IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Akiwumi & Tunoi JJ A)

CIVIL APPEAL NO. 60 OF 1993

BETWEEN

ROCKLAND KENYA LIMITED...APPELLANT

AND

ELLIOT WHITE MILLER..RESPONDENT

(Appeal from an order of the High Court of Kenya at Nairobi (Shields J) dated 9th February, 1993 in HCCC No 342 of 1992)

JUDGMENT

Gicheru JA. The object of an interlocutory injunction is to protect the plaintiff against injury by violation of his legal right for which he could not be adequately compensated in damages recoverable in the action if the matters in dispute were resolved in his favour at the trial. However, his need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal right for which he could not be adequately compensated under the plaintiff's undertaking in damages if the subject-matter of the trial was decided in his favour. It is a remedy that is both temporary and discretionary. In cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the Court at the hearing of the application for an interlocutory injunction is given on affidavit and is therefore incomplete as it has not been tested by oral cross-examination. At that stage therefore, it is not the function of the Court to attempt to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. Such matters are to be dealt with at the trial. Nonetheless, the Court must in the exercise of its discretionary power in this regard be satisfied that the claim in respect of which an interlocutory injunction is sought is neither frivolous nor vexatious: in other words, that there is a serious question to be tried.

Should the material available to the Court at the hearing of the application for an interlocutory injunction disclose that the plaintiff has some real prospect of succeeding in his claim at the trial, then the Court should

consider whether, if the plaintiff were to succeed at such trial in establishing his legal right for which the temporary injunction was sought, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be injuncted between the time of the application and the time of that trial. If damages in the measure recoverable at law would be adequate remedy and the defendant would be in a financial position to pay

them, the interlocutory injunction would normally not be granted, however strong the plaintiff’s claim may appear to be at that stage. On the other hand, if damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether if the defendant were to succeed at the trial in establishing his legal right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being stopped from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction. Where, however, there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, the question of balance of convenience then arises.

Matters to be taken into consideration in deciding where the balance of convenience lies will vary from case to case. Nevertheless, where other factors appear to be evenly balanced, it is prudent to take such measure as are calculated to preserve the status quo; for:

If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake: whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.”

Except for the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party who is unsuccessful on the application some disadvantages which his ultimate success at the trial may show that he ought to have been spared. Those disadvantages may be such that the recovery of damages to which such party would

then be entitled either in the action or under the plaintiff’s undertaking would not be sufficient to compensate him fully for all of them. This is always a significant factor in assessing where the balance of convenience lies: and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may be proper to take into account in tipping the balance the relative strength of each party’s case as revealed by the affidavit evidence adduced on the hearing of the application. There may be other special factors to be taken into consideration depending on the peculiar circumstances of each individual case. See the speech of Lord Diplock in the *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at pages 405, 406, 407, 408 and 409.

In the Nairobi High Court Civil Suit No 342 of 1992 Elliot White Miller, the respondent herein, was the plaintiff, Stones Limited was the first defendant, John Saul was the second defendant, Gabriel Nyambu was the third defendant, Raj Sahi and Stavros Spyropoulos were the fourth defendant, and Rockland Kenya Limited, the appellant herein, was the fifth defendant.

Stones Limited and the appellant are limited liability companies incorporated and registered under the Companies Act, chapter 486 of the Laws of Kenya with their respective registered offices at Nairobi.

By a further amended plaint in the suit above mentioned dated 2nd October, 1992 the respondent alleged that sometime in 1974 he caused Stones Limited to be incorporated under the Companies Act and through his instructions and directions forty five (45) shares in that company were held by him while a further forty five (45) shares in the said company were held by Quadrant Services Limited. According to him, Quadrant Services Limited is controlled by the firm of Messrs Kaplan & Stratton, advocates. At all material times therefore, he caused one Michael E Aronson, a partner in the said firm of advocates to be appointed as a director of Stones Limited.

From the respondent’s allegations in his further amended plaint, John Saul controls and/or owns Rockland International Corporation, a foreign registered company, and since 1981 neither John Saul nor his company has transacted any business with Stones Limited. Gabriel Nyambu, however, was at all material

times employed by Stones Limited as its manager at the mine.

In a meeting of the Board of Directors of Stones Limited called by Michael E Aronson and held on 6th May, 1990 and whose agenda was

to approve the minutes of a previous board meeting held on 8th May, 1986; to appoint John Saul and Gabriel Nyambu to the membership of the Board of Directors; to allot further shares; to appoint new signatories to the company's bank account with Barclays Bank of Kenya Limited, Queensway Branch; to accept the resignation of Michael E Aronson from the post of the company's Chairman; and to appoint John Saul to that post, the respondent strongly opposed the Chairmanship of Michael E Aronson to that meeting. He also took exception to the appointment of outsiders to the membership of the company's Board of Directors. Resulting from his stand at the said meeting, none of the proposed resolutions at that meeting was passed. On the following day, 7th May, 1990, the Secretaries to Stones Limited, Messrs E A Registrars, called an extraordinary general meeting of the company to be held on 30th May, 1990. According to the respondent, he was not given notice of this meeting. This meeting, however, aborted as there was no quorum but the same was adjourned to the following week on 6th June, 1990. On the latter date, only the representative of Messrs Quadrant Services Limited, Michael E Aronson, was present. At that meeting, John Saul and Gabriel Nyambu were appointed as directors of Stones Limited. At 10.35 am on the same day, the newly appointed directors together with Michael E Aronson held a meeting of the Board of Directors of the company aforementioned wherein Michael E Aronson was appointed Chairman of the said company for a term of two (2) years and nine (9) shares in that company were allotted as follows:

(1) Messrs Quadrant Services Limited - 4 shares

(2) Michael E Aronson - 3 shares

(3) Gabriel Nyambu - 2 shares

According to the respondent, no notice was given to him of the extraordinary general meeting held on the date above mentioned nor of the meeting of the Board of Directors held subsequent thereto as is set out above. This was notwithstanding his being the holder of forty five (45) shares in Stones Limited as well as being its Managing Director. To him therefore, these two meetings were deliberate attempts by those involved in them to pass resolutions affecting Stones Limited in his absence and without notice to him with the sole purpose of overcoming his objections at the meeting of the Board of Directors held on 6th May, 1990. In a letter dated 5th November, 1990 addressed to Messrs Kaplan & Stratton, Advocates, the respondent therefore took strong objection to the holding of the two meetings and the passing of the resolutions thereat. Following that letter, it would appear that Michael E Aronson resigned from Stones Limited and renounced the allotment in his favour of the three (3) shares mentioned above.

Notwithstanding the respondent's interest in Stones Limited, Messrs Kaplan & Stratton, Advocates facilitated the opening of a bank account for the said company with Barclays Bank of Kenya Limited, Moi Avenue Branch with John Saul and Gabriel Nyambu as the only signatories to the account. Thereafter, the aforementioned firm of advocates transferred the funds it was holding for and on behalf of Stones Limited to the above mentioned account and caused substantial loads of rubies belonging to Stones Limited to be deposited with the said bank. To protect his interests in the funds transferred to and the rubies deposited with this bank, the respondent filed Civil Suit No 3248 of 1991 in the High Court of Kenya at Nairobi against that bank. On 10th December, 1991, however, John Saul and Gabriel Nyambu held a meeting of the Board of Directors which resulted in calling an extraordinary general meeting of Stones Limited on 10th January, 1992. At the meeting held on the latter date, John Saul and Gabriel Nyambu passed a resolution to voluntarily wind up Stones Limited and appointed Raj Sahi and Stavros Spyropoulos as the liquidators of the said company. According to the respondent, no effective notice was given to him in connection with these meetings. To him therefore, the actions of Michael E Aronson, John Saul and Gabriel Nyambu at the extraordinary meeting of 6th June, 1990 and subsequent thereto were null and void.

On 19th March, 1991 John Saul and Gabriel Nyambu and Agents (Stones Limited) obtained a consent for mining from the Ministry of Tourism and Wildlife over a delineated mining area in Tsavo West National Park on which Stones Limited had previous mining rights for several years. On 14th August, 1991 the appellant was incorporated and registered under the Companies Act. A day after its incorporation, 15th August, 1991, John Saul caused a Special Mining Lease No 19 to be granted to the appellant by the Mines and Geological Department of the Ministry of Environment and Natural Resources over the same mining area whereon Stones Limited had mining rights and in respect of which there was in existence a valid and current consent for mining in favour of Stones Limited. Indeed, this was notwithstanding the Mines and Geological Department agreeing to grant Stones Limited a mining title as was indicated in a letter dated 14th March, 1991 addressed by that department to the Director of Kenya Wildlife Service and copied to the Permanent Secretary, Ministry of Environment and Natural Resources which letter no doubt was the strength upon which the consent for mining dated 19th March, 1991 was issued in favour of Stones Limited. Nevertheless, following the grant of the special mining lease to the appellant, John Saul and Gabriel Nyambu and Agents (the appellant) proceeded to obtain and did obtain on 11th December, 1991 a consent for mining in favour of the appellant from the Ministry of Tourism and Wildlife over the same area in respect of which Stones Limited had

earlier been issued with a similar consent for mining by the same Ministry and which Consent had not expired nor in any way invalidated.

