informed that it is a club and it has a constitution. The constitution is not annexed to the applicants supporting affidavit. However the court takes note to of the applicant's deponent in the said affidavit, that they are relying on all documentations annexed to affidavits for and against the application so far filed in this matter. By reason of this deponement, the Court has licence to scheme through the record and refer to those documents in so far as they relate to the issues in controversy in this application.

The Court, as been told there are two versions of the constitution, the l998 version, and the 2003 version. Their relevance will be referred to later on. The copy revised in 2003 has been traced to a replying affidavit of one Rajandra Thakar sworn on l9th April 2004 and filed on the same date. The difference between the two as will be demonstrated later, in so far as it is relevant to this ruling is that according to the l998 version, the management committee had power to authorize its chairman or the Trustees to deal with the Gymkhana property. Whereas the 2003 version stipulate that it is the annual general meeting or special annual general meeting who have power to do so.

Clause 1(a) of the 2003 version thereof describes the Nairobi Gymkhana as a club. Where as clause 3 X thereof deals with trustees. It states:- "*The Trustees shall have the power to sue or be sued on behalf of the club.*

As for the KBA (Kenya Bridge Association) it is averred in paragraph 14 of the amended plaint that it is a society exempt from registration vide exemption certificate no 1342 of l8.6.l963. It is therefore subject to the provisions of the societies Act of Kenya Cap.108 Laws of Kenya . Under the said Act a

"society" is defined as:- "includes any club, company, partnership, or other association of ten or more persons, whether its name, object established in Kenya or having its headquarters or chief place of business in Kenya and any branch of a society, but does not except in paragraph (i) and (ii) of Section 11(2) (f) of the Act include.

§ *Accompany so registered either locally or foreign.*

§ *Any corporation so registered.*

§ *A registered trade union.*

§ *A company, firm, association or partnership consisting of not more than twenty persons formed and maintained with a view to carrying on business for profit.*

§ *A co-operative society registered as such under any written law.*

§ *A school registered under the Education Act, Board of governors, District Education Board, School Committee or similar organization established under and in accordance with the provisions of any written law relating to education.*

§ *A building society as defined by the building Societies Act.*

§ *A bank licensed under the banking Act.*

§ *Any international organization of which Kenya is a member or any branch, Section or organs of any such organization.*

§ *Any combination or association which the minister may by order declare not to be a society for the purposes of this Act".*

The legal status of a society is not specified in the Act, that is the power to sue and be sued, by the society in its own right and name. However this has been settled by case law. In the case of **FREE PENTECOSTAL FELLOWSHIP IN KENYA VERSUS KENYA COMMERCIAL BANK NAIROBI HCC NO. 4116 OF 1992/(O.S.)** Bosire J. as he then was now (JA) made observation at page 2 paragraph 2 of the ruling that "*the religious organization is not a body corporate in order to sue as a legal personality. In paragraph 3, the learned Judge as he then was (now JA). Continued thus:- an incorporated body lacks the capability to own land in its own name.*

At page 1 of the judgment/ruling it is observed that objection was raised to the proceedings because the suit was instituted in the name of a religious organization which was a mere society.

There is a more recent decision y J.B. Ojwang J decided on 22nd July of 2005 in the case of ***JOSEPH GITAU ISAAC NJUGUNA MBURU, CECILIA WANJIRU SUING ON BEHALF OF 100 OTHERS MEMBERS OF UNIONOF MITUMBA WOMEN GROUP VERSUS ESTATE LIMITED NAIROBI HCCC 813 OF 2004***. At stake in this case were the rights of a self-help group organization registered only with the provincial director of Social Services.

At page 7 line 23 from the bottom of the ruling, the learned judge made the following observations:-

"*Is it permissible that a body of no true juridical status Wilson Mitumba Women group, can come to court wielding a land title in its own name? that would defeat the recognized mode of legal reasoning.*

Although the frontiers of legal ingenuity in the creation of legal personality may not yet be completely exhausted, it takes weighty legal arguments to demonstrate, that the said Wilson Mitumba Women Group" has validly become the registered owners of the suit land. Learned counsel for the plaintiffs however was and with much respect distinctly laconic in his submissions, on the applicable law on the

juristic status. I think the plaintiffs do not win on this ground, and it is the defendant's contention that carry validity". On the basis of the above reasoning the learned judge struck out the suit.

The sole purpose of so journeying into the definition and legal status of KBA as an association was simply to demonstrate that even KBA would have had difficulty claiming the said rights.

3. The 3rd aspect of the case which is not disputed by both sides as admitted by the defendants/applicants submissions is that there are two constitutions of the Nairobi Gymkhana, whose provisions in so far as they relate to property rights are concerned are relevant to this ruling. That is the l998 version. It's relevant as submitted by the plaintiff respondent and conceded by the applicants is that by its provisions the management committee had authority and or mandate to authorize its chairman or its trustees to deal with the property of the club as directed.

Where as the 2003 version on the other hand, made provisions to the effect that it is only the annual general meeting or special annual general meeting which could authorize dealing in the property of the club.

On this account, it is not disputed that the act of authorizing KBA to built a hall on the Nairobi Gymkhana premises and the granting of the exclusive rights to KBA as regards the use of the said hall were done, by the management committee through its chairman under the l998 constitutional provisions. However when the dispute leading to these proceedings arose, the constitution in operation was that of 2003.

4. The 4th aspect of the proceedings not in dispute is that the plaintiff was incorporated on 18th September, 2001 after the agreements relied upon by the plaintiff had been entered into by the KBA. It is however not clear as to whether the incorporated plaintiff comprised all the KBA as at the time of the execution of the said agreement. The stand of the plaintiff is that it is, whereas the defendant applicants states that it is not otherwise if it had been, then there would have been no dispute arising among them leading to events of 1st March 2004 culminating in these proceedings.

