



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE 129 OF 2017

(FORMERLY NAIROBI ELC 1103 OF 2007)

G.K MARTIN TRANSPORTERS LIMITED.....PLAINTIFF

VERSUS

PHILIP KIMWELE.....DEFENDANT

GIDEON GITHUKA MARTIN.....1ST INTERESTED PARTY

MARTIN MUTISYA MUTHENGI.....2ND INTERESTED PARTY

JUDGMENT

By a Plaint dated 23rd July 2003, the Plaintiff herein brought this suit against the Defendant for the following orders;

- 1. That the defendant, his servants, and/ or agents be evicted from all that parcel of land known as L.R No. 209/7367, located along Nanyuki Road in Industrial area-Nairobi.***
- 2. The Plaintiff to be paid all mesne profit(rent) by the Defendant arising from the said parcel of land known as L.R No. 209/7367, Nairobi from 25th April 2000 to the date of the Judgment.***
- 3. Costs of the suit***
- 4. Any other and further relief this court may deem fit and just to grant.***

In its statement of Claim, the Plaintiff averred that it is the registered owner of the suit property **L.R No. 209/7367, along Nanyuki Road**. That the Defendant and a shareholder of **Nuvaland Transport Company Limited**, previously owned the suit property but it voluntarily wound up. That the Defendant together with his Co-Director and shareholder of **Nuvaland Company**, agreed before the order of liquidation was issued to transfer the said parcel of land to the plaintiff, which was done with his full knowledge. The Defendant later refused to vacate the suit property and has leased out the suit property without the Plaintiff's knowledge and/ or consent. Though he had been served with an order of eviction, he has not honoured the same.

The suit is contested and the Defendant filed an Amended Defence and Counter claim dated 15th October 2012 and prayed for the following orders;

- a) A permanent injunction restraining the Plaintiff from transferring, charging and/ or in any manner alienating the premises known as L.R No. 209/7369 Nairobi while pending the hearing and determination of the suit.***
- b) An order for Cancellation of the Plaintiff's registration as a proprietor of this suit premise and general damages thereof.***
- c) Costs of this suit and interest.***

In his defence, the Defendant denied the allegations made in the Plaint and averred that **G.K Martin**, forged the transfer documents to facilitate the transfer of the suit premises to **G.K Martin Transporters Limited**, and when he realized the Plaintiff had registered the suit premises in his name, he then filed an Application in **Winding up Cause No. 20 of 2000**, seeking to set aside the registration which application was still pending. Further that the transfer was illegal and therefore null void.

In his **Counter claim**, the Defendant averred that they were both shareholders of **Nuvaland Company Limited** and as such they are joint legal owners of the suit property in accordance with their shares. That sometimes in **2000**, the Plaintiff fraudulently transferred the suit property to his Company and the suit property is now of a substantial value and he stands to lose his investment. He further alleged that interested parties fraudulently transferred the suit premises without his knowledge.

The 1st interested party filed his Defence to the **Counter claim** dated **23rd November 2012**, and denied the allegations made in the Counter claim and averred that the Court lacks jurisdiction to entertain the suit. He averred that the Company was wound up at which point assets were shared and the suit property was transferred to the 1st interested party with the Defendant's consent. The defendant had transferred **L.R 9897** to **Kyaume Company Limited**, failed to share the proceeds of the alienation of the property with and failed to account to **Nuvaland Transporters Limited** and admitted, apologized and consented to the transfer of the suit property. As such assets were being shared having regard to these facts and consented that the Defendant transferred Motor Vehicle Registration **No.KAD 177L**, to his wife and therefore he is not entitled to his claim.

The 2nd Interested party filed his amended Defence to Counterclaim on the **29th April 2013**, and denied all the allegations made in the Counter claim. He averred that he was the Company Secretary of **Nuvaland Transporters Company Limited**, and the said Company was wound up in **September 2000**, but before it was liquidated the Defendant consented to the transfer of the suit property to the Plaintiff and the same resulted from the fact that the Defendant had also transferred other properties that belong to the Company without his co-director's permission. He further contended that the suit is time barred.

The Defendant filed a Reply to the 1st and 2nd Interested party's defence to the Counter claim and reiterated the contents of the Counter claim and asserted that he is entitled to a claim in the suit property and that the Plaintiff and interested parties acted in collusion and cohorts to disentitle and defraud him of the suit property and that he discovered the fraud at the time of filing his application to amend the Defence.