In view of the foregoing, to the respondent, John Saul and Gabriel Nyambu with others incorporated the appellant with the object of defrauding Stones Limited of its mining rights and title over the area on which it had carried out mining activities between 1979 and 1984 when during the latter year its mine was looted by the Kenya Police resulting in a suit against the Government of Kenya which was subsequently resolved but thereafter a ban on mining in the area in question was imposed by the Government of Kenya with the result that Stones Limited could not carry out further mining activities in that area before the said ban was lifted. Because of his property interests in Stones Limited, the mining rights acquired by the appellant over the disputed area were, according to the respondent, so gained with a view to defraud him. Accordingly, he sought declarations from the superior court that those rights as are contained in the Special Mining Lease No 19 and in the relevant consent for mining are held by the appellant in trust for Stones Limited and for him; that the resolutions made in the extraordinary general meeting and in the meeting of the Board of Directors which meetings were both held on 6th June, 1990, the appointment of John Saul and Gabriel Nyambu as directors of Stones Limited and all acts carried out by them for and on behalf of Stones Limited subsequent to their appointment are null and void; and that the resolution of the Board of Directors at its meeting dated 10th January, 1992 purporting to voluntarily wind up Stones Limited and to appoint Raj Sahi and Stavros Spyropoulos as its liquidators and any other acts done by the said liquidators for and on its behalf are null and void.

In an application made by way of a Chamber Summons under order XXXIX rules 1, 2, and 3 of the Civil Procedure Rules and dated 26th October, 1992, the respondent sought orders from the superior court that:

1. That the 5th Defendant whether by itself, its directors, officers, servants and/or agents be and is hereby restrained from continuing further mining activities in all that mining area covered under Special Mining Licence Number 59 (issued in the name of the 1st defendant company in 1978) and presently under Mining Lease No 19 in the name of the 5th defendant company.

2. That the 5th defendant, Rockland Kenya Limited be and is hereby restrained from transporting, exporting, removing and/or in any other way disposing of any and all gemstones and/or materials from the said mining area.

3. That the 5th defendant do deliver up to the 1st defendant company’s Managing Director, Mr Elliot White Miller, all such gemstones and/or

materials as are currently in its possession.

4. That the 5th defendant, its servants and/or agents be and are hereby restrained from removing all assets

currently at the said mining area including all motor vehicles, machinery and equipment.

5. That the 5th defendant, its servants and/or agents be ordered to vacate the said mining area.

6. That the plaintiff be permitted to enter into the said mining area to seal up all tunnels, veins etc that may have been created by the 5th defendant, its servants and/or agents towards carrying out mining activities in the said mining area.

7. That the Officer Commanding Station, Voi Police Station together with the officers under him be requested to supervise the enforcement of orders No 1-6 above.

8. That the plaintiff be allowed to install his own security at the said mining area.

9. That costs be provided for.

The application above mentioned was supported by the respondent's affidavit together with the annextures thereto the contents of which were principally the same as those contained in his further amended plaint dated 2nd October, 1992. In that affidavit, however, the respondent emphasised that from the circumstances of the matters in dispute between him and the appellant, it appeared that the appellant was formed by John Saul and Gabriel Nyambu with a view to committing fraud on Stones Limited and himself with the object of taking over the latter company's most valuable asset; namely, the mine: and once the new mining title was issued to the appellant, they proceeded to put Stones Limited into liquidation. If therefore the appellant, its directors, officers, servants and/or agents were not restrained from continuing with the mining activities in the mining area the subject-matter of the suit against the appellant and others, the assets of Stones Limited would continue to be plundered by the appellant with the resultant depreciation and/or exhaustion of the mining area in issue to the great loss and detriment to him and Stones Limited.

In its statement of defence to the respondent's suit and the grounds of opposition to his application referred to above both of which were dated 18th November, 1992, the appellant's position was that neither the respondent nor Stones Limited had any legal or beneficial interest in the area of land covered by Special Mining Lease No 19 granted to it by the Commissioner of Mines and Geology, the Commissioner, on 15th August, 1991 especially after the expiry in January, 1983 of the Special Licence No 59 issued to Stones Limited in 1978 and under which the latter company had carried out mining activities in the area in question

since 1979. According to the appellant, by reason of the special mining lease referred to above, it had acquired exclusive rights to prospect for and mine minerals within the area of land covered by that lease. Whether or not therefore Stones Limited had an unexpired consent for mining from the Ministry of Tourism and Wildlife, the same did not confer upon it any mining rights over the area in dispute. That consent only permitted its ingress and egress to and from Tsavo West National Park where the area of land in issue is situated. To the appellant, at the expiry of Special Licence No 59 as is mentioned above, the mine in the area of land covered by that licence and now covered by Special Mining Lease No 19 ceased to be an asset of Stones Limited. Hence, the respondent had no basis for seeking the orders contained in his application for an interlocutory injunction.

On 5th November, 1990 John Saul as a director of Stones Limited wrote a letter to the Commissioner and copied it to the Attorney-General the contents of which were as follows:

"I understand that mining will shortly be permitted again in Tsavo National Park.

As a director of Stones Limited I would now ask formally for the mining lease of the area comprised in Special Licence No 59 as modified as a result of your decision in the boundary dispute with Mr John Gitonga Kihara, to be granted to Stones Limited.

You will recall that we first applied for the mining lease and paid the requisite fee as long ago as January,

1981, your receipt No U30223 of 30th January, 1981 refers. You will also recall that a full cadastral survey of the property was obtained and submitted to you in 1986. All other requirements which you have asked us to enable you to issue a mining lease have been delivered to you several years ago. If there is anything further you require to enable you to issue a mining lease in accordance with the Mining Act, could you please advise the company.

For your information, Mr E W Miller is no longer the Managing Director of the company and will take no further part in its operations. Mr Miller will remain a director of the company but he is no longer resident in Kenya. It is our intention to employ the services of a mining engineer and the day to day management

will be handled by Mr Gabriel Nyambu. Mr Nyambu will also be a director of the company together with myself and Mr M E Aronson of Kaplan & Stratton. All correspondences should be addressed to Mr Aronson and copied to Mr Nyambu."

Although in his letters addressed to Stones Limited and dated 5th and 7th March, 1990 respectively, the Commissioner confirmed that the latter company's Special Mining Licence No 59 had expired and would not be renewed and that its application for a special mining lease under section 55 of the Mining Act, chapter 306 of the Laws of Kenya had been rejected and that arrangements were being made to refund the sum of Kshs 338/= which had been paid by the said company in respect of that application, his response to John Saul's letter as is set out above was as is contained in his letter reference No CONF/M/5/VOL XII/229 addressed to the Director of Kenya Wildlife Service and dated 14th March, 1991. That letter was copied to the Permanent Secretary, Ministry of Environment and Natural Resources and its contents were:

"Stones Limited

After consultations with the Attorney-General on the above subject, we will grant a mining title to Stones Limited. For this, consent from the Kenya Wildlife Service is necessary.

Please, therefore, kindly deal with the company's application for consent.

Signed

C Y O Owayo

Commissioner of Mines and Geology"

The Commissioner's letter reference No L/35/(69) addressed to the Deputy Chief Litigation Counsel in the Attorney-General's Chambers and dated 3rd December, 1992 confirms the foregoing response for in that letter he stated that he had written the letter dated 14th March, 1991 after his receipt of John Saul's letter of 5th November, 1990, both of which letters are set out above, and after representations had been made to him by John Saul or by the latter together with Gabriel Nyambu.

By a strange turn of events, however, on 15th May, 1991 John Saul again as a director of Stones Limited wrote a letter to the Commissioner in these terms:

"Dear Sir,

A memorandum of agreement on file with the Mines and Geological Department recites that the Government of Kenya acknowledges that Rockland International Corporation had a valid mining right in respect of Nganga Mine. This acknowledgement refers to the original mining right first issued for this deposit following its discovery by the agents of Rockland International Corporation.

By the same memorandum of agreement, the Nganga Mine was to be operated by Stones Ltd.