5. The 5th aspect of the case which is not in dispute are the agreements averred to in paragraphs 14-17 of the emended plaint which are:-

(i) The agreement of June 2000 between the management committee of Nairobi Gymkhana and the KBA as a society allowing KBA in its capacity as a society to built a Bridge hall on the Gymkhana premises. It is averred that no formal agreement was executed between the parties but that not withstanding the existence of the arrangement is not disputed.

(ii) The hall was duly constructed at an alleged cost of 6 million as per the averment in paragraph 15 of the amended plaint.

(iii) On 12 march 2001 the then chairman of Nairobi Gymkhana as duly mandated by the managing committee Nairobi Gymkhana signed a memorandum of agreement with the Kenya Bridge Association and the parties in good faith inserted a clause in the said memorandum to the effect that the right to use the hall and all concessions under the agreement were being given solely to Kenya Bridge Association as then in existence.

It is against the a fore set out background information that the plaintiff presented a plaint to this court, in the first vide a plaint dated 2nd day of April 2004 and filed on 5/4/2004 and as amended on 14th day of June 2004 and filed on 15th June 2004 seeking vindication of their grievances, which amended plaint is sought to be faulted by the application subject of this ruling.

The assessment of the above facts has given rise to a number of questions for determination by the court, in the process of its attempt to resolve the matter in controversy herein. These may be stated briefly as:-

(1) What is the subject matter of the proceedings?

(2) Who are the key players in this dispute in relation to the above subject matter?

(3) What is their legal status in relation to the proceedings?

(4) What is their legal relationship to each other in so far as these proceeding are concerned?

(5) In view of the a fore set out responses to question number 1,2,3 and 4 above, does the plaintiff have an enforceable cause of action against the defendants as displayed in the amended plaint sought to be faulted.

(6) In view of the responses set out above in response to question number 1,2,3,4 and 5 do the defendant/applicant have a genuine complaint .

(7) What are the final orders as regard this application.

The subject matter of the proceedings is a hall constructed by Kenya Bridge Association, on premises owned by Nairobi Gymkhana. As noted earlier on the construction of the said hall Was done on the basis of, mutual understanding between the two parties. The consideration was simply for KBA to use the said hall for their activities. At no time was it to become the KBAS disposable asset. There was no resolution to the effect that KBA would have a last say on the use of the said hall. By implication the KBA can be said to have respected the property rights of the Nairobi Gymkhana through its trustees in the said hall. It is clear that on the basis of that mutual understanding, the hall was constructed and was used as such from 2001 to 2004 when a dispute arose over its use between some member still calling themselves the KBA and the plaintiff. Since the property in dispute was on Nairobi Gymkhana premises, the Nairobi Gymkhana had no alternative but to bar its use until issue sorted out hence these proceedings.

The key player in this dispute as revealed by the facts on record are the Nairobi Gymkhana represented to these proceedings by the defendants, in their capacity as members of the management committee and trustees, and the plaintiff Kenya Bridge Africa who cited claim hereditary rights from the alleged parent association KBA and behind the scenes, KBA- Kenya Bridge Association. The court says KBA is a behind the scene player because it has not been brought on board by either party already on board despite the fact that it is the one which constructed the hall, and its claim to use the said hall is what sparked off the events that led to the filing of these proceeding .

The legal status of the plaintiff Kenya BRIDGE Association limited that of limited liability company. This court has schemed through the exhibits on record and it has missed to trace the memo and articles of Association among the many exhibits exhibited herein since the filing of the proceedings. That not withstanding this court, has judicial notice of the fact that it is trite law that a corporate body has legal personality enabling it to sue and be sued in its corporate name.

The plaintiff therefore had a right to come to court, in its own name seeking the relief sought whose success will depend on the faulting of the application subject of this ruling.

As for the Nairobi Gymkhana it is on record and it is also common ground, that there is a constitution in place which makes provision for its legal status. There is the constitution of 1998 which was operational when KBA was granted the right to put up the subject hall, and the 2003 revised edition when the events leading to these proceeding were sparked off. It is however clear from a reading of both versions that property rights of the Nairobi Gymkhana were and still are vested in the Registered trustees for the time being in officer. The right to sue and be sued is also vested in the trustees, hence the inclusion of the 14th to 18th defendants to these proceedings.

As for the KBA which is the party behind the scene, its creating documents is a certificate of exemption traces on the record and marked as an annexture 3 to the affidavit of Samina Esmail Sworn dated 16th April 2004 and filed on the same date in support of an application by way of chamber summon

dated the same 16th April 2004 and filed the same date, where in the applicants sought leave to be enjoined to the proceeding as members of KBA . The exemption certificate bears the number 1342. Extracts of the content of the constitution are annexed as annexture 4. A printed copy is also traced on the record marked as annexture BB1 annexed to the replying affidavit of one Bharat Bhardwaj J. dated 28th day of April 2004 and filed in response to the application filed by KBA seeking leave of court to been joined to the proceeding as interested parties it is not indicated print or when the print came out or when the rules were first introduced. Of importance from the said rules, is that the affairs of the Society are entrusted to a management committee. There is no provision of the right to sue and be sued. As noted earlier on the societies Act Cap. 108 Laws of Kenya, also does not confer any legal status to a Society. It would mean then, any grievances maturing into a legal action can only be undertaken by the officials of the management committee with the mandate of the general society.

Turning to the defence, the legal status of the first to the 13th defendants is that they are members of the management committee of the Nairobi Gymkhana. The creating constitution does not vest them with the right to deal with the property in the same manner as the Trustees, save that the

committee conduct the day to day affairs of the club. There is no right to sue and be sued vested in the management committee. It means that they have to be sued through the trustees.

