



**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 1400 OF 2013**

**PRUDENZIO NICHOLAS GAITARA.....PLAINTIFF**

**VERSUS**

**PATRICK KARIUKI MUIRURI.....1<sup>ST</sup> DEFENDANT**

**THIKA DARIES LTD.....2<sup>ND</sup> DEFENDANT**

**MAPEMA HOLDINGS LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**The Plaintiffs' Application**

What is before the court for determination is a Notice of Motion dated 14<sup>th</sup> November 2013 brought by the Plaintiff under sections 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act, and Order 40 Rules 1,2 and 4(1) of the Civil Procedure Rules. The Plaintiff is seeking a temporary injunction restraining the Defendants by themselves, agents, servants and/or anyone working under them from transferring, surveying and erecting beacons, leasing, mortgaging and or charging or any other dealings with the suit property known as LR No. 4953/2414 (hereinafter "the suit property) in Kiambu County, pending hearing and determination of this suit.

The Plaintiff has also sought an order restraining the 1<sup>st</sup> and 3<sup>rd</sup> Defendants by themselves, agents, servants and/or anyone working under them from dealing/transacting in any way in the name of or on behalf of the 2<sup>nd</sup> Defendant pending hearing and determination of this suit. Lastly, the Plaintiff sought orders revoking the purported transfer of the suit property to the 3<sup>rd</sup> Defendant.

The application is supported by the Plaintiff's affidavit sworn on 14<sup>th</sup> November 2013, wherein he states that on or about the 4<sup>th</sup> day of August, 1992, he together with the 1<sup>st</sup> Defendant and others promoters came together and formed/incorporated the 2<sup>nd</sup> Defendant, and he annexed as evidence copies of the incorporation certificate of the 2<sup>nd</sup> Defendant dated 4<sup>th</sup> August 1992, as well as particulars of its directors as on 29<sup>th</sup> July 1992. It is the Plaintiff's case that on or about 1993, the government allocated them the suit property which measures 7 hectares and he exhibited a certificate of title of the suit property dated 27<sup>th</sup> March 1997 issued in the name of the 2<sup>nd</sup> Defendant.

According to the Plaintiff, the nominal capital of the 2<sup>nd</sup> Defendant as provided in the Memorandum and

Articles of association was Kshs.2,000,000 divided into 20,000 shares each of kshs.100 each. The Plaintiff has alleged that on or about 13<sup>th</sup> October, 1993, the 1<sup>st</sup> Defendant signed a resolution purporting to increase the nominal capital by shares worth 150 pound divided into 30,000/= shares each of 5 pounds. It is contended that the resolution was made without the consent/authority of the rest of the directors as provided under the Articles of Association of the 2<sup>nd</sup> Defendant. The Plaintiff has annexed as evidence copies of the special resolution of the 2<sup>nd</sup> Defendant passed on 13<sup>th</sup> October 1993 and a Notice of increase in Nominal Capital of the same date.

Further, he alleges that on 4<sup>th</sup> of September 1996, the 1<sup>st</sup> Defendant signed another notice increasing the nominal Capital to 5,000,000 thereby creating 50,000 ordinary shares of Kshs.100.00 each. Copies of the special resolution dated 14<sup>th</sup> September 1996 as well as a statement of increase of nominal capital return of allotment and the annual returns dated 4<sup>th</sup> September 1996 have been exhibited. The Plaintiff stated that the 1<sup>st</sup> Defendant proceeded to file a notice of change of Particulars of Directors and Secretaries of the company appointing Mr. John Mburu Muiruri and Mr. John Sebastian Muiruri, and he annexed a copy of the notice of change of particulars 4<sup>th</sup> September 1996 as well as a letter from the Registrar of Companies showing the directors of the 2<sup>nd</sup> Defendant and the number of shares held as at 14<sup>th</sup> December, 2005.

It is the Plaintiff's averment that upon realizing the changes, he lodged a complaint with the Register of Companies and the Attorney General through a letter dated 27<sup>th</sup> June, 2005, a copy of which he furnished. The Plaintiff has contended that despite a letter dated 10<sup>th</sup> February, 2006 from the Attorney General whose copy he exhibited, he is yet to receive a report of the complaint. It is the Plaintiff's case that all the transactions on the Company were illegal and fraudulent since the company never held an extra ordinary meeting that purported to make the purported resolutions.

While alleging that the file of the 2<sup>nd</sup> Defendant cannot be traced, the Plaintiff has averred that the exact particulars of the said company as at today cannot be confirmed. It is also alleged that the 1<sup>st</sup> Defendant illegally transferred the suit property to the 3<sup>rd</sup> Respondent without the knowledge and/or authority of other Directors/Shareholders. The Plaintiff has annexed copies of certificate of title of the suit property in the name of the 3<sup>rd</sup> Defendant dated 27<sup>th</sup> March 1997 as well as the transfer dated 5<sup>th</sup> March 2011, and has averred that the 1<sup>st</sup> Defendant acted in bad faith while dealing with the matters of the 2<sup>nd</sup> Defendant. It is the Plaintiff's case that the 1<sup>st</sup> Defendant's actions continue to cause irreparable damages to him and the other shareholders.

In a further affidavit sworn on 11<sup>th</sup> February 2014, the Plaintiff stated that as at 4<sup>th</sup> August 1992, the late John Mburu, John Sebastian Muiruri and Rachael Wanjiku Kariuki were not shareholders of the company and a copy of the 2<sup>nd</sup> Defendant's Memorandum and Articles of Association dated 29<sup>th</sup> July 1992 have been exhibited. The Plaintiff has averred that the late John Mburu Muiruri and John Sebastian Muiruri could not have been directors of the 2<sup>nd</sup> Defendant as they were minors at the date of incorporation, and according to him, the purported notice of change of particulars of directors indicates that they joined the 2<sup>nd</sup> Defendant on 4<sup>th</sup> September, 1996.