In view of the fact that Special Licence No 59 has now terminated and the area is not now covered by a mining authority from your Department, the Board of Directors of Stones Ltd would not object if the

original discoverer, Rockland International Corporation, were to apply in its own name for a 21-year special mining lease over the area covered by Special Licence No 59.

Yours faithfully,

Signed

John M Saul

Director"

This letter was written after the respondent had complained to the Kenya Police against John Saul and Gabriel Nyambu with regard to an alleged misappropriation of funds in an account with Barclays Bank of Kenya Limited, Moi Avenue Branch belonging to Stones Limited to which the latter two were the only signatories. The respondent had also at the same time complained to the police against the same persons in connection with their alleged misappropriation of other assets of Stones Limited. Resulting from these complaints, on 19th March, 1991 a warrant to investigate and freeze the account above mentioned was issued by the Chief Magistrate's Court at Nairobi.

Following the letter of 15th May, 1991 which I have set out above, the Mines and Geological Department of the Ministry of Environment and Natural Resources agreed with John Saul to grant a mining lease to another Kenyan company to be incorporated and to be known as Rockland Kenya

Limited. On its incorporation on 14th August, 1991, on the next day, 15th August, 1991, it was granted a Special Mining Lease No 19 of 1991 and the Mines and Geological Department instructed the Kenya Wildlife Service to issue the newly incorporated Company with a consent for mining in place of Stones Limited. In the letter above mentioned, John Saul is, in regard to the interests of Stones Limited, perhaps for obvious reasons, back-pedalling in view of his earlier letter to the Commissioner dated 5th November, 1990 and the latter's letter to the Director of Kenya Wildlife Service dated 14th March, 1991 both of which are set out above. According to the respondent, the Board of Directors of Stones Limited did not hold any meeting at which a resolution was passed that the latter company had no objection if another company applied for a special mining lease over the same mining area covered by its expired Mining Licence No 59.

The record of the proceedings taken by the judge who tried the respondent's application was cryptic and therefore of little assistance to this Court. That notwithstanding, however, the material I have attempted to outline above was before him and was contained in the respondent's further amended plaint and supporting affidavits to his application together with the annextures thereto; in the appellant's statement of defence and its grounds of opposition to the respondent's application; and the affidavit of Arthur Abongo Ndegwa, a Senior Mining Engineer in the Mines and Geological Department of the Ministry of Environment and Natural Resources, together with the annextures thereto.

At the commencement of the hearing of the respondent's application on 30th November, 1992, counsel then and now appearing for the appellant, Mr Kapila, asked the trial judge to disqualify himself from hearing the said application in view of his ruling given on 21st June, 1987 in the Nairobi High Court Civil Case No 397 of 1985. The learned judge's short response to this request was:

"I am quite satisfied that I should not disqualify myself from hearing this case because of what I know about HCCC 397/85. It is unfortunately my duty to continue with this case."

The appellant did not appeal against the trial judge's refusal to disqualify himself from hearing the respondent's application. The same proceeded to hearing and the ruling in respect thereof was delivered on 9th February, 1993. That ruling was brief but in it the learned judge said:

"The plaintiff alleges that he is the beneficial owner of the 1st defendant and alleges that he has been deprived of such beneficial ownership by the machinations of

the 2nd and 3rd defendants and others acting in concert with them. It is not necessary to set these alleged machinations here as they have been set out in previous rulings and I at least have expressed the view that the plaintiff has a substantial case to regain control of the 1st defendant.

The application for an injunction now before the Court arises because the 5th defendant which is controlled by the 2nd and 3rd defendants has been issued with a mining lease of an area which was previously covered by Special Licence No 59 issued to the 1st defendant which had expired.

I have read the various affidavits filed including the affidavit of Arthur Abongo Ndegwa and the correspondence exhibited. As this is an interlocutory application, it seems unnecessary that I should analyse it in any great detail."

The trial judge then briefly set out the facts in the case of *Keech v Sandford* [1558-1774] All ER Rep 230 and concluded:

"Accordingly, being of the view that the plaintiff may very well be the beneficial owner of the shares in the 1st defendant, (and in view of) the relationship of the 2nd and 3rd defendants to both the 1st defendant and the 5th defendant and the rule in *Keech & Sandford* and the inadequacy of an award of damages, I award the plaintiff an injunction as sought until the determination of the action subject to the usual undertaking as to damages. Costs to abide the result of trial."

Against the aforesaid ruling, the appellant appeals to this Court and has in that regard put forward fifteen (15) grounds of appeal.

At the hearing of this appeal on 6th December, 1993, Mr Kapila for the appellant argued the 1st and 3rd grounds of the appellant's appeal together and all the other remaining grounds of the said appeal separately. Mr Gautama for the respondent, however, responded to the appellant's fifteen (15) grounds of appeal together and submitted that the matter for decision was whether the trial judge was justified in granting the interlocutory injunction the subject-matter of the appellant's appeal to this Court. According to him, there was abundant documentary evidence before the

judge to warrant the grant of that injunction. That evidence indicated that a mining title in respect of the area of land covered by the expired Special Licence No 59 previously issued to Stones Limited was to be granted to the latter company. That title was instead granted to the appellant in the form of a Special Lease No 19 at the instigation of John Saul. Subsequent thereto, the latter together with Gabriel Nyambu and without any effective notice to the respondent purported to pass a resolution at an extraordinary general meeting held on 10th January, 1992 voluntarily winding up Stones Limited. To Mr Gautama, anyone reading the respondent's further amended plaint and his affidavits in support of the allegations contained therein would immediately see that the game that was being played was to divert the interests of Stones Limited in the mining area above mentioned to the appellant to the detriment of the respondent's interests in Stones Limited. Without reference to the respondent therefore, this was certainly, according to Mr Gautama, fraudulent and in the absence of any affidavit by John Saul, Gabriel Nyambu and the appellant to dispute the allegations made against them by the respondent, the latter had demonstrated that he had a *prima facie* case against the appellant with a probability of success. In any event, there was a vigorous dispute between the parties to the suit in respect of which the respondent's application was made. If therefore Stones Limited was declared beneficially the owner of the Special Mining Lease No 19 referred to above and that the appellant held the same as its trustee in title, no doubt the said lease would be rectified in favour of Stones Limited and to the benefit of the respondent.

The appellant's complaints in its 1st and 3rd grounds of appeal are that the learned trial judge was wrong in his ruling on the application before him as he did not consider the appellant's statement of defence nor its grounds of opposition to the respondent's application and that he did not make any findings of facts on the material issues raised in the said application and in the statement of defence and grounds of opposition aforementioned. In this regard, Mr Kapila's submission was that the appellant's statement of defence and its grounds of opposition to the respondent's application for an interlocutory injunction went to the very root of the said application. According to him, their net effect demonstrated that the respondent had no

prima facie case with a probability of success against the appellant. There was therefore nothing upon which the respondent could have been granted the interlocutory injunction that he sought. The failure by the learned judge to consider these documents, to analyse them and make the necessary findings of facts on the material issues raised in them and in the respondent's application made the ruling on the said application suspect.

It is true that in his ruling the trial judge made no reference to the appellant's statement of defence nor to its grounds of opposition to the respondent's application. He equally made no mention of the respondent's further amended plaint in which the appellant was joined as a party in the Nairobi High Court Civil Suit No 342 of 1992. What he said he had read were the various affidavits filed in that application including that of Arthur Abongo Ndegwa which latter affidavit was at the request of counsel for the appellant, Mr Kapila. The judge also said that he had read the correspondence exhibited in the application in question. From the material available to him which included the appellant's statement of defence, its grounds of opposition to the respondent's application and the respondent's further amended plaint and which material I have endeavoured to outline above, it is evident that having read the affidavits filed in respect of the application before him together with the annextures thereto, he had sufficient facts at his disposal to enable him to make appropriate decision. However, although, as is pointed out at the beginning of this judgment, it is not the function of the Court in an application such as was before the trial judge to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend, the Court must nevertheless in the exercise of its discretionary power in such an application consider and manifest its consideration of the material before it and be satisfied that the claim in respect of which the application is made is neither frivolous nor vexatious: put in another way, that there is a serious question to be investigated.

In the ruling the subject-matter of the instant appeal, the trial judge said that as the application before him was interlocutory, it seemed unnecessary that he should analyse it in any great detail. In fact he did not analyse it at all. Indeed, without going back to the record of that application, the ruling in connection therewith is hopelessly bare. Thus, although the material available to the learned judge in the said application disclosed adequate facts to facilitate his making appropriate decision in respect thereof, the appellant's complaints as are set out above were not without cause. The complaints in the appellant's 2nd and 4th grounds of appeal are that in not appreciating that the respondent had no *locus standi* to institute proceedings against the appellant and therefore seek the orders contained in his application for interlocutory injunction and that the appellant was a body corporate and therefore a legal person separate and distinct from John Saul and Gabriel Nyambu, the learned trial judge fell into error. In this connection, Mr Kapila submitted that the respondent never had any mining rights over any piece of land in Kenya. Only Stones Limited would have had a right to sue the appellant. The respondent should therefore have brought his suit in the name of Stones Limited. In any event, the

appellant being separate and distinct from John Saul and Gabriel Nyambu and not the latter persons' alter ego, the actions of these two persons could not be attributed to it.