Regarding the legal relationship between the parties, that between KBA and Nairobi Gymkhana is found in the document marked as BB1 to the affidavit of Bharat Bhardwaj sworn on 2nd day of April 2004 and filed on 5th of April 2004. It is dated 15th March 2001. Since this document seems to be the cornerstone on which the plaintiff's action, on the one hand, and the applicant's application on the other hand, are anchored, there is no harm in setting it out herein. It reads:-

"*Memorandum of agreement between Kenya Bridge Associations (KBA*

And

Nairobi Gymkhana (NG)

It is hereby agreed as follows

(1) KBA will pay for and furnish the Bridge hall of approximately 4000 sq.ft built on a site allocated by NG between the Cricket and the Squash Courts.

(2) The hall will be part of and wholly owned by Nairobi Gymkhana except for the furniture and effects within the hall owned or provided by KBA.

(3) The hall will be used for the playing of bride by members of KBA and Ng and such facility may be extended by consent of the parties for other card games such as Rummy for instance.

(4) The hall will be reserved for the exclusive use of KBA for two days in the week and for any international or District or such other Bridge tournaments played under the auspices of KBA, of which KBA will give advance notice of a minimum of 14 days to Ng.

(5) The hall will be at the sole disposal of NG during any international or Cricket Fixture for the viewing of matches of which Ng will give advance notice to KBA as in 4 above.

(6) Non members of Ng in the employ of or serving on any KBA Committees will be issued passes by NG/KBA to allow access to the Hall, but such access and use of facilities will be strictly limited for the purposes of their functions and duties with KBA and will not allow access to any other area or facilities of NG other than those connected with their duties.

(7) All members of KBA other than those referred to in 6 above and those entering the hall on the

invitation of KBA and who are not members of NG will be restricted to strictly to the hall and the facilities offered therein and will at no time have access to other areas or facilities of Ng unless expressly agreed to by Ng.

(8) KBA will keep the hall in good and tenantable state and condition at all times.

(9) Cleaning and maintenance of the hall will be at the expense of Ng except during international or other Bridge hall or Bridge tournament organized by or under the auspices of KBA when KBA will be responsible for any extra staff or expenditure that may be incurred.

(10) KBA may use and may designate the hall as the Headquarters of KBA and NG will negotiate in good faith and agree from time to time the terms and conditions and procedures for better carrying into effect this agreement.

(11) The right to use the hall and all concessions under this agreement are given solely to KBA as in existence now and in the process of being incorporated as per memorandum and Articles of Association supplied to NG and may not be assigned to any other party without the agreement of Ng.

Signed Signed

NAIROBI GYMKHANA KENYA BRIDE ASSOCIATION"

Construction of clause 2, 5 and 12 in this Courts', opinion, shows clearly that the property rights in the hall though constructed by KBA were retained by NG (Nairobi Gymkhana. As per the above agreement, there is no way KBA could assign any rights therein to either itself, its agents and or employees without the sanctions of N.G. There is no landlord, tenant relationship either by conduct or through a formal lease agreement. As stated, the relationship can only best be described as that of a licensee for KBA and licensor for N.G.

As regards the relationship between KBA and KBA Africa Ltd, it is to be observed that, this has been explained by one Samina Esmail in the affidavit sworn on 16th April 2004 and filed on 16th April 2004 in support of an application by way of chamber summons seeking leave to be joined to the proceedings as interested parties. Paragraph 6,7,8 and 9 are of assistance herein. They read:-

"*6 that the last Annual General Meeting of Kenya Bridge Association was held on 2nd April 2001 and the management committee elected as follows:-*

(a) *Ashwin Shah – Chairman*

(b) *Sobhah Shah – vice-Chairman*

(c) *Rakesh Sharma – Secretary*

(d) *H.P. Modi – Treasurer*

(e) *Paresh Shah*

7. That the same individuals, who were the officers of the Kenya Bridge Association (management Committee) were behind the formation of the Kenya Bridge Africa Limited, the Plaintiff herein, which is a company limited by shareholding, privately run and managed and they are indeed the Directors of the said company.

8. That this group of individuals, who are the share holders, and Directors, of Kenya Bridge Africa Limited, have deliberately attempted to kill and swallow the Kenya Bridge Association, which is a non profit, non-commercial organization to promote the sport of Bridge in Kenya Africa and internationally.

9. That Kenya Bridge Association is alive despite the attempt to kill it by bringing in Kenya bridge (Africa) Ltd".

Annexed to the above mentioned affidavit there is copy of certificate no. 1342 being an exception certificate exempting KBA from registration dated 18th day of June l963. The letter of exception is also dated, the same date of 18.6.63 and it is annexed marked as annexture 3. The constitution, already referred, to is annexed as annexture 4 what is missing from the said bundle of exhibits are the minutes of the AGM during which KBA converted itself into Kenya Bridge Africa Ltd.

Also annexed to the affidavit, are correspondences from Kenya National Sports Council, one dated 16th December, 2003 ref: knsc/so/39(165) addressed to the Registrar of Societies Nairobi and another one dated 16th December, 2003 ref. knsc/so/39(164) addressed to the President World Bridge Federation, another one dated 7th July 2003 addressed to the Chair lady Kenya Bridge Association and another dated 9th June 2003 also addressed to Kenya Bridge Association. These were marked as annextures 5. The theme running through all of them is that KBA was still alive as an Association. It was still recognized as such by the KNSC and had in fact held elections successfully on 30th June 2003.

Annexture 6 on the other hand contains two correspondences emanating from the same ministry one dated 27th January 2004 and another 16th January 2003 addressed to the President, World Bridge Federation, and the Registrar of Societies, respectively. The Central theme in both of them is that there appears to be squabbles between KBA and KB Africa Ltd, with Kenya Bridge Africa Ltd, being a new entrant in the arena.

Further documentations have been traced among annextures to the replying affidavit of one Rajendra Thakar sworn on the 19th April 2004 and filed the same date. Annexture RT– 5 on the letter head of KBA Ltd dated October 16th 2002 is to the effect that the writer was confirming that KBA was not in existence. Under the bundle marked annexture RT 9, there is a letter from the Registrar of Societies dated 26.6.03 addressed to Nyaencha, Waichari & Co. Advocates of P.O. Box 79630, under the hand of one C.K. Nyiha (Mrs) Senior Assistant Registrar of Societies. The content read thus:-

"*RE: SOCIETIES ACT (CAP.108)*

KENYA BRIDGE ASSOCIATION.