In Reply to the 2nd interested Party's defence to **Counter claim**, he averred that the Winding up Cause shall only be concluded after discharge of the liquidator. Further that upon appointment of a liquidator in winding up cause, a Company Directors become *functus officio* and cannot dispose off its property as was done by the interested party and Plaintiff herein. It was his contention that **Nuvaland Transporters Company Limited** still owes his wife and attempts to resolve the issue never bore fruits.

PLAINTIFF'S CASE

PW1 Gideon Kithuka Martin, the Director of **G.K Martin transporters** together with his son who is based in Bujumbura stated that the suit property **L.R No. 209/7369**, is an open area with a Company office and the property is in the name of **G.K Martin transporters Limited**. However, earlier on, it was in the name of **Nuvaland Transport Company Limited**, which Company had two directors **Gideon Kithuka Martin** and **Philip Kimwele Kula**. That he had two shares in the Company and Philip had one. Nuvaland also had another land in Maanzoni **L.R 19897**, registered in its name but it is currently in the name of another Company and it was sold by **Philip Kimwele** without his consent. That though he wanted to sue **Kimwele**, he did not as they came into an agreement that the parcel of Land along Nanyuki Road i.e the suit property be transferred to the Plaintiff.

That **Mr. Mutisya** who was the Company secretary who did the transfer swore an Affidavit and attached the sale agreement signed by the Plaintiff. That by the time **Mr. Kimwele** was filing a Winding Up Cause, the parties had already distributed the property according to their shares. He was to get two shares and Kimwele got one and they did the property's valuation. He alleged that **Philip Kimwele** does not have any right over the suit property which is along **Nanyuki Road** and he would wish Kimwele would give him his share in Maanzoni land. Further that Kimwele wants a share of the rent on the suit property as he rents offices there but Kimwele has locked two offices on the parcel of land and his requests to move the items in the offices have been declined.

Further that he would have rented out the stores on the parcel of land and gotten about **Kshs. 100,000/=** rent per month and as for the closed stores, he would have charged **Kshs. 5000/=** per store. He urged the Court to order Kimwele to open the store and pay him the damages for the period he was using it. Further that Mr. Mutisya was the Company Secretary and he was allowed to sign the transfer.

On cross examination by the advocate for the 1st Defendant, he testified that the Company is **Gideon Kithuka Transporters (k) Ltd** and the Plaintiff is **G.K Transporters(K) Limited** It was his evidence that he thumb printed the letter dated **30th May 2011**, and although he can sign, he is unable to see well. That they wound up the Company in **September 2000**, but in **July 2000**, he transferred the suit land to his Company and he did not pay **Kshs. 750,000/=** for the transfer. However only the Company Secretary could give evidence of such transfer. Further that he signed the transfer together with his son but denied signing the sale agreement. Though there was a sale agreement, he did not know if Kimwele had signed it or not. That he was illiterate and **Philip Kimwele** was the one who used to lead him but that there was no Company resolution authorizing the transfer. It was his evidence that he wanted Kimwele to be evicted from the suit land and be ordered to pay the accrued rent as he has a tenant on the property and Kimwele is not a party to the tenancy. That Kimwele locked the two stores, but Plaintiff has a title deed to the parcel of land and he would like Kimwele to pay him rent. Further that the Maanzoni land was sold by Kimwele and he wants Kimwele to pay him for the stores. That the stores on the suit property were locked by Kimwele and not them. That Muema was an auditor and he did not know the relationship between the said Muema and Maanzoni land. He further did not know about **Kshs.300,000/=** loan by Mr. Mutisya to the Company to pay up KRA tax.

On cross examination by the Advocate for the 2nd Interested party, he testified that Kimwele transferred land without his consent and he was given 21 days' notice and after the lapse of the notice they agreed that the suit property be registered in his name and thereafter they prepared an affidavit and the suit land was registered in his name and Kimwele filed a suit to wind up the Company. That he could not recall the value of the land and there was an agreement between Martin and Kimwele that Martin should sign the transfer and Martin signed the transfer for the suit property. That the accountant were appointed by Kimwele and he signed the agreement they had made.