The Plaintiff reiterated that the increase in nominal capital was solely undertaken by the 1<sup>st</sup> Defendant, without there being an annual, general or special meeting, and averred that the minutes annexed to the Replying Affidavit indicate that a meeting that was held on 4<sup>th</sup> September 1996 and yet the increase in nominal capital was undertaken on 13<sup>th</sup> October, 1993. The Plaintiff also annexed a copy of a notice of change of particulars dated 29<sup>th</sup> July 1992, and contended that the records with the Registrar of Companies as at 9<sup>th</sup> September, 1996 showed that he was still a shareholder and director of the 2<sup>nd</sup> Defendant, five days after he was purportedly removed as shareholder and director. It is the Plaintiff's case that he has not been guilty of laches and has not been indolent as his attempts to access the files at the Companies Registry and Lands Registry have not borne fruit. He averred that was only able to conduct a successful search at the Lands Registry on 30<sup>th</sup> October, 2013, when he discovered the transfer

registered in favour of the 3<sup>rd</sup> Defendant and filed the instant suit on 14<sup>th</sup> November, 2013.

### **The Defendants' Response**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposed the application and filed technical objections dated 20<sup>th</sup> December 2013, wherein they contended that the application was frivolous, unmeritorious, and an abuse of the due process of law as the certificate of title was acquired on the ground of fraud or misrepresentation to which the 3<sup>rd</sup> Defendant was a party, and hence the application contravened the mandatory provisions of section 261 (a) of the Land Registration Act 2012.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the Plaintiff had no proprietorship right over the suit premises for lack of valuable consideration contrary to section 27(1) of the Land Registration Act 2012. It is the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's contention that the application lacks merit as it fails to establish a prima facie case since pursuant to section 26(1) (b) of the Land Registration Act, the subject title is impendable as it was obtained illegally, unprocedurally and fraudulently and further, that the documents that conveyed the title were forged and hence null and void.

The 1<sup>st</sup> Defendant also filed a replying affidavit sworn on 20<sup>th</sup> December 2013 where he admitted that the 2<sup>nd</sup> Defendant was incorporated on 4<sup>th</sup> August 1992 and that the government allocated the suit property to the 2<sup>nd</sup> Defendant where he was a majority shareholder. The 1<sup>st</sup> Defendant exhibited a copy of a search from the Registrar of Companies dated 14<sup>th</sup> December 2005 showing the directors and shareholding of the 2<sup>nd</sup> Defendant as at 9<sup>th</sup> September 1996. The 1<sup>st</sup> Defendant contended that he paid the land rent, rates and all out goings on the property and he attached as evidence copies of receipts dated 11<sup>th</sup> March 1997 and 26<sup>th</sup> September 2013.

Further, the 1<sup>st</sup> Defendant stated that the resolution to increase the nominal capital of the 2<sup>nd</sup> Defendant shares was done pursuant to the memorandum and Articles of Association of the Company in an extra ordinary special annual general meeting and copies of minutes dated 13<sup>th</sup> October 1993 have been annexed as evidence. It was also contended that on 4<sup>th</sup> September 1996, the 2<sup>nd</sup> Defendant increased its nominal capital again to 5,000,000 creating 50,000 ordinary shares each Kshs.100/- and a copy of minutes of special annual general meeting held on 6<sup>th</sup> September 1996 have been exhibited.

While alleging that pursuant to the Memorandum and Articles of Association of the company and after a resolution by an extra – ordinary annual meeting held on 4<sup>th</sup> September 1996 resolving the directors of the company, the 1<sup>st</sup> Defendant contended that they filed a notice of change and changed particulars of the Directors the notification of change of the particulars of directors dated 4<sup>th</sup> September 1996 was annexed.

It is the 1<sup>st</sup> Defendant's case that initially he was a sole proprietor of the 2<sup>nd</sup> Defendant but later decided to incorporate the Plaintiff with only one (1) share and further, that the Plaintiff never paid a single cent until they resolved to remove him as a Director/Shareholder from the company. According to the 1<sup>st</sup> Defendant, Thika Dairies Limited was a family Company where he was a majority shareholder together with Rachael Wanjiru Kariuki Muiruri, John Mburu Muiruri, John Sebastian Muiruri and Private eye (K) Ltd.

While stating that the transfer of the suit property to the 3<sup>rd</sup> Defendant was fraudulent, the 1<sup>st</sup> Defendant stated that the photograph on the transfer was not his and further, that the identification and PIN number were not his proper identification. It is the 1<sup>st</sup> Defendant's case that the purported sale agreement is null and void as only a sum of two million shillings was paid to him as a deposit but not to the 2<sup>nd</sup> Defendant since the agreement was for nine million shillings Nine million. According to the 1<sup>st</sup> Defendant, the sale agreement and the transfer of the title documents are fraudulent. It is the averment of the 1<sup>st</sup> Defendant that the agreement was signed on 10<sup>th</sup> March 2008 while the transfer was registered on 14<sup>th</sup> March 2012

after the expiration of the mandatory thirty days purportedly agreed by the parties and after a period of more than five years from the date of signing the agreement had lapsed.

In a supplementary affidavit sworn on 8<sup>th</sup> May 2014, the 1<sup>st</sup> Defendant denied having visited the offices of Mr. Ngunjiri for purposes of executing the sale agreement. It is the 1<sup>st</sup> Defendant's contention that the payment was not for the sale of the suit property which belongs to the 2<sup>nd</sup> Defendant who was yet to be paid consideration for the property.