I refer to your letter dated 17th June 2003 and have to bring to your attention that there is no provisions in the above captioned Act, under which a duly registered association can be "converted". To a limited liability Company and so for client's action had no legal basis whatsoever.

Further, the above named association was never dissolved in terms of section 17 of the above Act, and is still in the Register of Societies.

Kenya Bridge Association, and Kenya Bridge Africa Limited are two different legal entities and the Registrar of Societies has nothing to with the company limited and the two can co. exist.

Kindly advise your client accordingly.

Yours faithfully"

Apart from the deponements in the affidavit of Samina Ismail to the effect that KBA, though still alive, in existence, incorporated ,another entity called Kenya Bridge Africa Ltd. This court has not traced any minutes and or resolutions where that action was sanctioned.

The Court, has not also traced any memorandum of Association and Articles of Association of the said KBA Ltd on the record to show how the incorporation came up. Neither is there any minutes of either the

Board of Directors or shareholders after in corporation, talking about the new entitles relationship with its mother, the KBA. Further as observed by the Registrar of Societies, in his letter mentioned, and quoted herein, there appears to have been no resolution passed either by KBA as an Association and the Plaintiff as its corporate body, dissolving the KBA as an association in order to leave the arena for the KBA Africa Ltd.

As regards the relationship between KBA Africa Ltd and KBA there is no dispute THAT IT IS AN OFFSPRING OF KBA. Although the certificates of incorporation is not exhibited, both sides are in agreement that the plaintiff is duly incorporated. Traced on record there is an annexture annexed to the supplementary affidavit in reply of Bharat Bhardwaj sworn on 28th April 2004 and filed on 17th May 2004. There is an annexture marked BB3. It is headed Kenya Bridge Association and Kenya Bridge Africa Ltd – Legal opinion, prepared by G.O. Oraro. Advocate of material to this ruling is an observation at page 2 line 4 from the top to the effect that "*minutes of the SGM of 14th September, 2000 were approved at the AGM of the Association on 2nd April 2001. the notes to the financial statement presented and passed at the AGM confirms that members had agreed to incorporate a company. It reads "At a special general meeting held on 14th September, 2000 members approved the incorporation of a Limited company and use of the Association funds towards the building project on completion of legal formalities the new building will become an asset of the company and the shares will be issued*". The learned advocate went on to observe at line 19 from the bottom on the same page as follows:-

"*secondly since there is nowhere in the societies Act nor in the Associations Constitution preventing the conversations of Kenya Bridge Association to accompany, the resolution was valid in law".*

From the wording of the resolution, the Association was to be dissolved upon the incorporation of the Association into a company. Thus upon the incorporation of the company on 18th September 2001, the Association ceased to exist. As required by the societies Act notice was to be given to the Registrar of the dissolution. Section 21(1)(c) of the societies Act (Cap.108) provides that every exempted society which dissolves itself shall within 14 days from the date of effecting such dissolution, give to the Registrar notice thereof in writing signed by three of the officers of the society. From the facts, notice was not given within 14 days as required, instead it was given vide a letter dated 28th January 2003 and appropriate fee paid (this notice was out of time as more than one year had lapsed. However an ordinary interpretation of the said Section 21 clearly shows that the giving of notice is subsequent to the dissolution of a society and not a precondition thereto. Therefore the failure to give notice within the required time does not render the dissolution of the society nugatory. The much it can do is to visit charges on the erring society as contemplated by Sec. 21(2) of the said Act.

In conclusion, Kenya Bridge Association ceased to exist with the incorporation of Kenya Bridge Africa Ltd"

It is to be noted that these observation run contrary to those of the Registrar of Societies, to the effect that in the absence of appropriate steps being taken to dissolve the association the registration still stands.

At page 4 of the said document at line 13 from the bottom, the learned Counsel went on to state thus:-

"*On the first issue it is to be noted that the Registrar of Societies is a statutory body created by the Societies Act at Section 8 thereof. As such the office of the Registrar derives its powers solely from the said Act. Nowhere in the societies Act is the Registrar given power to revive an already dissolved society. As stated above, the Association, was dissolved by the incorporation of the Association into a company pursuant to the resolution of a special general meeting duly held in accordance with the constitution of the Association on the 14th day of September, 2000. The fact that the Registrar came to know of the dissolution more than one year later in contravention of the statutory requirement of a 14 day notice, does not make the dissolution void in law. What it does as contemplated by Section 14(2) of the Act is to make erring society liable under the said subsection. Authorizing a meeting of a dissolved Association is in essence saying that the Association exist. That office has no such powers and any exercise thereof is void in law.*

The lawful thing which the Registrar should have done, considering that there was a dispute, was to take the matter for *arbitration before an impartial body instead of taking sides without hearing both sides. When the opposing parties unanimously decided at the meeting held on 28th April 2003 to take the matter before an Arbitration Committee agreed upon by themselves, it was a move in the right direction. The Registrar should have supported it. Instead Registrars office decided to unilaterally go against the unanimous will of the parties to resolve the dispute between them by arbitrarily authorizing the splinter group to call for a meeting while arbitration was still going on. This went against the principle of natural justice as the other party was not given a chance to be heard. The decision cannot therefore be supported in law"*

There is nothing on record to show that the plaintiff acted on that legal advise. It therefore follows that as at the time the Plaintiff came to court, and even at the time of writing this ruling, there are two entities which appear to be claiming to have a right to the very subject matter of these proceedings. There are correspondences which act as a building blocks culminating in the filing of the suit.