On re-examination, he testified that he paid for the Nanyuki Road property(suit property) that was transferred to him. The property was in the Company's name and he was a shareholder and as Kimwele had sold the Maanzoni land, and had agreed that the suit property be transferred

to the Plaintiff. Further that there are four stores at the suit property and if the two stores were not locked by Kimwele, he would be getting rent from them. That he did valuation so that they could sub divide the two plots and **Mr. Martin Mutisya** is his Advocate who registered the transfer as the Company Secretary. He was not involved when Kimwele sold the land and only learnt of the same after one year.

On 21st July 2016 parties agreed to have both valuation reports admitted.

DEFENCE CASE

DW1 Philip Kimwele testified that he filed his witness statement dated 18th January 2013, and adopted it as part of his evidence. He also produced a list of documents and supplementary list of documents as exhibits. That together with the Plaintiff, they formed a Company to transport Petroleum. However with time, things were not going on well and he applied for Winding Up of the Company. When it was wound up, it was handed over to a official receiver. Further that he bought the suit land from the Company, and sold his trucks and moved out of the suit property. He asked the court to cancel the transfer in favour of the Plaintiff as it was unknown. That he only learnt of the transfer from a 3rd party. He further urged the court to direct that the property be sold and proceeds be divided into two and each party be given his share.

On cross examination by the Advocate for the Plaintiff, he testified that when they formed the Company, the shareholding was 50; 50 and they moved to 60: 40 in favour of the Plaintiff. It was his evidence that at first it was a partnership and later changed to a Limited Liability Company as the Plaintiff's shares kept on rising though he had no evidence of the partnership on a 50: 50 basis. That in the Memorandum and Articles of Association, his share is one against two held by the Plaintiff. Further that in their business, they had lorries and parcels of land. That they both agreed to sell the property in **Maanzoni LR 18897**. However, the Plaintiff was in hospital then and so Defendant executed the transfer alone. Further that he did not have the Plaintiffs written consent to sell the property as it was a verbal agreement. When the transfer was executed, by one director, he did not swear an affidavit as the signature was lifted and he had the Affidavit in the draft form.

Further that he did not sign the document in the Plaintiff's supplementary list of documents filed on 19th August 2015, and the actual document was submitted at Ardhi House and the signature was lifted from that document, but he did not report any case of fraud. That the transfer was done during the Winding up and the winding up order was issued on 8th September 2000. That the Winding Up Cause was filed on 9th May 2000 and the transfer was executed on 11th March 2000. That by the 10th of March 2000, he was working on the Winding Up application and he had discussed verbally with the Plaintiff. However, he did not have that evidence. Further that there was an Affidavit that made reference to the sale of the Maanzoni property and transfer for a consideration of **Kshs. 750,000/=** was the figure that was entered in the Title Deed. It was his testimony that the Affidavit is false. Further that he transferred Motor Vehicle **KAD 177C**, that was registered in the name of **Nuvaland Transporters Ltd** to his wife's name. That he vacated the premises but a few of his items remained locked in the stores as most of them have been seized by **Kithukas agents**. Further that there is one truck that he did a chattel transfer and he signed the transfer but the Plaintiff did not sign. It was his further evidence that the 1st interested party was a shareholder of the Company and executed the transfer in favour of the Company. He denied that they agreed on the transfer of the suit property

He transferred the truck on his own as they had already divided and he had a document to show how they had agreed to the said sharing. That the Maanzoni property was transferred to pay debts that were known to him and Kithuka. After the sale, he did not give the Plaintiff any money as he was in the hospital. Further that the Company was doing very well but he wound it up because the Directors disagreed and by the time of winding up, they had already started sharing the properties. That he signed the Asset sharing document in 1999, and by then Mr. Mutisya was not their Company secretary. However when they started to disagree, **Mr. Kithuka** called in Mr. Mutisya and he introduced **Mr. Muema to Kithuka**. When he was selling the **Maanzoni** property, **Mr Mutisya** was officiating the sale though he did not appoint him. He realized that **Kithuka** was dealing with **Mr. Mutisya** during the Winding Up Cause. At the said Cause, the Company was represented by **Thuita Kiiru Advocate**, but on the sale of the Manzoni Company, **Mr. Mutisya** represented the Company. That they had debts and they sold the Maanzoni property to settle loans and the same was provided in the sale agreement in Court though there is no document signed to that effect by the Plaintiff.

Further that he was the Administrator of the minority shareholder and he held everything pertaining to the audited report. Further that they paid KRA taxes after the sale of the property, though he did not have any receipt. That after the winding up, there was no report from the liquidator to show that the Nanyuki property was improperly sold out. That the liquidator advised them to bring the matter to court but he only came to Court after he was served with summons to enter appearance but he did not commence any proceedings.