The position of the respondent was that his woes started when at the meeting of the Board of Directors of Stones Limited held on 6th May, 1990 he strongly opposed the Chairmanship of Michael E Aronson to that meeting and the appointment of outsiders as directors of Stones Limited with the result that none of the proposed resolutions at that meeting was passed. To get over his recalcitrance at this meeting, an extraordinary general meeting of Stones Limited held on 6th June, 1990 and attended only by Michael E Aronson as a representative of Messrs Quadrant Services Limited appointed John Saul and Gabriel Nyambu as directors of Stones Limited. At 10.35 am on the same day, John Saul, Gabriel Nyambu and Michael E Aronson jointly held a meeting of the Board of Directors of Stones Limited wherein Michael E Aronson was appointed Chairman of the said company for a term of two (2) years and nine (9) shares in that company were allotted to Messrs Quadrant Services Limited, Michael E Aronson and Gabriel Nyambu as is set out towards the beginning of this judgment. According to the respondent, he was not given notice of any of the meetings of 6th June, 1990 although he was the holder of forty five (45) shares in Stones Limited and was its Managing Director. To him therefore, the meetings of that date were deliberately meant to overcome his opposition to the resolutions passed therein as manifested in the Board of Directors' meeting of 6th May, 1990. Thereafter, an account of Stones Limited was opened with

Barclays Bank of Kenya Limited, Moi Avenue Branch with John Saul and Gabriel Nyambu as the only signatories. Subsequently, the funds and substantial loads of rubies held by the firm of Messrs Kaplan & Stratton, Advocates on behalf of Stones Limited were transferred to that bank. To protect his property interests in the said funds and rubies, the respondent filed Civil Suit No 3248 of 1991 in the High Court of Kenya at Nairobi against the said bank. On filing that suit, John Saul and Gabriel Nyambu, without notice to the respondent, held a meeting of the Board of Directors on 10th December, 1991 which resulted in calling an extraordinary general meeting of Stones Limited on 10th January, 1992. Again, the respondent was not given notice of this latter meeting. At that meeting, John Saul and Gabriel Nyambu passed a resolution to voluntarily wind up Stones Limited and appointed Raj Sahi and Stavros Spyropoulos liquidators of the said company. It is to be noted that this was after the letter dated 14th March, 1991 addressed to the Director of Kenya Wildlife Service by the Commissioner and the letter dated 15th May, 1991 addressed to the Commissioner by John Saul which letters are both set out above and following which letters the appellant was incorporated

on 14th August, 1991 and granted a 10-year Special Mining Lease No 19 over the area of land originally covered by the expired Special Mining Licence No 59 previously granted to Stone Limited.

The end result of what is alleged to have transpired from the meetings of 6th June, 1990 and the subsequent events leading to the incorporation of the appellant and its being granted Special Mining Lease No 19 was to prejudice the respondent's property interests in Stones Limited. Those responsible for that result were not, from the material before the trial judge, free from real moral blame according to the accepted notions of fair-play amongst commercial men. In the circumstances, the respondent had a right of action against the appellant notwithstanding that the latter was a body corporate and therefore a legal person separate and distinct from John Saul and Gabriel Nyambu.

In its 5th ground of appeal, the appellant's complaint is that the trial judge's failure to consider whether or not the respondent had made out a *prima facie* case with a probability of success was wrong in law. In his scanty ruling, it is not apparent that the learned judge addressed himself to the issue whether or not the respondent had demonstrated that he had a *prima facie* case with a probability of success against the appellant. However, in the absence of any replying affidavit by the appellant controverting the allegations made by the respondent in his application for an interlocutory injunction, it is too late in the day for the appellant to make this complaint in view of the material available to the trial judge.

Principally, the appellant's complaint in its 6th, 7th and 8th grounds of appeal concerns the trial judge's error in refusing to disqualify himself from hearing the respondent's application because of:

(i) His previous involvement when he was the Chief State Counsel in the Attorney-General's Chambers in matters related to the subject-matter of the suit in which the application above mentioned was made;

(ii) His having disqualified himself in the Nairobi High Court Civil Suit No 397 of 1985 between the respondent and the Attorney-General for the reason of the aforesaid involvement; and

(iii) His previous rulings in suits and applications between the respondent and the other parties to the suit in which the respondent's application was made and which rulings he relied on in the ruling the subject-matter of the present appeal.

Mr Kapila's submission in this regard was that when the learned judge was the Chief State Counsel in the Attorney-General's Chambers he wrote a detailed minute about the mine the subject-matter of the respondent's suit against the appellant and four (4) others. In the Nairobi High Court Civil Suit No 397 of 1985 referred to above, the trial judge had disqualified himself for this reason as he felt that what he had learnt about the mine in question may have led him to decide that suit on the knowledge he had thus acquired other than the evidence presented to him in Court. In any event, he had adjudicated upon various applications between the respondent and four (4) other parties to the suit against the appellant and had made certain findings which latter, according to Mr Kapila, were naturally bound to colour his mind in regard to the mine above mentioned. The learned judge could not therefore have been seen to do justice in the application out of which this appeal arises and his refusal to disqualify himself from hearing that

application prejudiced the appellant's position. This, to Mr Kapila, was a clear demonstration of bias.

Justice must be rooted in confidence; and confidence is destroyed when fair-minded people go away thinking: "The judge was biased." Indeed, as was observed by Frankfurter, J in *Public Utilities Commission of the District of Columbia v Pollak* [1952] 343 US 451 at pages 466 to 467:

"The judicial process demands that a judge moves within the framework of relevant legal rules and covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feelings on every aspect of the case. There is a good deal of shallow talk that judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges rescue themselves. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."

When on 30th November, 1992 the trial judge refused to disqualify

himself from hearing the respondent's application, the appellant did not appeal against that refusal. It is not now competent for the appellant to complain against the said refusal in an appeal against the ruling given by that judge on that application for in not challenging that refusal at the appropriate time, the appellant appears to have accepted it and the application proceeded to hearing with the appellant's full participation to its final conclusion. At any rate, from the material before the trial judge in that application, I am unable to discern any biased inclination by the trial judge against the appellant.

The appellant's 9th ground of appeal is a complaint against the trial judge's failure to appreciate that with the expiry in January, 1983 of the Special Mining Licence No 59 originally granted to Stones Limited as is mentioned above, the latter company ceased at the said expiry to have any legal or beneficial interests in the area of land covered by that licence. According to Mr Kapila, subsequent indication by the Commissioner to grant Stones Limited a mining title over the same area conferred to the said company no such interests.

The letters dated 5th November, 1990 addressed to the Commissioner by John Saul and 14th March, 1991 addressed to the Director of Kenya Wildlife Service by the Commissioner both of which are set out above were pointers as to what interests Stones Limited had in the mining area originally covered by Special Mining Licence No 59. The acrobatic behaviour of John Saul in his letter dated 15th May, 1991 and that of the Department of Mines and Geology in granting the appellant a Special Mining Lease No 19 on 15th August, 1991 over the same area required serious investigation. On the face of it, it may therefore be incorrect that after the expiry of Special Mining Licence No 59 Stones Limited ceased to have any legal or beneficial interests over the said area of land.

The appellant's 10th ground of appeal is a complaint that the trial judge fell into error when he found that the appellant was controlled by John Saul and Gabriel Nyambu despite the appellant's express denial in paragraph four (4) of its statement of defence and the fact that Gabriel Nyambu had no shareholding in the appellant. To Mr Kapila, this finding was not supportable by the material available before the learned judge and the truth was that at the material time the appellant was not controlled by John Saul and Gabriel Nyambu.