There is a letter dated October 16, 2002 on the Plaintiffs headed paper marked RT-5 to the replying affidavit of Rajendra Thakar filed on 19th April, 2004. In it one Rakesh Sharma, Hon. Secretary, was informing the firm of Arthur K.Igeria of Igeria & Co. Advocates, that Kenya Bridge Association is not in existence. The few exhibited comprise a letter dated 24th October, 2003 on the Plaintiffs headed paper, also one of the exhibits under annexture RT-5. In it one Bharat Bhardwaj wrote a letter to one Mr. Raj Thakkar the then Chairman of NG. it contains relevant information. From its content there is no doubt that it is based on the content of the legal opinion given by Oraro Advocates, whose extracts have already been set out here. A summary of the salient features of the same are as follows:-

(i) That as per the legal opinion of Oraro Advocates KBA, ceased, to exist with the incorporation of Kenya Bridge Africa Ltd and the failure to notify the Registrar of Societies under Section 14(2) of the Societies Act does not invalidate the dissolution.

(ii) Reiterated that the Registrar had no power under the Act to authorize a meeting of a dissolved association.

(iii) As per the legal opinion of the advocate, the election purportedly held by the splinter group were illegal as the registrar had no power under the Act to authorize the holding of the elections.

(iv) That the MOU signed between Nairobi Gymkhana and Kenya Bridge Association, specifically states that the right to use of the hall and the concessions granted under the agreement are solely to Kenya Bridge Association as in existence now, and in the process of being incorporated.

(v) That with the incorporation of Kenya Bridge Africa Ltd, as per the resolutions passed by KBA, it clearly confers that aright to Kenya Bridge Africa Ltd.

(vi) On account of what has been stated in number (v) above the writer requested the Nairobi Gymkhana to honour the MOU and open up the hall to Kenya Bridge Africa Ltd with immediate effect but by not later then 31st October, 2003.

(vii) Added that if that request was not acceded to, Kenya Bridge Africa Ltd, would be compelled to seek legal recourse.

On 25.11.2003 the Hon. Secretary of NG addressed a letter to the Plaintiff marked BB2 to Bharat Bardwaji' Affidavit sworn on 2nd April 2004. In the content, the Secretary referred to the Plaintiffs letter dated 25.11.2003 which had been tabled at the management committee meeting held on even date. Of importance herein are these words:-

"*At this meeting it was unanimously agreed that the Nairobi Gymkhana will abide by the terms of the memorandum of Agreement dated 15th March 2001 and in terms of clause 12 thereof, accept with*

immediate effect Kenya Bridge Africa Limited as the party entitled and to whom the Nairobi Gymkhana conferred the right to use the hall and all concessions granted under this agreement.

It is for purposes of record that it was agreed by Kenya Bride Africa Limited that in recognition of Nairobi Gymkhana agreeing to abide by the terms of the memorandum of Agreement as above Kenya Bridge Africa Limited shall indemnify Nairobi Gymkhana against all costs, claims, demands, damages expense, and/or liabilities whatsoever arising from any claim or action instituted against it by the splinter group, calling itself and purporting to be Kenya Bridge Association, and now headed by Mrs Samina Esmail as Chairman. Further that the said undertaking is irrevocable and shall be binding on your successor and assigns of Kenya Bridge Africa Limited.

The agreement takes immediate effect on the under standing that the Kenya Bridge Africa limited will provide substantive assurance of its ability to honour the said indemnity

Yours faithfully,

Signed

D.S Bharit .J

Hon. Secretary."

This was responded to, vide the plaintiffs letter dated 20th November,2003 annexture BB3(11) signed by all the Directors giving indemnity, forwarded by the letter BB3 (i) dated 4th December, 2003.

The NG went further and did annexture B4 dated February 18,2004 forwarding a formal deed of indemnity annexture BB5(1). The deed of indemnity is marked BB5(11). It reads:-

"*Deed of Indemnity whereas:-*

(1) *Kenya Bridge Association (hereinafter called "KBA") a society registered under the societies Act (Chapter 108) laws of Kenya entered into a memorandum of Agreement dated 15th March 2001 with Nairobi Gymkhana (herein after called "N.G.") where under KBA would pay and furnish the Bridge Hall built by KBA on a site allocated by NG to KBA between cricket Pavilion and the Squash Courts (herein after called Bridge Hall.*

(2) *The Kenya Bride Africa limited herein after called "KBAL" a limited liability company, incorporated subsequent to the said Agreement, purports to have been so incorporated pursuant to a resolution of special general meeting of the members of KBA and further purports to have taken over the activities and functions of KBA.*

(3) *There is a dispute between some members of the KBA and KBAL as to the legal status, leadership and membership of both KBA and KBAL to which N.G. does not wish to be drawn in particular relating to the us of the Bridge Hall which NG has had to close.*

(4) *KBAL and its directors have requested NG to re-open the Bridge hall and agreed to indemnify NG and its officers against any just claims and demands that may be made against them by KBA and those purporting to be its members as a result of such re-opening.*

Now by this deed of indemnity, we Kenya Bridge Africa Limited and Bharat Bhardwa. J, Chairman, and Ashwin Shah, Director of Post Office Box number 46325 – Nairobi in consideration of NG agreeing to re-open and re-opening the Bridge Hall, for use by all those entitled to the use, hereof DO hereby jointly and severally agree to indemnify and keep indemnified NG, its successor and assigns, and its officers and their successors in office, from all just claims and demands that may be preferred or brought against them or any of them by any member of KBA or by KBA as a result of their agreeing or having agreed to re-open the bridge Hall before resolution of the apparent dispute between KBA and KBAL or their

members as witness the due execution of this deal, this 24th day of March 2004.

Sealed with the common seal of the Kenya Bridge Africa Ltd."