While denying that he forwarded completion documents including the original certificate of title for the suit property to Mr. Ngunjiri, the 1<sup>st</sup> Defendant stated that he did not execute the deed of transfer and averred that there was an admission of fraudulent dealings by Mr. Ngunjiri in his affidavit sworn on 18<sup>th</sup> March 2014. The 1<sup>st</sup> Defendant reiterated that the documents transferring title to the suit property to the 3<sup>rd</sup> Defendant were fraudulent since the photographs on the Transfer Deed, the National Identification Number and the PIN number were not genuine and further, that the sale agreement did not indicate the consideration.

The 3<sup>rd</sup> Defendant also opposed the application through a replying affidavit and further affidavit sworn by its director, Mr. Viktar Maina Ngunjiri on 6<sup>th</sup> December 2013 and 18<sup>th</sup> March 2014 respectively. The 3<sup>rd</sup> Defendant contended that on 10<sup>th</sup> March 2008, the 2<sup>nd</sup> Defendant agreed to sell the suit property to it at an agreed consideration of the sum Kshs.9, 000,000/= . The said deponent annexed as evidence a copy of the agreement dated 10<sup>th</sup> March 2008 entered between it and the 2<sup>nd</sup> Defendant, and averred that in discharge of its obligations under the contract, the 3<sup>rd</sup> Defendant paid to the 2<sup>nd</sup> Defendant the agreed purchaser price of Kshs.9, 000,000/=.

It is the 3<sup>rd</sup> Defendant's case that upon receipt of the purchase price, the 2<sup>nd</sup> Defendant conveyed to the 3<sup>rd</sup> Defendant the leasehold interest comprised in the grant, and the deponent exhibited copies of the transfer, stamp duty declaration, assessment and pay in slip dated 8<sup>th</sup> March 2012, as well as a certificate of title of the suit property in the name of the 3<sup>rd</sup> Defendant dated 14<sup>th</sup> March 2012. The 3<sup>rd</sup> Defendant alleged that the sale agreement together with the transfer were executed by the directors of the 2<sup>nd</sup> Defendant, and the company seal affixed in their presence and copies of the National Identity cards of the said directors have been exhibited.

The 3<sup>rd</sup> Defendant alleged that it has been paying land rents and land rates since it acquired the leasehold interest, the 3<sup>rd</sup> Defendant annexed copies of payment receipts dated 15<sup>th</sup> October 2013, 26<sup>th</sup> September 2013, 11<sup>th</sup> October 2013 as well as a rent clearance certificate dated 25<sup>th</sup> October 2013. While stating that the allegations made by the Plaintiff that the transaction for the purchase and sale of the suit property is illegal for want of authority of the directors of the 2<sup>nd</sup> Defendant cannot be maintained, the 3<sup>rd</sup> Defendant contended that it did not have actual knowledge or constructive notice of the matters pleaded in the Plaintiff's supporting affidavit. Further, the 3<sup>rd</sup> Defendant averred that it entered into the contract for the purchase and sale of the suit property in good faith and honestly.

According to the 3<sup>rd</sup> Defendant, since the agreement for sale and the transfer were executed by the directors of the 2<sup>nd</sup> Defendant under seal, the 3<sup>rd</sup> Defendant has a right to infer that the directors of the 2<sup>nd</sup> Defendant acted regularly, and that the resolution authorizing the transaction was legitimately done. It is the 3<sup>rd</sup> Defendant's averment that it cannot be called upon to make any other inquiry into the regulation of the 2<sup>nd</sup> Defendant's internal procedures, but was only entitled to rely on what appeared on its face to have been as legally and regularly done by the 2<sup>nd</sup> Defendant's directors. Further, the 3<sup>rd</sup> Defendant maintained that it was entitled to a presumption of the fact that the necessary internal rules, regulations and formalities authorizing the directors of the 2<sup>nd</sup> Defendant to sell the suit Property have been complied with since throughout the transaction, there were no suspicious circumstances that would have put the 3<sup>rd</sup> Defendant on inquiry.

The 3<sup>rd</sup> Defendant contended that no evidence had been produced by the Plaintiff to demonstrate that the directors of the 2<sup>nd</sup> Defendant company were prohibited by the regulations contained in the memorandum and articles of associations from entering the transaction for the sale of the suit property, and therefore, that the 3<sup>rd</sup> Defendant cannot be affected by any irregularities which may take place in internal management of the 2<sup>nd</sup> Defendant company. It is the 3<sup>rd</sup> Defendant's contention that at all material times, it dealt with the 1<sup>st</sup> Defendant who held himself out as a bona fide director of the 2<sup>nd</sup> Defendant with authority to enter into the contract for the purchase and sale of the suit property, and therefore, that the 2<sup>nd</sup> Defendant is bound by the actions of the said director.

The 3<sup>rd</sup> Defendant maintained that it acquired the suit property for valuable consideration and was therefore the absolute and indefeasible owner of the property. It is the averment of the 3<sup>rd</sup> Defendant that there is no allegation that it was a party to any fraud or misrepresentation in the acquisition of the suit property from the 2<sup>nd</sup> Defendant, and that the contract for the purchase and sale of the suit property was beyond reproach. The 3<sup>rd</sup> Defendant contends that its transfer is valid and enforceable as against the 2<sup>nd</sup> Defendant. While stating that the contract giving rise to the application before court was entered into on 28<sup>th</sup> day of March 2008, the 3<sup>rd</sup> Defendant averred that the Plaintiff was indolent and guilty of laches and that the remedy of equity could not aid him.