On cross examination by the Advocate for the 2nd interested party, he testified that he became aware of the transfer in late 2000, and filed the Winding up Cause in May 2000. In May 2000, he was aware that the property was being transferred without his knowledge. Though he testified that Mr. Mutisya was not their Company Secretary, he however did not have any document to show who was their Company secretary. The Company secretary used to make returns on behalf of the Company. Further that he signed the sale agreement and left it with Mr. Mutisya for Mr. Kithuka to sign. He denied that he was transacting a lot with Mr. Mutisya but only appeared before him for an affidavit which was drafted by him. Further that there was no formal resolution but a gentleman's agreement and Mr. Kithuka was aware about the debt in KRA. As per the agreement and transfer document he borrowed the money from **Muema and Mutisya** and Mutisya signed the agreement and he pledged his Lorry as security. Further that he borrowed the money for **Nuvaland Transport Company Ltd** and the same was a gentleman's agreement. That he stepped down from the Company and they agreed on the distribution of the Company's Assets. That he was entitled to 3 tankers and Kithuka took 2. He had put a caveat on the suit property and he was not aware of any other Caveat. He voluntarily agreed to wind up the Company and most of the distribution was reduced into an Affidavit. However the Nanyuki property (suit property) was not in the Affidavit and the Affidavit in court is not the one that he signed before Mr. Mutisya the Commissioner of Oaths. Although he stated that Mr. Mutisya was fraudulent, he did not report the matter to the police, but took up the matter with his Advocate and put up a Caveat.

In re-examination, he testified that **Nuvaland Transport company Ltd** was wound up because the Directors had already divided the assets as they were unable to agree. It was his evidence that the Maanzoni property was sold because they had KRA debts and he has a letter from KRA to show tax liability. When the money from the sale was received, the Company did not receive any money as it was used to pay up the debts. In the sale agreement the purchase part was signed by **Mr. Mutisya** and he left it with for **Mr. Kithuka** to sign when he came from

the hospital. That Mr. Mutisya signed the document for Kithuka but not as their Company Secretary and the consideration was **Kshs. 750,000/=**. He denied signing the agreement on page 52 and that in the distribution list, the Lorry is listed on his side but the debt to his wife is still outstanding and he transferred the Lorry to his wife to clear the said debt. Further that he did not report the fraud to the police but sought legal advice and filed the case.

INTERESTED PARTY'S CASE

IP - Martin Mutisya adopted his witness statement dated **15th May 2013**. Further that the 1st interested party issued a notice to transfer the property and in the year 2000, there was a meeting between himself, Kimwele and the Accountant for **Gideon Kithuka**. That he was instructed to draw an Agreement on the basis of what they had agreed, and an Affidavit was signed and he was further instructed to prepare a transfer for the land on Nanyuki Road(suit property). That Mr. Kithuka signed and he signed on behalf of the other directors because there were some problems. He then signed the Affidavit, the transfer and effected the transfer and he produced his list of documents as **Exhibit 1** and the Affidavit as Exhibit 2. That the Defendant signed the transfer in his presence and he denied acting fraudulently or benefiting from the transfer of the property. That there was no complaint against him to the Police nor the Advocates Complaints Commission and the suit herein is an afterthought. He testified that the transfer had a consideration of **Kshs. 750,000/=** in which **Kshs.550, 000/=** was coming from the land Mr. Kimwele had sold to the Defendant which he could not account for. Further that the Defendant transferred a vehicle worth **Ksh. 200,000/=** to his wife as per the Affidavit and that was counted as part of the money that went to the Company. That there was a resolution but it was not written. He acknowledged signing the agreement dated **27th September 1999** as it was between **Nuvaland and Kyamue Co Ltd**. It was also signed by **Mr. Kimwele** and a director called **Maureen Muthengi**, the wife of **Muema Titus Muthengi** a Directors of **Kyamue Ltd**. He denied being a Director of **Kyamue Co Ltd** and urged the Court to dismiss the Counter claim.