Documentation regarding the deliberations, on the aforesaid Deed are not annexed by either side. However on March 30, 2004 one R.M. Patel, Hon. Secretary of NG did a letter. It was addressed to the chairman Kenya Bridge Africa Ltd, P.O. Bo 8298 Nairobi. It is on the headed paper of NG. The content reads:-

"*At the managing committee meeting held on 29.03.2004, it was unanimously agreed that the use of Bride hall pavilion will NOT be allowed to both members of Kenya Bridge Africa Ltd and Kenya Bridge Association. However, the use of the Bridge Hall/pavilion will be allowed to members of Nairobi Gymkhana and their guests as per clause 14 of the club constitution."*

This correspondence is marked annexture BB7. As mentioned earlier on, in this ruling, this is the action the plaintiffs say that it went contrary to the earlier memorandum agreement for the construction and use of the subject hall, that was executed between the KBA and NG and which was inherited by the Plaintiffs upon incorporation.

Feeling aggrieved, the plaintiffs moved to court, and filed initial plaint dated 1.4.2004 and filed on 05.04.2004 which was subsequently amended on 14/06/04 and filed on 15/06/04 sought to be faulted by the defend out applicants. As to whether the said plaint is to be faulted or not will depend on this courts, determination of three major issues namely competence of the pleading as is presented, competence of the plaintiffs opposition to the application, seeking to fault the said pleading, and 3rdly existence or non existence of a reasonable cause of action against the defendants.

On competence, of the plaint, the court, will address issues of presentation of the plaint, that is the plaint itself, issues of authority, to depone, the accompanying verifying affidavit. Whereas competence of the opposition to the application seeking to fault the plaint, will centre on the authority to depone the opposing documents to that application.

On the plaint paragraph, 1, thereof describes the plaintiff as a limited liability company. It reads:-

"The plaintiff is a private limited liability company corporate in Kenya having its registered office in Nairobi, Kenya. …".

Paragraph 1 of the verifying affidavit sworn by one Bharat Bhandwaj on 2.4.04 and filed along side the plaint reads:-

"*That I am Director and Chairman of the Plaintiff Company and am duly authorized by the company to make this affidavit"*

In the case of **WAITHAKA VERSUS INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION [2001] 374,** it was held inter alia that "*an affidavit sworn on behalf of a corporation must identify the capacity of the deponent in the corporation. Without identifying the deponent it is impossible for the court, to accept that any matter deponed to is within the deponent's knowledge".*

In the case of **RESEARCH INTERNATIONAL EAST AFRICA LTD VERSUS JULIUS ARISI AND 213 OTHERS NAIROBI CA 321 of 2003,** at page 89 of the judgment, line 12, from the top, the following observation is made: "*Rule 12(1) of Order ICP rules referred to, Inter alia, permits anyone or more of the several plaintiffs to authorize any other of them to appear, plead or act for such other in the proceedings. But rule 12(2) of order, emphatically provides*

(2) *The authority shall be in writing signed by the party giving it and shall be filed in the case".* At page 9 line 8 from the bottom the law Lords of the Court of Appeal went on to state thus:- "*The learned judge overlooked rule 12(2) of Order ICP rules which requires that the authority if granted should be in*

writing and signed by the person giving such written authority, and should be filed in these case. In the absence of such a written authority in the case file, the learned judge, erred in holding in effect that Julius Arisi had sufficiently verified the correctness of the averments in the plaint with the authority of and on behalf of the 2nd to 214th plaintiffs".

On the validity or competence of a verifying affidavit the law lords of the Court of appeal, in the same Arisi case had this to say at the bottom:-

"*in our view the true construction of rule 1(2) of order VII Civil Procedure rules is that even in cases where there are numerous plaintiffs each plaintiff is required to verify the correctness of the averments by a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. (At line 3 from the bottom). Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1(2) of Orders VII Civil procedure Rules and that their suit was liable to be struck out by the superior court, under rule 1(3) of Order VII Civil Procedure Rules.*

The superior court however had discretion. It had jurisdiction instead of striking out the plaint, to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule".

Applying the above guiding principles to the facts of this case, it is clear that the authority to file the suit, and depone, the verifying affidavit ,as well as the opposing affidavits to the application of striking out have not been exhibited. None has been traced in the record filed generally, giving a general power to Bharat Bharwaji to represent the company in the matter generally, or annexed to the verifying affidavit and the opposing affidavit. This court has judicial notice of the fact a body corporate has a recognized mode of communicating this authority. Either by a Board of Directors or share holders resolution. See the case of Affordable Homes Africa Ltd versus IAN Henderson, Superior homes Kenya Ltd and Michael Klesh Milimani HCCC 524 of 2004 where Njagi J ruled that in the absence of a Board resolution sanctioning of this action by the company, the company is not before court at all. for that reason the learned judge struck out the suit with costs being ordered to be borne by the advocate. Through a decision of a court of concurrent jurisdiction and therefore of persuasive authority to this court , this court, this court has judicial notice of the fact that it has restated the correct position in law which is not trite, and though not binding on this court there is no reason to depart from it.

In the absence of exhibition of such resolution of either the Board of Directors, or shareholders, authorizing the filing of the suit and the deponing of the above mentioned affidavits, both the suit plus the above mentioned affidavits are incompetent and cannot stand. If the filing of the suit is faulted, then the plaintiff cannot avail itself of the saving power in order 7 rule 1(3) whereby the court struck out an incompetent verifying affidavit and then allow the defaulting party to file a proper one.

The above finding disposes off the entire proceedings and the court would have stopped there. However the other issues need to the ruled upon, the reason being that it is necessary to do so for purposes of jurisprudence, on the subject, and secondly failure to make a pronouncement on all issues raised, would amount to an abdication of duty by the court. In this second category fall issues relating to the competence of the defendants to be sued in the capacity in which they are sued, and secondly he existence or non-existence of the cause of action against the defendants.

On capacity to be sued, issue was raised about the 1st to 13th defendants being sued in their individual capacity. A perusal of the amended plaint reveals that the first and second defendants are described as the chairman and vice chairman of N.G. respective fully, the 3rd and 4th defendants are described as Hon. Secretary and Hon. Assistant Secretary respectfully, the 5th and 6th defendants are described as Hon. Treasurer and Assistant, Hon Treasurers respectfully, the 7th and 8th defendants are described as outdoor and indoor secretary respective fully, the 9th to 13th defendants on the other hand are described as members of the management committee of the Nairobi Gymkhana. Where as the 14th to the

18th defendants are

described as Trustee for the 14th defendant, and acting Trustees for the rest of the Nairobi Gymkhana.