Further, the 3<sup>rd</sup> Defendant contended that the Plaintiff had not met the threshold to warrant the grant of injunctive orders since no *prima facie* case with a probability of success had been established. It was also averred that the Plaintiff had not furnished the 3<sup>rd</sup> Defendant with an undertaking for damages that may result from the interim orders sought being granted and further, had qualified the damages it has allegedly suffered and his assertions that it has suffered irreparable loss and damage therefore have no foundation.

The 3<sup>rd</sup> Defendant in its further affidavit contended that the 2<sup>nd</sup> Defendant's allegations that it fraudulently acquired the suit property were unsubstantiated. It is its case that it acquired the suit property from the 2<sup>nd</sup> Defendant for valuable consideration and that the full purchase price in the sum of Kshs.9,000,000/= was paid to the 1<sup>st</sup> Defendant as per the agreement for sale dated 10<sup>th</sup> day of March 2008. The 3<sup>rd</sup> Defendant attached as evidence copies of 2 cheques dated 7<sup>th</sup> March 2006 for Kshs 1,000,000/= each as well as 3 cheques dated 31<sup>st</sup> March 2008 for Kshs.2,500,000/=, Kshs.1,000,000/= and Kshs.3,500,000/=

The 3<sup>rd</sup> Defendant stated that after receiving the full purchase price, the 2<sup>nd</sup> Defendant's directors furnished it with the completion and granted it vacant possession of the property. It is the 3<sup>rd</sup> Defendant's case that having received the full purchase price in consideration for the suit property, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are estopped by their conduct and representation from deceitfully claiming that it did not pay the full purchase price. The 3<sup>rd</sup> Defendant maintained that the 1<sup>st</sup> Defendant and John Sebastian Muiruri executed the transfer instrument and affixed the company seal in the presence of Mr. Patrick Ngunjiri Maina.

While stating that the mistake on the identification card numbers on the deed of transfer were honest and frank mistakes made by their advocate's clerk, the 3<sup>rd</sup> Defendant averred that it was not aware of the mistake on the face of the instrument of transfer until it was alleged by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. According to 3<sup>rd</sup> Defendant, the allegations of fraud are baseless since it was not a party to the honest mistakes committed by the advocate who acted for both parties in the transaction.

Further, the 3<sup>rd</sup> Defendant averred that the 1<sup>st</sup> Defendant and his co-director, Mr. Sebastian Muiruri had not disputed having executed the sale agreement together with the instrument of transfer and therefore, that the sale of the suit property was beyond reproach and the transfer to it was valid. Lastly, the 3<sup>rd</sup> Defendant reiterated that it has enjoyed quiet and uninterrupted possession of the suit property since 31<sup>st</sup> March 2008 to date and therefore, that the balance of convenience tilts in its favour.

The counsel who acted for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the transaction that is the subject matter of this application, Mr. Patrick Ngunjiri Maina, swore a further affidavit dated 18<sup>th</sup> March, 2014 in support of the 3<sup>rd</sup> Defendant. He stated that upon receiving instructions to act for the directors of the 3<sup>rd</sup> Defendant in the transaction for the purchase of the suit property in February 2008, he carried out due diligence with a view to ascertaining the veracity of the grant. He averred that the search ascertained that the property was a leasehold interest from the Government of Kenya granted to the 2<sup>nd</sup> Defendant on 27<sup>th</sup> March 1997, and advised the 3<sup>rd</sup> Defendant to proceed and acquire the property for valuable consideration from the 2<sup>nd</sup> Defendant.

The deponent further stated that in early March 2008, the directors of the 2<sup>nd</sup> Defendant including the 1<sup>st</sup> Defendant called on him in his office for purposes of commencing the process of the sale of the property to the 3<sup>rd</sup> Defendant. While stating that the 1<sup>st</sup> Defendant introduced himself as a director and majority shareholder of the 2<sup>nd</sup> Defendant which was said to be a family business, the 1<sup>st</sup> Defendant also informed him that he together with his son John Sebastian Muiruri who was also a director of the 2<sup>nd</sup> Defendant would execute the conveyancing documents related to transaction and affix the company seal. According to the deponent, the 1<sup>st</sup> Defendant did not intend to engage a different advocate and by mutual agreement, he acted for seller and the purchaser.

The deponent stated that the agreed purchase price in the sum of Kshs.9,000,000/= comprised a deposit in the sum of Kshs.2,000,000/= which was paid upon execution of agreement, and that the balance of Kshs.7,000,000/= was payable on or before the expiration of 90 days from the date of execution of the agreement. He further stated that having prepared the agreement, both parties appeared before him on 10<sup>th</sup> day of March 2008 for the execution of the sale agreement, and subsequently payment of the deposit of the purchase price was effected.

It is the averment of the deponent that the agreement was voluntarily signed in his presence and under the seal of the 2<sup>nd</sup> Defendant by its directors namely Patrick Muiruri and John Sebastian Muiruri, and further, that the directors of the 3<sup>rd</sup> Defendant namely Viktah Maina Ngunjiri and James Kamau Nyambura also executed the agreement under the seal of the 3<sup>rd</sup> Defendant. He annexed a copy of the agreement dated 10<sup>th</sup> March 2008 as well as copies of 2 cheques for Kshs 1,000,000/= each in the name of Patrick Kariuki Muiruri. Further, that on 31<sup>st</sup> March 2008 the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were paid the balance of the purchase price in the sum of Kshs.7,000,000/= by the 3<sup>rd</sup> Defendant and he annexed copies of cheques dated 31<sup>st</sup> March 2008 for Kshs 1,000,000/=, 2,500,000/= and 3,500,000/= in the name of the 1<sup>st</sup> Defendant.