On cross examination by the Advocate for the Defendant, he testified that he is an Advocate of the High Court of Kenya admitted to the Bar in **January 1996**, and appointed as a Company Secretary in the **year 1999**. That he was not the custodian of the documents as they are kept in the registered office of the Company. He was instructed verbally to prepare the Affidavit and the Directors swore Affidavits and not resolution. That an Affidavit was not prepared pursuant to any Court proceedings and there is no court stamp. That he is conversant with **Cap 15** and the Affidavit does not comply with the said Act as the Act did not apply at that time. Further that the document was signed in his presence before **M/S Mate** and he did not indicate that it was drawn before him and it was not clear where the Affidavit was drawn nor does it have a Jurat. That he was not a commissioner of oaths then. He acknowledged that he knew Mr. Muema who is his elder brother and the Auditor of **Nuvaland Company Ltd** and Maureen is his wife and therefore his sister in law. It was his evidence that in the Chattels transfer between Mutisya Advocate and Nuvaland, the Motor Vehicle is **KAD 177C** and the document did not receive stamp duty payment and though it states that he lend **Kshs. 565,000/-** to Nuvaland Co Ltd he had no evidence of transmission of that money to Nuvaland Company Ltd. That the instrument was signed by the borrower and not the lender and as the borrower was Limited Liability Company, the two Directors needed to sign and that he advised that the document was to be signed by two directors. Further that there was a guarantee and an Affidavit by Betty Kimwele who was An Advocate. He denied that Jean Mate and Betty Kimwele were the same person and that the guarantee was by **Kimwele** in his personal capacity and the document was not registered and stamped. Further that the Motor Vehicle was transferred to **Mr. Kimwele's** wife without the Company's consent. That the Purchase price of the Nanyuki plot was **Kshs. 750,000/=** but the value on the plot was **Ksh. 5,000,000/=**. That he prepared the transfer between **Nuvaland Transport Company Limited** and **GK Transport** but it does not bear his name as the drawer and it was signed on behalf of the Company by **Gideon Kithuka** and **Martin Mutisya Muthengi**, but **G.K transporters** have not signed the transfer. That he signed as the Company Secretary and Kithuka signed on behalf of the vendor and the transfer went through. That he drew the sale agreement and it shows the purchase price as **Kshs. 1.3 million** whereas the transfer shows **Kshs. 750,000/=** and further that the documents relate to two different properties as the agreement dated **27th September 1999**, is between **Nuvaland** and **Kyamue Company Limited** for **L.R 19897** and the transfer is for **Nuvaland Transport Company Limited** dated **10th March 2000** for **L.R 209/7367**.

Further that the documents did not show that the money was paid to Kimwele but as the Advocate, the money was not paid into the account of **Nuvaland** as **Kimwele** received the money in cash and took it to the Accountant and the money was to be paid to KRA but he did not receive any receipt from KRA though Mr. Muema gave an account of how the money was utilized. Further that he received the money in his office from Kyamue but Kimwele did not sign acknowledging receipt of the money but signed the Chattel. That he drew the plaint but did not seek for cancellation of the sale of the property of the Maanzoni land but Kimwele in his Counter claim has sought for cancellation of the sale for Nanyuki property(suit property).

On cross examination by the Advocate for the Plaintiff, he testified that he drew the **Plaint in 2003** and the transfer made to the Plaintiff Company. The agreement made reference to sale of Maanzoni property and sale of a truck without the consent of the 1st Interested Party and the Defendant had no interest in the Nanyuki property and the transfer was done with the blessing of the Defendant. That as at **27th September 1999**, the date of the sale agreement, there was no consent to transfer the Maanzoni property. Further that the 1st Interested Party did not execute the Chattel and the money advanced by him was given to Mr. Kimwele for settlement of some KRA dues from what Kimwele told him. That the Defendant is the only one who participated in the sale of the Maanzoni land and the 1st interested party did not give authority to sell nor was there a Company resolution as the two Directors used to conduct their business in a casual manner. Further that the Affidavit filed in court on **12th November 2012**, was allegedly the genesis of the transfer of the suit property to the Plaintiff as it communicated the intention of the directors to transfer the Nanyuki property to the Plaintiff. The Caveat was to be withdrawn and there was nothing unusual when Mr. Kimwele signed the transfer of the property as it was the way they used to conduct business. That from the Plaintiff, he was seeking orders of eviction as the property had already been transferred to Kithuka.