As averred in the plaint, the conduct of the affairs of the Nairobi Gymkhana is vested in two entities, namely the managing Committee and the trustees. As at the time the plaintiffs came to court, the operational constitution was the one effective July 2003 annexture RT1 to the replying Affidavit of Rajendra Thakar sworn on 19th day of April 2004 and filed on the same date. Clause 6 deals with the management committee. The salient features of the same are that, the committee comprises members elected during an AGM who hold post ascribed to the 1st to the 8th defendants. In addition there is also the honourable past chairman, of the club, and five other members known as committee members described in paragraph 9th to 13th of the Amended plaint.

The powers of the management committee are specified in clause 8 of the said constitution. A reading of the same reveals, existence of a general mandate to deal with the day to day running of the affairs of the club. It is evident that the power to sue and be sued on behalf of the club is absent.

As for the trustees these are provided for in clause 3 of he constitution. It is provided that theirs is an elected office, also elected during the AGM, and hold office for a period of five years and they are the sore authority for the interpretation of the constitution, and among others they are vested with the power to sue and be sued on behalf of the club.

Applying the above constitution to the facts of this case the court, makes a finding that there is no mandate on any party to sue members of the management committee. Likewise they do not have any mandate to sue on behalf of the club. In this regard they were wrongly sued in their individual capacity.

As for the trustees there is mandate given to them by the club constitution, both to sue and be sued on behalf of the club. It therefore follows that they were rightly sued by the plaintiff in their capacity as trustees. However the validity of their being so sued will depend on this court, ruling that the plaintiff has a valid cause of action against the said defendants.

In addition to the constitutional provisions, the NG Constitution, incorporates the provisions of the Trustees (Perpetual Succession Act) Cap 164 Laws of Kenya. Section 3 (3) thereof provides :- "*The Trustees shall thereupon become a body corporate by the name described into certificate and shall have perpetual succession and a common seal and power to sue and be sued in their corporate name*".

In the case of **JOHN GICHINJI WANG'ONDU VERSUS RAPAHEL GITAU NJAU AND 5 OTHERS, NAIROBI CA 241 OF 1997**, the Court of Appeal ,upheld the Superior Courts decision to strike out the respondents as defendants because they were the office bearers of a corporate body which had power to sue and be sued, under Section 3 (3) of the Trustees (Perpetual Succession Act) Cap 1164 Laws of Kenya.

The complaint of the plaintiff is about the use of the Bridge Hall on the premises of the NG. It is therefore a complaint about property of the NG Club. This is provided for in clause 3, 4, 8 and 17 of the Club Constitution which Constitute the office of the trustee is whom the property is vested. Clause 4 provides:-

"*Property of the club;*

(a) *The property of the club shall belong to the full members, but no individual full member shall have, by reason of his membership only, an assignable or transferable interest in the property of the club.*

(b) *Subject to the provisions of "The trustees (Perpetual Succession Act) Cap 164 Laws of Kenya so far as may be applicable, the movable property of the club, including all permanent improvement and fixtures thereon, shall be vested in the trustees. The common seal of the trustees will be vested in them,*

and they shall lodge the same for safe keeping in the premises of the club, but under their own custody and control."

Clause 8 (iv) precludes the M.C. endorsing documents relating to movable property and Clause 17 which exonerates the club from being held liable for the loss and or damage to the members or guests property brought into the premises.

From the foregoing the court makes finding that the sole discretion, in so far as dealing with the club property is concerned, is vested in the trustees. In the exercise of that power, denied the plaintiff of the right to use the Bridge Hall. The right to claim is anchored on the oral agreement made in the years 2000, between the NG and the KBA, followed by the written memorandum of agreement of March 2001 already set out herein as the content of annexture BBI to the affidavit of Bharat Bhardwaj sworn on 2/4/2004 and filed on 5/4/2004. As stated earlier on of importance to this ruling, are the content of clause, 2, 11 and 12. These read: -

"*2. The hall will be part of and wholly owned by Nairobi Gymkhana except for the furniture and effects within the hall owned or provided by KBA.*

11. KBA and NG will negotiate in good faith and agree from time to time the terms and conditions and procedure, for better carrying into effect this agreement.

12. The right to use the hall and all concessions under this agreement are given solely to KBA as in existence, now and in the process of being incorporated as per memorandum and articles of association supplied to NG, and may not be assigned to any other party without the written agreement of NG".

This courts construction and its own understanding of the same in its own judicial wisdom is that:-

(1) Clause 2 reserved the right to have the last say on the use of the hall in the club and not KBA. This being the case, nothing precluded the NG from withholding the use of the said hall from the KBA or its successors as in title.

(2) Clause 11 anticipated change of circumstances which would may be necessitate the alteration of the terms of the said memo of agreement. This meant that alteration of the term was not to be automatic. Any changes in the use of the said hall that may arise would not be automatically accommodated in the existing arrangement. But would be negotiated mutually and in good faith by both contracting parties and then the way forward agreed upon mutually. The change of status of KBA, from an association, to a limited liability in this courts', opinion, in one such circumstances, that would have necessitated negotiation mutually between the parties and in good faith. Despite the birth of KBA Ltd. no negotiations were under taken, between the stake holders, and arrive at a mutual agreement on how the said memorandum agreement could be altered to accommodate the new creation, KBA Ltd. In the absence of such a move being undertaken, there is no automatic right to KBA Limited to claim automatic right to the use of the hall.