According to the deponent, the 2<sup>nd</sup> Defendant voluntarily furnished the 3<sup>rd</sup> Defendant with completion documents through his office upon receipt of the full purchase price, whereupon he prepared the deed of transfer which was voluntarily signed in his presence by the 1<sup>st</sup> Defendant and John Sebastian Muiruri under the company seal of the 2<sup>nd</sup> Defendant. The deponent stated that he attested the signatures of both directors under seal, attended to stamping of the instrument of transfer after payment of initial stamp duty and eventually lodged the documents for registration on 14<sup>th</sup> of March 2012.

In reference to the photographs attached to the deed of transfer, the said deponent admitted that the photographs were not those of the 2<sup>nd</sup> Defendant's directors. He attributed the mix up to an honest and inadvertent mistake on the part of his conveyancing clerk and stated that the photographs were of persons whom he recognized to have acted for in separate land transactions. He also contended that the directors' serial numbers as opposed to their national identity card numbers were inscribed on the deed of Transfer, and he annexed as evidence copies of identification cards of the 1<sup>st</sup> Defendant and John Sebastian Muiruri.

While stating that the 3<sup>rd</sup> Defendant was not privy to this genuine mistake, the deponent averred that the allegations of fraud imputed against it are without sufficient basis. It was his contention that the

inadvertent mix up of the vendors' photographs by an advocate office is not sufficient to impeach the express intention of the vendor to sell the property when his directors voluntarily signed the deed of transfer under seal. He further stated that after payment of the full purchase price, the 2<sup>nd</sup> Defendant handed over vacant possession of the property to the 3<sup>rd</sup> Defendant who has continued to enjoy unhindered and uninterrupted occupation since 2008 and had even undertaken various developments on the property.

### **The Submissions**

The application was canvassed by way of written submissions which were highlighted by counsel for the parties during the hearing of the Plaintiff's application on 16<sup>th</sup> June 2013. The Plaintiff filed submissions dated 20<sup>th</sup> February 2014 where he argued that he had met the required standards to merit the granting of an injunction as established in the case of **Giella -vs- Cassman Brown, (1973) EA 358**. Counsel for the Plaintiff submitted that under the rule in **Foss -vs- Harbottle**, the proper plaintiffs for wrongs done to a company is the company itself which can only act through majority shareholders and not the minority shareholders. Counsel argued that there was an exception to the rule in **Foss -vs- Harbottle** which entitled minority shareholders to institute the suit where acts which constitute fraud against the minority and the wrongdoers are themselves in control of the company amongst others.

Counsel for the Plaintiff made reference to the case of **Musa Musango -vs- Eric Musigire & Others, (1996) EA 390** as well as the case of **Edwards -vs- Halliwell, (1950) 2 All ER 1064** for the submission that an individual shareholders may bring a derivative action on behalf of his company against wrongdoers who have committed fraud on the minority if the wrong doers are in control of the company. Reliance was also placed on the cases of **Mason -vs- Harris, (1879) 11 Ch 97**, and **Alexander -vs- Automatic Telephone Company, (1990) 2 Ch 56** for the proposition that showing that the alleged wrongdoers own a majority of the shares conferring voting rights amounts to proof of control.

It was submitted that at the time of incorporation, the 2<sup>nd</sup> Defendant had as its shareholders the Plaintiff, the 1<sup>st</sup> Defendant and Lawrence Ngamau Kuria with 1 share each together Private Eye(K) Ltd with 9,999 shares and Eveready Agricultural Services Ltd with 9,998 shares. The Plaintiff contended that he was the majority shareholder and the managing director of Eveready Agricultural Services Ltd which was a shareholder of the 2<sup>nd</sup> Defendant with 9,998 shares.

Counsel relied on the case of **Affordable Homes Africa Ltd -vs- Henderson & Others, (2004) 2 KLR 473** for the submission that a company can only make decisions thorough the agency of its organs which are primarily the board of directors or the general meeting of its shareholders. It is the Plaintiff's submission that there was no meeting that passed the resolution to increase the nominal capital of the 2<sup>nd</sup> Defendant or change the particulars of directors.

The Plaintiff submitted that the increase in nominal capital was an illegal act done by one of the directors in an effort to dilute the shareholding in the company to give himself a majority stake in the company. It was submitted that as a result, the 1<sup>st</sup> Defendant ended up awarding himself 60,001 shares and brought his family members into the company as shareholders with the late John Mburu Muiruri and John Sebastian Muiruri having 5,000 shares each and Rachel Wanjiku Kariuki Muiruri holding 10,000 shares. Counsel for the Plaintiff argued that the decision to institute a suit would require a resolution which would need to be passed by the wrongdoers and therefore, that the rule in **Foss -vs- Harbottle** cannot be sued to clog this suit.

The court was referred to the cases of **Caneland Ltd -vs- Dolphin Holdings Ltd & Another, Nairobi HCCC No. 1135 of 2000**, **Lord Davey in Burland vs Earle (1902) A.C. 83** and **Walleisteiner vs Moir (1974) 1 WLR 991** for the position that equity would not permit a statute or a law to be a cloak for fraud and an individual shareholder will be allowed to sue on behalf of the company when there has been fraudulent misappropriation of the corporate's assets..