On re-examination, he testified that there was a resolution by the Directors as they sat down and agreed on transfer of the Nanyuki Road property(suit property) as all the resolutions need not be in writing and though the Affidavit was not dated, it is still valid. Further that the transfer document that he was shown was not complete as he filed a complete transfer and he produced the complete transfer as exhibit. He testified that his office in Afya centre burnt down and that it was not mandatory then for the vendor and the purchaser to sign the transfer document as it is at the moment. Further that Mr. Kimwele received the money for the Chattel document and though he acted for both parties, there was no conflict of interest. Further that he was not part of the schedule drawn by the Directors as the minutes and the original documents were kept by **Mr. Kimwele**.

The court directed parties to file written submissions and the parties also had a chance to highlight their written submissions in court. The Plaintiff and the 1st interested party through the Law Firm of **Nyamu & Nyamu Company Advocates** filed their submissions on **20th July 2017**, and submitted that the Plaintiff's suit is conceived, competent merited and not an abuse of the court process and the Plaintiff has established his case that damages are not adequate. They relied on various decided cases and provisions of law among them the case of **Central London Property Trust Limited versus High Trees(1947)1 KB 130 as cited in the case of Brite Print (K) Ltd & Another versus Barclays Bank of (K) Ltd (2014)** where it was held that;

“Where parties enter into an agreement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on by the promise, the court will treat the promise as binding on the promisor to the extent that it will not permit him to act inconsistently with it even though the promise may not be supported by consideration in the strict sense and the effect of the arrangement is to vary the terms of a contract under seal to the one of less value.”

The Defendant on the other hand through the **Law Firm of Lubulellah & Associates Advocates** filed his submissions on **16th November 2017**, and submitted that he was not part of the transactions regarding the land as alleged by the 1st and 2nd interested party. Further that he is not in the premises and the prayer to evict him has been overtaken by events. He further submitted that the sale and transfer of the land was done illegally, unprocedurally and fraudulently and the documents that conveyed the title were a forgery and therefore null and void. He relied on various decided cases amongst them the case of Affordable **Homes Africa Ltd v Henderson & Others (2004)2 KLR 473**, wherein the court held that;

“a Company can only make decisions through the agency of its organs which are primarily the Board of Directors or the general meeting of its shareholders.”

The 2nd Interested party through the Law Firm of **Mutisya & Company Advocates** filed his submissions on **6th March 2018**, and relied on various case laws and provisions of the law amongst them the case of **Adetoun (NIG) Ltd v Nigeria Breweries PLC S.C 91/2002** where the court held that;

“...It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleading's or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

It was therefore submitted that the Defendant's suit was improperly before the court and that the transfer was authorized and there was consideration for the transfer herein and further that no fraud and/ or malice has been established as against the 2nd interested party.

The Court has now carefully read and considered the pleadings, the evidence on record and submissions by the parties and finds the issues for determination are as follows:-

- i. Whether the Defendant had locus standi to bring the counter claim.***
- ii. Whether the Affidavit sworn by the parties was fraudulent***
- iii. Whether the Affidavit was valid***
- iv. Whether the Affidavit constitutes a proper resolution***
- v. Whether the Plaintiff is entitled to the Reliefs sought***

i. Whether the Defendant had locus standi to bring the counter claim.

The 2nd interested party has pleaded lack of Jurisdiction by the

Defendant and as such the Court must first determine the said issue of jurisdiction. Jurisdiction is everything and when a Court lacks Jurisdiction it has no option but to down its tools. See the Case **Owners Of The Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd 1989 KLR 1**, wherein it was held inter alia, as follows:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction----“

To be able to establish whether or not this Court has jurisdiction over the Counterclaim, the court must establish whether the Defendant had locus standi. The Defendant has averred that the suit property belonged to a Company that both the 1st Interested Party, and himself owned and the interested parties forged documents and transferred the suit property to the Plaintiff. It is therefore correct to say that the Defendant as a Director of the Nuvaland Company was suing on behalf of the Company. For a Company to bring a suit against any party, there must be a resolution and if any other party be it a Director or a shareholder seeks to bring a suit on behalf of the Company, then leave of the Court must first be sought to bring a derivative sought.

Section 238(1) of the Company Act Cap 486(Repealed) gives the meaning of a Derivative claim and provides as follows;

“In this Part, "derivative claim" means proceedings by a member of a Company—

(1) (a) in respect of a cause of action vested in the Company; and

(b) Seeking relief on behalf of the Company”.