It is true that in paragraph four (4) of its statement of defence the appellant denied that it was controlled by John Saul and Gabriel Nyambu. Indeed, notwithstanding John Saul's letter to Gabriel Nyambu dated 30th October

1991 wherein he proposed that the latter should receive a percentage in the appellant equal to twice his holdings in Stones Limited; the letter dated 13th January, 1992 addressed to John Saul by the promoters

of the appellant, Messrs Lila Vadgama and Yasson Papaeliopoulos, indicating that they had agreed to allot and to issue to him at par not less than five (5) percent of the capital shares in the appellant in consideration of Shs 1,000/= paid to them by or on his behalf; and the sign board at the entrance to the mine in question with inscriptions:

"John Saul Ruby Mine

Rockland Kenya Ltd

PO Box 2 Kasigau"

there was nothing else in the material available to the trial judge that indicated that John Saul and Gabriel Nyambu controlled the appellant. The statement by the learned judge that the appellant was controlled by John Saul and Gabriel Nyambu was therefore incorrect. That statement was, however, inconsequential for the purposes of the application before the trial judge.

In the 11th ground of appeal, the appellant complains that the trial judge did not in his ruling distinguish the respondent from Stones Limited and the latter company from the appellant. At the conclusion of his ruling on the respondent's application, the learned judge observed that he was of the view that the respondent may very well be the beneficial owner of the shares in Stones Limited and because of the relationship of both John Saul and Gabriel Nyambu to Stones Limited and to the appellant, the rule in *Keech v Sandford*, *supra*, and the inadequacy of an award of damages he granted the respondent the interlocutory injunction that he had sought on the usual undertaking as to damages. Clearly, the dominant reason for this decision was the appellant's conflicting interests with those of Stones Limited to the prejudice of the respondent's property rights in the latter company as manifested by the material available to the trial judge. Distinguishing the respondent from Stones Limited and the latter company from the appellant had therefore no bearing to the said decision.

When granting the orders sought by the respondent, the trial judge's reliance on the rule in *Keech v Sandford*, *supra*, was obvious. That case had neither been cited nor had any submissions been made on it by counsel appearing before him. This then is the basis of the appellant's complaint in its 12th ground of appeal. Mr Kapila's submission in respect thereof was that the case referred to above had no relevance to the matter before the learned judge as the facts in that case were dissimilar to the material available to him in the respondent's application. Besides, according to

Mr Kapila, the learned trial judge had no business relying on the case in question in his ruling when the same had not been referred to by counsel appearing before him nor had he given them opportunity to hear their submissions on it. In this connection, Mr Kapila referred to and relied on Alan Paterson's 1982 Edition of *The Law Lords* at pages 38 to 45.

Like the judgment of a Court, the ruling of a Court is the decision of such a Court in a legal proceeding. It also embraces the reasoning of the judge which leads him to his decision. The respondent's application was made under order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules. Under order XX rule 4 of the said Rules:

"Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

As was pointed out by Lord Wilberforce in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at page 212 letter H, judges when giving reasons for their decisions:

"are more than mere selectors between rival views: they are entitled to and do think for themselves."

Indeed, as Lord Diplock emphasised in *Cassell v Broome* [1972] AC 1027 at page 1131 letter G:

"On matters of law no Court is restricted in its decision to following the submissions made to it by

counsel for one or other of the parties."

For although in the words of Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at page 183 letters C to D:

"The judge, however wise, creative, and imaginative he may be, is `cabin'd, cribb`d, confined, bound in' not, as was Macbeth, to his `saucy doubts and fears` but by the evidence and argument of the litigants",

yet in the processing of the evidence and arguments of litigants the judge, in his paramount object of securing that justice is done according to law, is not "cabin'd, cribb'd, confined, bound in " as a mere selector between rival claims of litigants: for if that was his only role, when those litigants' evidence and arguments are based on misconceptions of the law, his mere selection between their competing views would conflict sharply with the obligation with which he is entrusted; namely, administering justice according to law. On matters of law therefore, he must not be

restricted in his decision to the confinement of the submissions made by counsel for the opposing parties appearing before him: for to do so would lead to the truncation of the administration of the law with fatal results to the administration of justice. "Rule 4 of order XX," *supra*, places no such restriction on the judge. Hence, although the authority of *Keech v Sandford supra*, had not been referred to nor submitted on by counsel appearing before the trial judge and although that authority may have had no relevance to the matter before the learned judge, Mr Kapila's criticism of him simply because in his decision he relied on the rule in that case without the same having been cited and submitted on by counsel appearing before him was without sound justification. At any rate, even without his reliance on the rule in the said case, the turn of events in the matter for adjudication before the trial judge would not have been altered in view of the material available before him.

Concerning the appellant's 13th and 14th grounds of appeal, the gravamen of the respondent's further amended plaint was the allegation of fraud perpetrated upon him by those, including the appellant, against whom he had filed the suit in respect of which that further amended plaint was lodged in the superior court. He had made no allusion of any such allegation against the Commissioner. The granting of the Special Mining Lease No 19 of 1991 to the appellant did not therefore by itself alone warrant the Commissioner being joined together with the five (5) others against whom the respondent had filed an action as is mentioned above. Consequently, the availability under the Mining Act, *supra*, of a specific procedure for appeal against the granting of the said lease was of no value to the respondent.

Finally, the appellant's complaint in its 15th ground of appeal concerns the trial judge's failure to consider the substantial loss that would result to it by reason of his ruling which is the subject-matter of the present appeal. It is true that apart from the use of the words "and the inadequacy of an award of damages" the trial judge does not appear to have deliberated on this issue in his ruling. Indeed, throughout the proceedings before him, scantiness was his greatest handicap. The appellant's complaint in this ground is not therefore without good reason. In fact, this complaint would have turned the course of this appeal if it were not for the material available to the trial judge which, *prima facie*, as I have indicated above demonstrated that those, including the appellant, who were responsible for the respondent's predicament were not free from practising fraud upon him. It is elementary law that no person can take advantage of his own fraud.

Evidently, from what I have tried to outline above, the appellant's appeal must fail. I would therefore dismiss the same with costs to the respondent. As Akiwumi and Tunoi, JJ A also agree, it is ordered that the appellant's appeal be and is hereby dismissed with costs to the respondent.

Akiwumi JA It is worthwhile setting out albeit briefly, the back drop to the present appeal. I shall refer to the parties to this appeal either in their original roles as plaintiff and defendants or by their names. The plaintiff in his original plaint which was subsequently amended, had sued the 1st to the 4th defendants seeking among other reliefs, injunctions to restrain the 2nd and 3rd defendants from meddling in the running of the 1st defendant, a mining company known as Stones Ltd, or from entering upon or carrying on any mining on the property of Stones Ltd particularly the area demarcated in Special License No 59

which Stones Ltd had mined since 1979. The amended plaint was subsequently, further amended by a further amended plaint to join Rockland Kenya Ltd as the 5th defendant. It is the plaintiff's case as disclosed in his further amended plaint, that he caused Stones Ltd to be incorporated and in which he held forty five shares. Another forty five shares were held by Quadrant Services Ltd in trust for him. The plaintiff appointed Mr Michael Aronson, as partner in the well known law firm of Kaplan and Stratton, and which also controlled Quadrant Services Ltd, to act as his nominee and director of Stones Ltd. In June, 1990, and without notice to the plaintiff, Mr Aronson called a meeting of the Board of Directors of Stones Ltd which was attended only by himself, who then proceeded wrongfully, to appoint the 2nd defendant, a Mr Saul and the 3rd defendant, a Mr Nyambu who was the manager of the mine belonging to Stones Ltd, to be the directors of that company. The three then, purporting to meet as the Directors of Stones Ltd, appointed Aronson as the Chairman of the Board of Directors and proceeded to allot shares of Stones Ltd to Quadrant Services Ltd, Aronson and Nyambu. Aronson was later to resign from Stones Ltd and to renounce his shares. The plaintiff then discovered that behind his back, a bank account had, with the connivance of the very law firm of which Aronson was a partner, been opened in the name of Stones Ltd with Barclays Bank, Moi Avenue Branch, Nairobi, with Saul and Nyambu as the sole signatories and into which bank account, the said law firm had transferred monies and rubies that they were holding on behalf of Stones Ltd. Subsequently, on 10th January, 1992, Saul and Nyambu purporting to act as directors of Stones Ltd and without notice to the plaintiff, illegally caused the voluntary winding up of Stones Ltd and appointed the 4th defendants as liquidators.