The Plaintiff's counsel also submitted that the Plaintiff had met the required legal standards for the grant

of an injunction as established in the case of **Giella -vs- Cassman Brown (supra)** as he has brought this case on behalf of his company and as the wrong doers are in control of the company and never had any intention to sue for the recovery of L.R No. 4953/2414. The Plaintiff relied on the decision in **Official Receiver ex-parte Paul Rotich Cheor Vs. Barclays Bank of Kenya, Kisumu HCCC No. 17 of 2000**, that an Applicant must show some property, right or interest in the subject matter of the complaint, and argued in this respect that he, together with his company Eveready Agricultural Services Ltd are shareholders in the 2<sup>nd</sup> Defendant Thika Dairies Ltd, which is the Registered owner of the subject property L.R. No. 4953/2414. Further, that he had brought this suit to protect the proprietary rights of the 2<sup>nd</sup> Defendant over L.R No. 4953/2414 as those in control of the said 2<sup>nd</sup> Defendant authorised an irregular sale. Further, that the 2<sup>nd</sup> Defendant has never received any payments from the sale transaction.

The Plaintiff submitted that without having produced any evidence to show that the full purchase price was paid, the 3<sup>rd</sup> Defendant cannot claim to have performed their obligations under the agreement for sale. Further, that if the 3<sup>rd</sup> Defendant procured the transfer of the said property fraudulently, the 3<sup>rd</sup> Defendant/t cannot have an indefeasible title such a title can be challenged under section 26 (1) of the Land Registration Act, Act No. 3 of 2012.

The Plaintiff also submitted that he would suffer irreparable loss as L.R NO. 4953/2414 was the sole asset of the 2<sup>nd</sup> Defendant and the purported selling price was at an undervalue. Further, that the loss of the sole company asset could force the 2<sup>nd</sup> Defendant to be wound up, and no amount of damages would be an adequate remedy for the loss that would be suffered by the Plaintiff as a shareholder, as well as the other shareholders. The Plaintiff in this respect relied on the decisions in **Samson Khasiani Amusibwa Vs. Alphose Musotsi Ambali & 2 Others, (2005) e KLR** and **Symon Thuo Muhia & Another vs. Housing Finance Company of Kenya Limited (2005) e KLR** that there are instances where an injunction will issue even if damages would be an adequate remedy.

Lastly, the Plaintiff submitted that the 3<sup>rd</sup> Defendant is not in possession of L.R NO. 4953/2414, did not pay the full purchase price and procured the transfer through fraud, and therefore that the balance of convenience in this instance would favour the Plaintiff for the temporary injunction to remain in force pending hearing and determination of this suit to avoid further illegal dealings. He also relied on the decision in **East African Building Society Ltd vs. ACA D'Souza Abdul Shakoora Khandwalla, Civil Appeal No. 124 of 1997** where it was held that if the balance of inconvenience meets the situation, there is no need to go into irreparable harm.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions dated 27<sup>th</sup> February 2014 wherein their pleadings were reiterated and it was contended that the sale of the suit property to the 3<sup>rd</sup> Defendant was unprocedural, fraudulent and illegal. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant relied on the case of **Elijah Makeri Nyangw'ra -vs- Stephen Mungai Njuguna & anor Eldoret ELC No. 609 (B) of 2012** for the proposition that the title of an innocent purchaser is impeachable so long as it was obtained illegally, unprocedurally or through a corrupt scheme. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant submitted that the Plaintiff had not established a *prima facie* case to warrant injunctive orders as the sale of the suit property was unprocedural, fraudulent and unlawful. Lastly, it was submitted that title to the suit property belongs to the 2<sup>nd</sup> Defendant absolutely.

The 3<sup>rd</sup> Defendant in submissions dated 18<sup>th</sup> March 2014 reiterated the facts of the case and argued that the rule in the case of **Foss -vs- Harbottle** is derived from the principle that a company is a legal entity separate from its directors and secondly, that a court will not interfere with the internal management of companies acting within their powers. Counsel for the 3<sup>rd</sup> Defendant referred the court to the case of **Omondi & Another -vs- National Bank of Kenya & 2 Others, (2001) KLR 579** for the proposition that only a company had capacity to take action to enforce its legal rights and the directors and shareholders lacked legal competence to institute the suit in their names as directors and shareholders. The court was also referred to the case of **Altaf Abdulrasul Dadani -vs- Amini Akberazi & 3 Others, (2004) 1 KLR 95** for the submission that it is for the company and not individual shareholders to enforce rights and actions vested in the company and to sue for the wrongs done to it.

Reference was also made to the case of **Edwards -v- Halliwell, (1950) 2 All E R 1064** and Counsel for the 3<sup>rd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant was a separate and distinct entity from its shareholders who had no proprietary interest in the suit property, Counsel argued that only the 2<sup>nd</sup> Defendant could suffer loss and damage as a result of an alleged wrongful disposition and therefore, that the proper party to seek redress would have been the 2<sup>nd</sup> Defendant and not the Plaintiff. It is the submission of the 3<sup>rd</sup> Defendant that the from the principle encapsulated in the rule in **Foss -vs- Harbottle** and **Edwards -v- Halliwell**, the majority shareholder of the 2<sup>nd</sup> Defendant was legally entitled to enter into the transaction for the sale of the suit property, and that the Plaintiff who was a minority shareholder with only one share cannot maintain an action in respect to the transaction that the majority shareholders were in favour of.

While submitting that the Plaintiff had failed to demonstrate the nexus between him and Eveready Agricultural Services Limited who was also a shareholder, counsel for the 3<sup>rd</sup> Defendant contended that the said entity had not complained and had not been joined in these proceedings. According to the 3<sup>rd</sup> Defendant, having alleged to have suffered a personal irreparable loss, the Plaintiff sought to redress a wrong done to him as opposed to a wrong done to the company which is precluded by the rule in **Foss -vs- Harbottle**. Counsel for the 3<sup>rd</sup> Defendant averred that the Plaintiff lacked the legal competence to institute the suit and seek the injunctive relief sought in his own name.