By the time the Defendant was filing the counter claim, the Company was already under receivership and the liquidator was the best suited person to bring the suit and even if the Defendant as a Director wanted to be the one to bring the suit, nothing precluded him from seeking the leave of the Court to bring in a derivative suit. See the case of Surya Holdings Limited & 4 Others versus ICIC Bank & Anor (2018)eklr where the Court held that;

“At heart of the right of a Director or Member to bring a Derivative Action in a Company under Receivership is the concept that merely placing a Company under receivership does not divest a Director or member of a Company of the right to bring or intervene in actions on behalf of the Company. But just as with ordinary Derivative Actions it must be in appropriate circumstances and with the sanction of Court. Whilst the repealed Companies Act (chapter 486) never provided for the procedure for seeking that Leave, the procedure then adopted was that of English Common Law (see Amin Akberali Manji & 2 Others Supra).”

Further Section 228 of the Repealed Company’s Act provides that;

“When winding up order has been made or an interim liquidator has been appointed under section 235 no action or

proceedings shall be proceeded with or commenced against the Company except by leave of this Court and subject to such terms as the Court may impose.”

Section 432 (1) of the Insolvency Act also provides that;

“When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the Company may be began or continued only with the approval of the Court and subject....”

In the instant case, the counter claim by the Defendant was brought on behalf of the Company, by the Defendant as against the Interested Parties. The proper route to be followed by the Defendant therefore would have been to seek the leave of the Court to bring in a derivative suit. Without such leave therefore, the Defendant did not have any authority and therefore lacked *locus standi* to bring the suit the same having been pleaded by the 2nd interested party. Without *locus standi*, this Court has no jurisdiction to hear and determine the said counter claim and therefore has no option but to down its tools. Consequently the Defendant’s counterclaim is dismissed with costs to the Plaintiff and the interested parties.

ii. Whether the Affidavit sworn by the parties was fraudulent

The Defendant has pleaded that he did not sign the said Affidavit and it was forged by the interested parties. The Defendant did not give evidence to this Court to show the fraud that was perpetuated by the interested parties. The Defendant has only pleaded and alleged that there was fraud. Fraud is a serious allegation that must be strictly proven. Section 107 and 109 of the Evidence Act provides that he who alleges must prove. The Defendant alleged that his signature was forged on the Affidavit and it therefore became his burden to prove the same. Both the Interested Parties testified that the Defendant was present and appended his signature on the Affidavit. Without any evidence on the contrary such as document examiner being called, to confirm that indeed the Defendant did not sign the affidavit and therefore prove to the contrary, this Court has no option but to believe the averments by the interested party’s. It is not merely enough to just state that **“I did not sign, the same is forged”**. The Defendant ought to have gone ahead and proved the forgery or at the very least show attempts that have been made by the defendant to complain to the authorities about the forgeries. The Court finds and holds that the alleged fraud was not proved.

iii. Whether the Affidavit was valid

The Defendant has alleged that the Affidavit was not valid and therefore did not meet the required threshold for constituting a resolution. Further that it was not dated, and it did not provide for the date and did not bear the Court’s stamp. The Affidavit at the time it was being prepared, it was not to be used for the Court’s purposes and therefore this Court finds that there would be no reason why the said Affidavit should bear the Court stamp.

As to whether or not the jurat being on different pages with the Affidavit makes the Affidavit to be defective, the Court in the case of Saggu Vs.. Roadmaster Cycles (U) Ltd (2002) 1 EA, stated that;

“The defect in the Jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an Affidavit.

The Constitution of Kenya 2010 and the overriding objective principles of Civil Procedure Act compel courts to look more to the substance of the case as opposed to technicalities and in doing the same, the Court should not be quick to throw out pleadings purely based on the form. The Court should be able to look at the substance of the case where the same would not prejudice the other party.

Section 34 of the Advocates Act specifies those documents and instruments that cannot be prepared by unqualified persons. The essence has been that the said documents are complex and requires someone who has gone through training to be able to effectively and efficiently prepare them. This court concurs with the submissions of the 2nd interested party that an Affidavit is not one of the listed documents and therefore it would have been drawn by anyone as it was not intended to be filed before any court, but only as a resolution that expressed the views the parties and such the same is valid.

iv. Whether the Affidavit constitutes a proper resolution

Having found that the Affidavit was valid, this Court now looks at

whether the same could constitutes a valid resolution.