(3) Indeed clause 12 conferred the right of use of the hall to KBA as then in existence, and in the process of being incorporated as per the memorandum and article of Association supplied to NG and may not be assigned to any other party without the written agreement of N.G. There is no follow up clause to clause 12 to show that KBA upon in corporation, was automatically to step into the shoes of KBA. In this courts' opinion, the procedures specified in clause 11 were to be called into play as soon as incorporation took place. Further it was necessary for this fact to be reflected in the memorandum and articles of association of the KBA limited. None have been exhibited to enable this court, known that indeed what was envisaged in clause 12, above had in fact been effected in the said documents. It should be noted that no explanation has been given by the plaintiff, why these important documents were with held from the court. The only reasonable inference that can be drawn from this conduct is that the content were unfavourable to the plaintiff in so far as the pursuit of the relief pursued were concerned.

(4) Further to number 1, 2, and 3 in the construction of the said memorandum of agreement is

concerned, the court is of the view that NG reserved the right to with hold the use of the said hall from both the KBA as in existence then, and KBA Ltd. as in its intended in corporation without assigning any reasons and this is what the NG did taking action within the terms of the negotiated memorandum of agreement and within the powers conferred to those who took action as conferred to them by the club constitution cannot be faulted by a party to a proceeding which has not provided first a basis for its locus standi, secondly a basis for laying a claim through a signatory to the said memorandum of agreement. It therefore matters not that both KBA and KBA limited were in exercise as at the time the rights were withheld, and the withholding was as a result of their failure, to co-exist in the use of the said hall facilities.

As regards existence of a reasonable cause of action Authority for determining such existence is found in the celebrated case of **DT DOBIE AND COMPANY (KENYA) LTD. VERSUS MUCHINA [1982] KLR1**, where the court of appeal held inter alia thus:-

"***(i)*** *The words "reasonable cause of action" in Order VI Rules 13 (1) means an action with some chance of success when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer..*

(ii) *The words cause of action means an act on the part of the defendant which gives the plaintiff his cause of complaint".*

Applying this decision to the plaintiffs complaint the court, is satisfied that the plaintiff had no, not only a reasonable complaint but no compliant at all as against the NG through its trustees as their action to withhold use of the Bridge Hall on their premises from the Plaintiffs was within the terms of memorandum of agreement on the basis of which the plaintiff allegedly anchored its claim.

For the reasons given in the assessment, there is merit in the defendants application dated 3rd March 2005 and filed on 4th March 2005 and the same is allowed in terms of prayer (a) only because by virtue of allowing prayer (a) prayer (b) has been overtaken by events as the suit has been struck out. Save to comment that had prayer (a) failed and the suit not struck out, nonetheless the suit could have been liable to dismissal for failing to disclose a reasonable cause of action against he defendants. The reasons given are as follows :-

(1).The plaintiff amended plaint amended on 14th April 2004 and filed on 15th April 2004 is struck out for being incompetent in that:

(i). No resolution of either the Board of Directors or the share holders has been exhibited to show that the filing of the suit against the defendant was authorized either by a resolution of the said Board of Directors or the shareholders.

(ii) No such resolution from either of the two organs has been exhibited either as giving general power to act in the conduct of the suit, throughout its duration or limited to any particular step to be taken in the matter. As such the authority to depone the verifying affidavit as well as the opposing affidavits to the application has been faulted. Once faulted the said affidavits become incompetent, and once declared incompetent, they cannot support any process. It therefore follows that upon faulting the verifying affidavit, the plaint become incompetent in that it does not comply with the provisions of Order 7 Rule (1) (3) Civil Produce Rules which mandatorily requires it to be verified by a verifying affidavit. Whereas on the other hand, the opposing affidavit to the application once faulted, they leave the application uncontested, save for any points of law urged in opposition to the same.

(iii) Upon faulting the verifying affidavit the plaintiff cannot take refuge under the cure in Order 7 Rule 1 (3) whereby the court can allow them leave to file a proper verifying affidavit, because, firstly the suit is incompetent right from its inception, by reasons of there being no resolution of either the Board of Directors, or the shareholders authorizing the filing of the suit, and secondly there is no reasonable cause of action against the defendant as will be demonstrated below.

(iv) The claim as against the 1st to the 13th defendants is incompetent as there is no mandate in the club constitution as relied upon by the plaintiff to find this action to sue them in their individual capacity. Any action against these defendants in their capacity as members of the M.C. of N.G has to be championed through the trustees who are already on Board.

(2) The plaintiff's suit is also liable to be dismissed with costs for failure to disclose reasonable cause of action against the defendants for the following reasons:-

(i) Vide clause 2 of the memorandum of agreement of March 2001 exercised by the KBA and NG, reserved its right to withhold the rights for the use of the said hall to KBA as then in existence then and as to be incorporated subsequently. It follows that NG was within its power, right and authority when it withheld the use of the said hall from the two.

(ii) in order for KBA Ltd to benefit from the said memorandum upon its birth it was necessary for parties to avail themselves of the clause 11 procedures to negotiate new terms to accommodate the new born upon its birth which was not done.

(iii) KBA limited if it wanted to avail itself of clause 12, it was necessary for it to exhibit its memo and Articles of association to demonstrate that it had adopted the action of the KBA as regards the said memorandum of agreement which was not done in the circumstances of this case.

(iv) As mentioned earlier on, execution of a corporate body's' activities are vested in the Board of Directors or shareholders. It was necessary for the rights under the agreement of March 2001 to be sanctioned by a resolution of either of the two organs. None has been exhibited; lack of its existence makes the action to be based on nothing.

3. Had the Court not struck out the suit it would have certainly dismissed the same under prayer (b) for the reason that on the facts as demonstrated by both sides, the plaintiff had no reasonable cause of action against the defendant. The reason being that the complaint raised by the Plaintiff was not justified because the NG through the Trustees acted within the terms of the said memorandum of agreement as explained in the assessment.

4. The defendants number 14th – 18th who are the applicants in this application will have costs of the application as against the plaintiff.

DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2008.

R.N.NAMBUYE

JUDGE