It was submitted in the alternative that the suit as filed was unmaintainable in law and that the orders sought by the Applicant could not be issued. The counsel for the 3<sup>rd</sup> Defendant made reference to the case of **Rai & Others -vs- Rai & 13 Others, (2002)1 KLR 537** for the submission that an exception to the rule in **Foss -vs- Harbottle** could be taken advantage of by minority shareholders if they can show fraud as Plaintiffs in a derivative action where a prima facie case has to be first established. The court was also referred to the case of **Altaf Abdulrasul Dadani -vs- Amini Akberazi & 3 Others, (2004)1KLR 95** and **Dr. Jane Wambui Weru -vs- Overseas Private Inv. Corp & 3 Others, HCCC 83 of 2012** for the proposition that leave must be sought to proceed with proceedings as derivative action.

In further submission, counsel for the 3<sup>rd</sup> Defendant argued that the agreement for the sale of the suit property was entered into freely and voluntarily, and that since the express terms of the agreement were clear and unambiguous, the agreement is sacred and the court was urged to enforce the same. Reliance was placed on the case of **Printing and Numerical Registering Company -va- Sampson, (1875) LR 19 Eq 462** for the submission that contracts entered into freely and voluntarily are held sacred and enforced by courts of justice. The court was urged not to alter or modify the unambiguous terms of the contract entered into between the parties and the counsel referred to the case of **National Bank of Kenya -vs- Pipelastic Samkolit (k) Ltd & Another, Civil Appeal No.95 of 1999** where it was held that a court of law cannot rewrite a contract between the parties.

The 3<sup>rd</sup> Defendant submitted that it could not be affected by any irregularities which may have taken place in the internal management of the 2<sup>nd</sup> Defendant, Counsel referred the court to the principle in the case of **Royal British Bank -vs- Turquand** as affirmed in the case **East African Safari Ltd -vs- Anthony Ambaka Kegode & Another, Civil Appeal No. 42 of 2007, Morjoria -vs- Kenya Batteries (1981) Ltd & 2 Others, (2002)1KLR** and **Livingstone Kunini Ntutu -vs- County Council of Narok ELC No. 1565 of 2000** for the proposition that third parties are entitled to assume that a company has complied with its internal rules unless they had actual knowledge of them or suspicious circumstances putting them to inquiry.

In further submission, Counsel stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not established a *prima facie* case that that the transfer of the suit property to the 3<sup>rd</sup> Defendant was fraudulent. It is the submission of the 3<sup>rd</sup> Defendant that the allegations made by the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant that the transfer of the suit property to the 3<sup>rd</sup> Defendant was void for reasons of non-payment of the full purchase price, and that the identity card numbers and photographs on the instrument of transfer did not belong to the 1<sup>st</sup> Defendant and John Sebastian Muiruri.

The 3<sup>rd</sup> Defendant maintained that the full purchase price was paid and therefore, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are estopped by their conduct and representations from deceitfully claiming the purchase price from it. For this submission, the 3<sup>rd</sup> Defendant relied on section 120 of the Evidence Act, the treatise **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol 16** at Paragraph 1609, and the cases of **Taylor's Fashions Ltd -vs- Liverpool Victoria Trustees Co. Ltd, (1982)1QB 13** and **Century Automobiles Ltd -vs- Hutchings Biemer Ltd, (1965) EA 304.**

While submitting that no evidence had been tendered to show that the 3<sup>rd</sup> Defendant had a hand in the genuine clerical mistake in the deed of transfer, the counsel averred that the clerical mistakes do not substantially affect the 3<sup>rd</sup> Defendant's interests in the suit property since the instrument of transfer may be rectified under the provisions of section 79(1)(a) of the Land Registration Act. It was also submitted that the allegation that the transfer was fraudulent having being registered after the expiry of a purported mandatory period of 30 days cannot stand since there was no clause in the agreement for sale requiring the instrument of transfer to be lodged within 30 days.

Counsel for the 3<sup>rd</sup> Defendant argued that pursuant to the provisions of section 26 of the Land Registration Act, the 3<sup>rd</sup> Defendant is now the absolute and indefeasible owner of the suit property having acquired the same for valuable consideration. The 3<sup>rd</sup> Defendant relied on the case of **Nairobi Permanent Markets Society -vs- Salima Enterprises, (1995-1998) 1 EA 232** where in the absence of allegations of fraud or misrepresentation in the acquisition of the property, the company was held as the registered proprietor of the suit land was held to be the absolute and indefeasible owner. It was submitted that the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had not met the required standard of proof in relation to the allegations of fraud attributed to the 3<sup>rd</sup> Defendant and Counsel relied on the case of **Mutsonga -vs- Nyati, (1984) KLR 425** for the submission that allegations of fraud must be strictly proved, and a degree higher than a mere balance of probabilities is required.

In further submissions, the 3<sup>rd</sup> Defendant averred that the agreement for the sale of the suit property was entered into on 10<sup>th</sup> March 2008. It was argued that the Plaintiff was indolent and guilty of laches as he waited 10 years to seek legal redress and therefore, had not approached the court with clean hands. Reliance was placed on the cases of **Githae -vs- Nairobi City Commission, (1991) KLR 529** and **William M. Khamasi & Another -vs- Leonida Khamasi, HCCC No. 1644 of 2001** for the proposition that equity cannot aid the indolent. Lastly, the 3<sup>rd</sup> Defendant submitted that the Plaintiff had not demonstrated that damages will not be an adequate remedy and reliance was placed on the case of **Mureithi -vs- City Council of Nairobi, (1981) KLR 332** in this regard.