Black Laws Dictionary (6th Edition) at 1310 and 1311 defines a resolution as;

“a formal expression of the opinion or will of an official body or a public assembly adopted by vote as a legislative resolution such is not law but merely a form in which a legislative body expresses an opinion.”

What then should be the form in which a resolution should be. The Court finds and holds that a resolution may take any form including an Affidavit as long as the Company’s opinion or will has been expressed in a formal way the same constitutes a resolution.

In the case of **Monecor (London) Ltd...Vs...Euro Brokers Holdings Ltd Court of Appeal-Civil Division, (2003) EWCA Civ 105**, the Court held that;

“It did not matter whether the formal procedures for agreeing on a particular matter were stipulated in the Articles of Associations, in the companies Act 1985 or in a separate contract between the members of the Company concerned. What mattered instead was that all the members, who ultimately exercise powers over the affairs of the Company through their right to attend and vote at a general meeting, had reached an agreement on that matter. Consequently as long as the members had previously reached an agreement, they were unable to purport that they were not bound by a particular matter simply because the formal procedure for assenting to was not followed.”

Consequently this Court finds that a resolution may take any form and in line with the above it would be safe to acknowledge that the Affidavit which the Court has already found was valid, constituted a valid resolution made by the Directors of the **Nuvaland Company Limited**. This is because the same was merely an agreement that was made between the shareholders of the Company and reduced into a formal document.

v. Whether the Plaintiff is entitled to the Reliefs sought

Under section **26(1) of the Land Registration Act**, the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud, misrepresentation to which the proprietor is proved to be a party and or where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.

From the foregoing, this Court has established that there was a valid resolution to transfer to the Plaintiff the suit property. Further that there was no fraud or misrepresentation that was perpetrated either by the Plaintiff nor the interested parties.

The Plaintiff therefore being the owner of the suit property is entitled to the reliefs sought. Though the Defendant has alleged that the prayer by

the Plaintiff to have him evicted from the suit property has already been overtaken by events, in his evidence he acknowledged that there are still some of his belongings that are locked away in the stores in the suit property. It therefore implies that he is still in occupation of the stores and the order for eviction must be sustained.

The Defendant in his evidence acknowledged that the Plaintiff did not authorize the sale of the Maanzoni land. The Defendant first contended that the Company Secretary was to take to the Plaintiff the agreement for signing but changed tune and alleged that the Company Secretary was to sign the Agreement on behalf of the Plaintiff. The Defendant has also admitted that that he had transferred to his wife the vehicle without the consent of the Plaintiff. It is this court’s findings that the version of events given by the 1st Interested party is believable as these are the issues that culminated into the resolution by the parties. Further the Court must also point out that by the evidence of the parties the shareholders in **Nuvaland Company Ltd** must have been conducting their businesses in a very casual manner thereby leading to all these misunderstandings.

On the issue of Mesne profits, The court finds that these are special damages that must be specifically be pleaded and proved **In the case of Peter Mwangi Mbuthia & another v Samow Edin Osman (supra) the Court of Appeal** was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows:-

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne

profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

Further the court held the above case that:-

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

It is therefore incumbent upon the party claiming Mesne profit to plead a specific amount and go further ahead and prove the same. The plaintiff in this case having failed to put a specific sum to its pleadings then must fail on this prayer of mesne profits.

However, the court finds that the suit herein came about because of the action of the Defendant. The Plaintiff is entitled to nominal general damages of **300,000/=**.

Having now carefully considered the available evidence and the rival submissions, the court finds that the Plaintiff has proved its case on the required standard of balance of probabilities.

Consequently, the court enters Judgment for the Plaintiff against the Defendant in terms of prayer No.1, 3 and 4. On prayer No.4, the Plaintiff is entitled to nominal general damages in the tune of **300,000/-** plus interest from the date of filing this suit to pay in full.\

However, the court dismisses the Defendant’s Counter claim against the interested parties with costs to the Plaintiff and Interested Parties.

It is so ordered.

Dated, Signed and Delivered at Thika this 15th day of November, 2019.

L. GACHERU

JUDGE

15/11/2019

In the presence of

Mr. Kinuthia holding brief for Mr. Nyamu for the Plaintiff

Mr. Omollo holding brief for Mr. Mutwagwa for for Defendant

No appearance 1st Interested Party

No appearance for 2nd Interested Party

Jackline - Court Assistant.

L. GACHERU

JUDGE

15/11/2019