But prior to the liquidation of Stones Ltd, Saul and Nyambu had caused to be incorporated, the 5th defendant, Rockland Kenya Ltd, with their

nominees as shareholders and directors namely, an advocate, Lila Vadgama and one Yasson Papaelipoulos whose profession or occupation is not disclosed. The real purpose of the incorporation of Rockland Kenya Ltd by Saul and Nyambu who at the time, were also acting as directors of Stones Ltd, the plaintiff contended, was fraudulently, to procure the mining interest which Stones Ltd enjoyed, for Rockland Kenya Ltd in which Saul and Nyambu but not the plaintiff, had beneficial interests. In March, 1991, the very same Saul and Nyambu had applied and obtained for Stones Ltd a mining consent from the Ministry of Tourism and Wildlife to carry on mining operations in, it is common ground, Tsavo West National Park. It must be stated right away, that a mining consent does not of itself, though not an entirely valueless piece of paper, entitle the beneficiary to actually commence or carry on any mining operations without also obtaining a special mining lease from the Commissioner of Mines and Geology whom I shall hereinafter, refer to as "the Commissioner". Subsequent to the obtaining of the mining consent and whilst it was unexpired, and after the Commissioner had agreed to grant a "mining title" to Stones Ltd which could only be a mining lease, Saul and Nyambu who had held themselves out to be directors of Stones Ltd, fraudulently obtained on 15th August, 1991, without the knowledge of the plaintiff who was the majority shareholder of Stones Ltd, a special mining lease No 19 of 1991 over the same area that is to say, the area covered by Mining Consent No 59, in favour, not of Stones Ltd as one would have expected, but that of Rockland Kenya Ltd which they had caused to be incorporated the day before. Saul and Nyambu then applied for and obtained a Mining Consent in favour of Rockland Kenya Ltd.

It is on the basis of the circumstances as set out briefly herein before, that the plaintiff brought his action against the defendants and sought, *inter alia*, that the 2nd and 3rd defendants be restrained from meddling in the affairs of Stones Ltd including its mine, a declaration that the special mining lease and mining consent granted in favour of Rockland Kenya Ltd be held by it in trust for Stones Ltd, and that Rockland Kenya Ltd be restrained from carrying on any further mining activities on, and removing various gem stones and equipment from, the area covered by the special mining lease.

The defence filed on behalf of Rockland Kenya Ltd denied the substance of the allegations contained in the further amended plaint and went on to aver that the Mining Consent granted to Stones Ltd in 1991 by itself, conferred no mining rights on Stones Ltd whose earlier interest in Tsavo West National Park had expired in January, 1983. Since the Mining Consent granted to Stones Ltd in 1991 did not confer any proprietary interest on

Stones Ltd to undertake mining activities in any particular part of the Tsavo West National Park, Stones

Ltd had in the first place no proprietary interest which could be wrested from it and given away to Rockland Kenya Ltd. It was also denied that Rockland Kenya Ltd was incorporated at the instigation of Saul and Nyambu or controlled by them. It could also not be said that Stones Ltd would suffer any damages as a result of the granting of the special mining lease to Rockland Kenya Ltd. Although both Saul and Nyambu took an active part in obtaining the special mining lease and mining consent for Rockland Kenya Ltd, this was lawful. What is more, Rockland Kenya Ltd contended there was, as if there could be under the given circumstances of the matter, no privity of contract between Stones Ltd and Rockland Kenya Ltd and therefore, the suit against the latter was also on this ground, misconceived and bad in law. This in summary was the essence of the defence of Rockland Kenya Ltd.

As was to be expected, the plaintiff having earlier succeeded in obtaining appropriate injunctions against Saul and Nyambu, then sought the interlocutory injunctions contained in his Chamber Summons dated 26th October, 1992, *inter alia*, to restrain Rockland Kenya Ltd and its servants or agents from exploiting the special mining lease and mining consent granted to Rockland Kenya Ltd. This application was supported by two affidavits by the plaintiff in the same vein as the averments contained in the further amended plaint, and to which were annexed various documents intended to establish the matters deponed in the affidavits. These include in chronological order:

(i) The letter of 5th November, 1990, on Stones Ltd headed note paper which incidentally, indicated "Nganga Ruby Mine Tsavo Park West" as being part of Stones Ltd, by Saul as Director, addressed to the Commissioner asking for a special mining lease in respect of the area comprised in a previous Special License No 59, to be granted to Stones Ltd; stating that the plaintiff who was not resident in Kenya, was no longer the Managing Director of Stones Ltd but was only a director, and thereby implicitly admitting the plaintiff's interest in Stones Ltd; that Nyambu another Director of Stones Ltd would now be in charge of the day to day management of Stones Ltd; and that all correspondence should be addressed to Aronson and copied to Nyambu;

(ii) A letter from the Commissioner dated 14th March, 1991, to the Director of the Kenya Wildlife Service

saying that the writer would grant a mining title to Stones Ltd and so, would the Director deal with Stones Ltd's application for a mining consent;

(iii) The mining consent dated 19th March, 1991, granted by the Director in the names of Saul and Nyambu for Stones Ltd of PO Box 146, Voi, to undertake mining activities in Tsavo West National Park.

(iv) A letter from Saul to the Commissioner on Stones Ltd headed note paper dated 15th May, 1991, this time, containing no reference to Nganga Ruby Mine Tsavo West and suggesting that since Special License No 59 had then expired and the area involved was not covered by any mining authorization, the Board of Directors of Stones Ltd contrary to what Saul himself had proposed in his earlier letter of 5th November, 1990, would not object if a mining lease was to be granted not to Stones Ltd, but to Rockland International Corporation, the original discoverer of the deposit in the area;

(v) The Certificate of Incorporation of Rockland Kenya Ltd dated 14th August, 1991;

(vi) Special Mining lease No 19 dated 15th August, 1991, between the Commissioner and Rockland Kenya Ltd whose registered office is given as being in Nairobi, obviously as a result of the letter from Saul of 15th May, 1991, authorizing the latter to undertake mining operations within the Tsavo West National Park, and executed by none other than Saul on behalf of Rockland Kenya Ltd;

(vii) A mining consent dated 11th December, 1991, in the names of Saul and Nyambu for Rockland Kenya Ltd, also significantly of the same address as Stones Ltd, namely, PO Box 146, Voi, corresponding with the special mining lease in respect of Tsavo West National Park already granted to Rockland Kenya Ltd;

(viii) A rather conspiratorial letter dated 3rd October, 1991, from Saul to Nyambu which clearly shows

that Saul had substantial control over Rockland Kenya Ltd in as much as the former offered the latter shares in Rockland Kenya Ltd equal to twice what he held in Stones Ltd on condition amongst other things, that Nyambu would use his "best efforts to change the name on the consent for mining issued by Kenya Wildlife Service so that it should read 'Rockland Kenya Ltd' in

place of 'Stones Ltd' (preferably without the additional mention of our personal names)"; and

(ix) A notice outside the mine reading:

"John & Saul Ruby Mine

Rockland Kenya Ltd

PO Box 2 Kasigau"

demonstrating Saul's close association with Rockland Kenya Ltd.

Faced with these facts, Rockland Kenya Ltd contended itself only with the filing of grounds of opposition to the plaintiff's application for the interlocutory injunctions, which were in the same vein as its defence. No affidavits in reply were filed by either Saul or Nyambu the alleged main actors in the drama.

Rockland Kenya Ltd though, sought from the Commissioner a simple affidavit and all copies of correspondence concerning the applications of Stones Ltd and Rockland Kenya Ltd for a special mining lease and mining consent. One Arthur Ndegwa, a surrogate of the Commissioner swore an affidavit which cannot be described as a simple affidavit. The effect of this affidavit was that since the Commissioner had at no time, granted a Special Mining Lease to Stones Ltd in respect of the area covered by Special License No 59, he could properly grant a lease in respect of the same area to Rockland Kenya Ltd. In any case, the Commissioner was not going to grant a Mining Lease to any company in which the plaintiff had any interest because he was *persona non grata* with the Government. Whilst this may be so, it did not deal with the breach of the fiduciary relationship alleged to exist between the plaintiff on the one part, and Saul and Nyambu, fellow directors of Stones Ltd with the plaintiff, on the other part. This breach being the actions of Saul and Nyambu as directors of Stones Ltd in obtaining a Special Mining Lease for Rockland Kenya Ltd which they had quickly incorporated and in which, the plaintiff had no shares, for the sole purpose of procuring for the new company what they themselves had shortly before, been striving to obtain for Stones Ltd, to the disadvantage of the plaintiff. If anything, Ndegwa's affidavit seems to show that the Commissioner was aware that what was going to happen was that the plaintiff, who together with Saul and Nyambu, had interests in Stones Ltd, would be left high and dry when Rockland Kenya Ltd was incorporated, and he encouraged it.

It also appears that whilst Mr Ndegwa was happy to annex to his affidavit

the letters of 5th and 7th March, 1990, from the Commissioner to Stones Ltd rejecting its application for the renewal of Special License No 59 and a related Special Mining Lease, he I think, in a not entirely candid affidavit, chose not annex a copy of the letter of the Commissioner dated 14th March, 1991, written about a year after those letters which he chose to annex to his affidavit, in which the Commissioner said that after consulting the Attorney General, he would grant a Special Mining Lease to Stones Ltd.