### **The Issues and Determination**

I have read and carefully considered the pleadings, evidence and submissions made by the parties herein. The preliminary issue to be determined is whether the Plaintiff has locus to bring the application herein. If the Plaintiff is found to have locus, the second issue that will need to be determined is whether the Plaintiff has met the threshold for the grant of the temporary and mandatory injunctions sought.

On the preliminary issue of locus, the Plaintiffs case in a nutshell is that he is a shareholder and Director of the 2<sup>nd</sup> Defendant, which 2<sup>nd</sup> Defendant was previously registered as Owner of the suit property herein. He argues that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have fraudulently sold and transferred the suit property to the 3<sup>rd</sup> Defendant, and that as a shareholder of the 2<sup>nd</sup> Defendant, his rights have thereby been infringed. He brought evidence of Particulars of Directors and Secretaries and Annual Returns of the 2<sup>nd</sup> Defendant showing his directorship of the 2<sup>nd</sup> Defendant.

The 3<sup>rd</sup> Defendant has disputed the Plaintiff's locus to bring this application on the ground that the Plaintiff is seeking to redress a wrong done to the 2<sup>nd</sup> Defendant which is precluded by the rule in **Foss -vs- Harbottle**. The 3<sup>rd</sup> Defendant submitted in this respect that the Plaintiff lacked the legal competence to institute the suit and seek the injunctive relief sought in his own name. The 3<sup>rd</sup> Defendant further

submitted on this issue that the exception to the rule in **Foss -vs- Harbottle** could be taken advantage of by minority shareholders if they can show fraud as Plaintiffs in a derivative action, where a *prima facie* case has to be first established. Further, that leave must be sought to proceed with proceedings as derivative action.

In the present suit and application it is not disputed that the suit property was first registered in the 2<sup>nd</sup> Defendant's name and is now registered in the 3<sup>rd</sup> Defendant's name, although both the Plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> Defendants have alleged fraud in the said transfer of the suit property to the 3<sup>rd</sup> Defendant. It is also not disputed that both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are limited companies.

It is settled law in this regard that the proper plaintiff in an action with respect to a wrong alleged to be done to a company is *prima facie* the company itself, subject to limited exceptions when a shareholder can bring a derivative action on behalf of other minority shareholders where the majority shareholders have sanctioned actions that bind the company. This is the rule in **Foss vs Harbottle (1843) 2 Hare 461** as explained in **Prudential Assurance Company Ltd vs Newman Industries Ltd and Others, (1982) 1 All E.R 364** and by the Court of Appeal in **Rai & 3 Others vs Ra1 & 13 Others (2002) 1 KLR 141**.

This rule in **Foss vs Harbottle** and the applicable exception was also explained thus in **Dadani v Manji & 3 Others, (2004) 1 KLR 95** at 104:

**“It is a cardinal principle in company law that it is for the company and not an individual shareholder to enforce rights of action vested in the company and to sue for wrongs done to it. It is also cardinal that in absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation such matter (see Foss vs. Harbottle (1843) 2 Hare 461). All this is in defence to the self-regulation the law allows corporations and thus limits the interference by courts in the running of such bodies on their own.**

However if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivation suit. *Minority Shareholders: Law, Practice and Procedure* by Joffe (Butterworths 2000) defines such cause as:

**‘.....Where the shareholders seeks to enforce a right not invested in himself but the company of which he is a member, for example a claim to the company’s property fraudulently misappropriated by the directors, he can only do so (if at all) by means of a derivative claim. The derivative claim is a claim brought by an individual shareholder in his own name but on behalf of the company. The reason the claim takes this form is that the minority shareholder is not in a position to see that the claim is brought in the name of the company itself to enforce the company’s right.’ ”**

The Plaintiff has relied on the exception to the rule in **Foss vs Harbottle** to argue that he has a *prima facie* case and will suffer irreparable damage as a shareholder of the 2<sup>nd</sup> Defendant. However, the Plaintiff is in this respect required by the law applicable to derivative claims to seek leave at the earliest opportunity after instituting this suit to continue with this action as a derivative claim, and it is only then that the Plaintiff can move to other stages or steps in his cause. It was held as follows in this regard in **Dadani vs Manji & 3 Others (supra)** at 109-110:

**“...we are persuaded and inclined to adopt and follow the English Courts procedures when derivative actions come calling. So the Plaintiff plus the application for permission to continue with a derivative action must be served before the application is heard. The application has to be heard *inter partes* because the plaintiff has to demonstrate a *prima facie* case by the company against the wrong doing directors and that the plaintiff should bring the case. The service of the plaintiff and application affords an opportunity to the defendants in their own pleadings and**

**evidence to try and knock out the intended derivative action. The powers which the Court has when hearing the application to continue though not specified, but it can be taken that it can grant the permission all the way upto trial or as it deems fair and just in the matter. And only then can the plaintiff move to the other stages or steps in the cause. Otherwise before the permission, proceedings are virtually stalled”**

The Plaintiff did not bring any evidence of his application for, and/or grant of leave to proceed with the proceedings herein as a derivative action. To this extent I find that the Plaintiff’s application by the Notice of Motion dated 14<sup>th</sup> November 2013 for various temporary and mandatory injunctions with respect to property owned by the 2<sup>nd</sup> Defendant is incompetently before this court, as he has not been granted any permission to commence a derivative action. The said Notice of Motion is accordingly hereby struck out.

The Plaintiff shall meet the costs of the Notice of Motion dated 14<sup>th</sup> November 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_1<sup>st</sup>\_\_\_ day of \_\_\_August\_\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**