In summary, the position as briefly described was what was before the learned judge, and having heard full arguments and having taken into consideration the evidence and submissions made before him, and rightly pointing out that he was not required at that stage, to analyse matters in great detail, concluded that, since the plaintiff may very well be the beneficial owner of the shares in Stones Ltd and having regard to the relationship of Saul and Nyambu to both Stones Ltd and Rockland Kenya Ltd, and to the rule in *Keech v Sandford*, the interlocutory injunctions should be granted.

Rockland Kenya Ltd as was its undoubted right chose to appeal to this Court against the interlocutory

orders of the learned judge rather than adopt the more expeditious procedure of forwarding the early conclusion of the action.

There were fifteen grounds of appeal filed against the ruling of the learned judge. It is necessary before going any further, to refer to this ruling, the pertinent part of which, is as follows:

“I have read the various affidavits filed including the affidavit of Arthur Abango Ndegwa and the correspondence exhibited. As this is an interlocutory application, it seems unnecessary that I should analyse it in any great detail. This however, I must say that my reading of the affidavits and exhibits referred to, I find it remarkably similar to the famous *Ramford Market* case ie *Keech v Sandford* 2 W & TLC (19 ed) 648 in 1726. A lessor of the profits of a market had denied the lease to the trustee for an infant. The trustee applied for a renewal of the lease for the infant which was refused. Upon this the trustee obtained a lease for himself but Lord King said ‘.... I very well see that if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use* ... It may seem hard that the trustee is the only person of all

mankind who might not have the lease, but it is very proper that the rule should be strictly pursued, and not in the least relaxed. . . .’

Accordingly being of the view that the plaintiff may very well be the beneficial owner of the shares in the 1st defendant, the relationship of the 2nd and 3rd defendants to both the 1st defendant and the 5th defendant and the rule in *Keech and Sandford* and the inadequacy of an award of damages.I award the plaintiff an injunction as sought until the determination of the action subject to the usual undertaking as to damages costs to abide the result of trial”.

Grounds 1, 2, 3, 4, 5, 10 and 11 of the grounds of appeal can be summarized thus, that the learned judge erred in law in failing to consider the defence of Rockland Kenya Ltd and its grounds of opposition, to make any findings of fact thereon, and to consider whether the plaintiff had made out a *prima facie* case with a probability of success. He also similarly erred in failing to consider whether the plaintiff had any *locus standi* to sue Rockland Kenya Ltd and to appreciate that Rockland Kenya Ltd was a distinct and separate entity from either Saul or Nyambu.

It seems to me that what the learned judge was saying in his ruling, if I may be permitted to summarize it, was that since on the evidence before him, and it seems to me that there was such evidence, the plaintiff may well have a beneficial interest in Stones Ltd, and since Saul and Nyambu who also had interest in Stones Ltd had assumed the running of the company, and were thus, trustees of the plaintiff, as far as his interest in Stones Ltd was concerned. Saul and Nyambu as such trustees, owed a duty to the plaintiff not to so deal with his interest in, and the affairs of, Stones Ltd so as to deliberately deprive Stones Ltd and the plaintiff of the financial advantages they as trustees, were originally striving to obtain for Stones Ltd, and worst still, not to divert and procure such advantages for themselves through Rockland Kenya Ltd which there is evidence to suggest that they and not the plaintiff, had beneficial interests in. Common sense alone, should dictate that Rockland Kenya Ltd as well, should be sued if the plaintiff is not to embark on a futile exercise.

It is also worth setting down this time, the full dictum of Lord King in the vintage case of *Keech vs Sandford* (1558-1774) All ER 230, which is in my view apposite to the matter before us:

“I must consider this as a trust for the infant, for I very

well see that if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. Although I do not say there is a fraud in this case, yet the trustee should rather have let the lease run out, than to have had it to himself. It may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that rules should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que use*”.

In *Re Biss* (1900-3) All ER 406 at 409, Sir Richard Henn Collins MR in determining the issue whether a tenant in common had abused his position in obtaining renewal of a lease for himself alone, held that the following questions were relevant: whether the renewal was an accretion of the original term or not, and whether it was not until there had been an absolute refusal on the part of the lessor and after the administratix had failed to procure the renewal for the estate, that the tenant in common accepted the proposal of renewal made by the lessor to him. He was however, of the firm view that:

"These questions cannot be considered or discussed when the party is by his position debarred from keeping a personal advantage derived directly or indirectly out of his fiduciary or quasi fiduciary position."

It would appear that this is the view that the learned judge took of the position of Saul and Nyambu *vis a vis* the plaintiff and Stones Ltd and for my part, I do not think that this can be said, on the basis of the evidence before him, to have been unreasonable in the context of the application then before him.

In my view, there was sufficient evidence before the learned judge to show that the plaintiff had made out a *prima facie* case with a probability of success. The learned judge may not have said so in many words, but that can clearly be inferred from his ruling. To my mind, the loss to the plaintiff cannot be compensated for in damages. In any case, on the basis of the evidence before the learned judge, the balance of convenience cries out for the granting of the interlocutory injunctions.

But did the learned judge fail to consider the defence of Rockland Kenya Ltd and the grounds of opposition filed in opposition to the plaintiff's application? I think that he did not. He was not required to make a detail

analysis of the matter before him or to make decisions that should be left to be decided at the trial. What he had to consider were the affidavits and these he did including the affidavit of Mr Ndegwa. His remarks concerning the relationship of Saul and Nyambu to the plaintiff, Stones Ltd and Rockland Kenya Ltd, and the rule in *Keech v Sandford*, show that he must have had in mind the grounds of opposition filed in the application which in essence, are the same as the substance of the defence of Rockland Kenya Ltd. Grounds 1, 2, 3, 4, 5, 10 and 11 of the grounds of appeal therefore fail.

The remaining grounds of appeal do not fare any better. Grounds 6 and 7 say that the learned judge should have disqualified himself from hearing the application on three grounds namely, that he had previously been involved as a member of the Attorney General's Chambers in matters related to the subject matter of the suit; that he had disqualified himself in January, 1987, from hearing a matter, HCCC No 397 of 1985 in which the plaintiff was also the plaintiff in that suit, for the reason that he might not be able to divorce his mind from what he learnt as Chief State Counsel rather than on the evidence that may be presented to him as a judge; and that he had presided over previous proceedings in HCCC No 3248 of 1991 and in the present suit prior to the joinder of Rockland Kenya Ltd therein as the 5th defendant, and had delivered rulings in such proceedings. It is not at all clear what the matter was in which the learned judge had been previously involved as Chief State Counsel. Was it a matter that involved the same parties or the same matters in dispute as there are in the present suit? That is not alleged and I must take it that that is not so. True it is, that the learned judge disqualified himself six years ago, from hearing HCCC No 397 of 1985 for the reason given, but here again, were the parties there the same as the ones in the present suit and were the matters in dispute the same or closely intertwined with the ones in the present suit? In the absence of any particulars on this matter and there are none, I cannot say that the learned judge should have disqualified himself. But should he not have disqualified himself from hearing the plaintiff's application when he had heard previous proceedings affecting the plaintiff and the first four defendants prior to the joinder of Rockland Ltd as the 5th defendant? I would say, no! The mere fact that he had heard these previous proceedings which involve the same subject matter in dispute, is no valid reason for disqualifying himself from hearing the application brought against Rockland Kenya Ltd. This is a thing that occurs in the superior court quite regularly without giving rise to any stigmatization. If anything, the previous proceedings in the same matter should stand the learned judge in good stead when dealing with the application brought against Rockland Kenya Ltd. And this seems to have happened. As the

previous proceedings are so intertwined with the instant application before him, I for one, cannot see anything wrong in the learned judge bearing in mind his findings in the previous proceedings when considering the application for the interlocutory injunctions sought against Rockland Kenya Ltd, particularly when there is evidence that Saul and Nyambu have interests in Rockland Kenya Ltd.

What must be avoided is counsel and litigants selecting the judges they want to hear their cases by moving judges they do not want to hear their cases, to disqualify themselves. The true test whether a judge should disqualify himself from hearing a case was laid down in *R v Liverpool City Justices ex parte Topping* [1983] 1 All ER 490 at 494 in which Ackner LJ posed the crucial question:

“. . . would a reasonable and fair minded person sitting in Court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant would not be possible?”

I think that the answer to that question in the present circumstances is no! No satisfactory evidence has been produced to justify any other answer. In the result, grounds 6, 7 and 8 of the grounds of appeal also fail.

It was urged in grounds 9, 13 and 14 of the grounds of appeal that since Special License No 59 had expired in 1983, Stones Ltd had no beneficial interest in the area covered by that License which it could claim as having been improperly diverted to Rockland Kenya Ltd, and that since the Commissioner had unfettered discretion in the granting of mining leases and he was not made a party to the present suit, and the plaintiff had not appealed against the issuance of Special Mining Lease No 19 of 1991 as provided for by the Mining Act, the plaintiff was disentitled from seeking any relief in Court in respect of the issuing of the Special Mining Lease No 59 of 1991. It will be necessary to advert to some of the affidavit evidence which were before the learned judge and which he considered. These include the fact that the Commissioner had on 14th March, 1991, himself, written to the Director of Wildlife saying that he would grant a mining title to Stones Ltd which was followed by his letter of 29th October, 1991, addressed to the Clerk to the Taita/Taveta Council that shows that even the Commissioner accepted that at the time of writing that letter, Stones Ltd had beneficial interests including existing physical facilities, to protect. This letter which was annexed to the affidavit of none other than Mr Ndegwa, is worth reproducing in full:

“29th October,

The Clerk to Council,

Taita/Taveta County Council,

PO Box 1066,

Wundanyi

Dear Sir

Mining Consent To Messrs Rockland Kenya Limited

Please note that the mining rights in Tsavo West National Park formerly held by a company called Stones Limited have been taken over by a newly registered Kenyan company called Rockland Kenya Limited whose address is PO Box 30333, Nairobi.

In order to update the records, please amend your consent or grant a new consent in the name of Rockland Kenya Limited. Rockland Kenya Limited has been granted Mining Lease No 19 in respect of the ruby mine in the Tsavo West National Park formerly held by Stones Limited.

By copy of this letter, I am informing the Company to contact you to formalize these changes.

Yours faithfully,

(C Y O Owayo)

Commissioner of Mines and Geology

cc Messrs Rockland Kenya Limited

PO Box 30333,

Nairobi

Please let me have a copy of the consent for my records.

The Director of Kenya Wildlife Service,

PO Box 40241,

Nairobi

The Provincial Commissioner,

Coast Province,

PO Box 90424,

Mombasa

The Permanent Secretary,

Menr".

It should also not be forgotten that when the Special Mining Lease was granted to Rockland Kenya Ltd, Stones Ltd was in possession of a valid Mining Consent.

The plaintiff's suit was brought to protect his interest in Stones Ltd and to recover that interest if it has been fraudulently passed on to a third party that is to say, Rockland Kenya Ltd, by the machinations and manipulations of his fellow shareholders and directors of Stones Ltd who had for this purpose, created and acquired interests in Rockland Kenya Ltd to the exclusion of the plaintiff, and had purported to wind up Stones Ltd. The plaintiff's prime target if he is to get anywhere would be to sue not only Saul and Nyambu but their creature Rockland Kenya Ltd. In any case, failure to follow the appeal procedure provided in the Mining Act should not preclude the plaintiff from pursuing what remedies he may have in equity against those that he did sue. Grounds 9, 13 and 14 of the grounds of appeal must fail.

The 12th ground of appeal is that the learned judge erred in law in basing his ruling on the authority of *Keech v Sandford* which had no relevance to the facts of the application before him, and without hearing the submissions of counsel on that authority. I think that that authority has a bearing on the matter then before the learned judge. He should, however, have brought this authority to the attention of counsel and heard their submissions on it. Though no definitive authority on this issue has been cited to us, the legal commentaries vary as to the effect of a judge not giving counsel the opportunity of making submissions on an authority which the judge intends to rely upon. See the *Law Lords* by Alan Peterson pp 38-45 from which the following observations emerge: Lord Guest refers to this as a dangerous practice, Lord Pearson's view is that cases which have not been cited should not be relied upon "because there is an etiquette against bringing in extraneous matter . . ." Lord Kilbrandon thinks that "you couldn't make a formula out of this. I don't think that you could lay down a rule". Lord Simon felt that:

"Where a Court does its own researches itself, as it often will and sometimes must, it should proceed with special caution since it is thereby acting without the benefit of adversary argument".

Lord Simon in *Milliangos v George Frank (Textiles) Ltd* [1976] AC 443, was less forceful when he said:

“. . . where a ‘Court does its own research itself’ . . . (and) such research throws up an authority or argument which is material . . . it is better that it should be mentioned in the judgment for the benefit of those who have subsequently to consider the judgment.”

The general view seems to be that though the practice is not to be encouraged, it is not fatal. And so, the 12th ground of appeal fails.

Lastly, it was contended in ground 15 of the grounds of appeal that the learned judge erred in failing to consider the substantial loss that Rockland Kenya Ltd will suffer as a result of the interlocutory injunctions that he granted. I think that he did consider this when he, in granting the plaintiff the injunctions sought, said that it shall be subject to the usual undertaking as to damages. But what he was really required to ask himself, is whether the damages that the plaintiff would suffer if the injunctions were not granted, could be compensated for in pecuniary damages, and this he did and came to the conclusion with which I agree, that in the given circumstances of the matter, this would not be so.

It is my firm opinion that the appeal should be dismissed and I would do so with costs for the plaintiff.

I think that now the plaintiff is duty bound to take all necessary steps to ensure that the suit brought by him is disposed of as quickly as possible. This is so since the interlocutory injunctions granted him by the superior court have been upheld. In the English Court of Appeal case of *Town and County Building Society v Daisystar Ltd and another* Times Law Report, October 16, 1989, which was a matter relating to a Mareva injunction, Lord Justice Farquharson had this to say which I think can be applied in respect of injunctions generally:

“. . . it was the duty of a litigant where a Mareva injunction had been granted, to press on with his claim so that the other party was subject to the order for the minimum amount of time necessary and not kept in limbo.

If such a litigant did not for any reason wish to proceed with his claim even temporarily, then he ought of his own motion to seek the discharge of the injunction from the Court”.

Tunoi JA The facts of this appeal are fully set out in the judgments of Gicheru and Akiwumi, JJ A which I have had the advantage of reading in draft and I consider it unnecessary to restate them here.

The main question in this appeal is whether the learned judge in the superior court was right, in the circumstances of this case, in granting the interim injunction. It is now trite law that granting or withholding an injunction, whether permanent or temporary, involves the exercise of judicial discretion which, although is wide, is exercised only on settled principles and “not according to private opinion, sympathy” or benevolence or capriciously. (See *M Setha v P Singh* (1931) 13 KLR 2). The oft-cited case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 laid down the tests to be applied. These are firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. It has been urged that the learned judge failed to apply these principles correctly or at all in the determination of the application before him.

What materials did the parties place before the learned judge? There were two lengthy affidavits deponed to by the plaintiff and to which were annexed various documents including the Special Mining Lease No 19 in favour of the appellant. It is worthy of note that no affidavits in reply were filed by either Saul or Nyambu. In my view, having read and considered the affidavits and the annexed documents, I think the learned judge came to the correct conclusion in holding that the plaintiff had presented to the Court a *prima facie* case which may well succeed. The question whether the plaintiff would suffer irreparable injury which would not be adequately compensated for by award of damages must be answered positively in the affirmative. As I am not in doubt, I do not strive to consider the balance of convenience, though on

the whole, I think, greater hardship would be caused in refusing the application than in granting it.

The learned judge placed considerable reliance on the decision in *Keech v Sandford* (1558-1774) All ER 230. This has elicited attack from the appellant on the ground that the authority was not referred to by counsel appearing before him and in not hearing counsel's submission on the said authority before using it as the bedrock of his ruling and in failing to appreciate that the said authority had no relevance to the facts of this case. The submission is well founded and has merit. Though the learned judge

should have brought the said authority to the attention of counsel and heard their submissions on it failure to do so was not fatal to his judgment.

The rule in *Keech vs Sandford* (*supra*) applies also to trustees and other fiduciaries such as mortgages, joint tenants, tenants in common, partners and shareholders who do not act *bona fide* and take advantage of the other persons interested so that if they purchase or acquire any interest in property which forms part of the trust estate, they must hold the interest purchased or acquired on trust for the estate. Upon these principles it is perfectly clear that the matter before the learned judge fell squarely on the above authority which he correctly applied.

In my view, the learned judge in the superior court was quite right in granting the interim injunction as sought. I concur with the order for dismissal of this appeal with costs as proposed by Gicheru and Akiwumi, JJ A, so that further losses are not incurred by the parties, they should set down the suit for hearing and disposal without any further delay. The Registrar of the High Court is ordered to give the parties a hearing date on a priority basis.

Dated and Delivered at Nairobi this 8th day of March 1994.

J.E.GICHERU

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JUDGE OF APPEAL

A.M.AKIWUMI

....

JUDGE OF APPEAL

P.K.TUNOI

....

JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR