



**IN THE COURT OF APPEAL
AT KISUMU**

CORAM: MARAGA, M'INOTI & KANTAI, JJ.A.

CIVIL APPEAL NO. 242 OF 2011

CONSOLIDATED WITH CIVIL APPEALS NOS. 90 OF 2012, 186 OF 2012 & 198 OF 2012

BETWEEN

PATRICK OKUKU.....1ST APPELLANT

KENNEDY ECHESA.....2ND APPELLANT

GABRIEL ATOKO.....3RD APPELLANT

GEORGE AMBUCHÉ.....4TH APPELLANT

BASIL KHALUMIMISANGO.....5TH APPELLANT

FRANCIS WASHIKA.....6TH APPELLANT

ALPHONCE BWIRE.....7TH APPELLANT

MUMIAS OUTGROWERS COMPANY (1998) LTD.....8TH APPELLANT

AND

JAMES KUTSUSHI ATINDO.....1ST RESPONDENT

MUSA CHICHOLE MAHERO.....2ND RESPONDENT

DAVID ASHIALIAJUMA.....3RD RESPONDENT

ISAIAH MUSUNGU NAMBIKHA.....4TH RESPONDENT

COLUMBUS MAKHOKHA SHIUNDU.....5TH RESPONDENT

FREDRICK MUMIA WANGARA.....6TH RESPONDENT

ZADOCK WAYWERA OKAMULO.....7TH RESPONDENT

PRISCILLA W. WAMUKOYAH.....8TH RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Kakamega (Kimaru, J.)

dated 4th November 2011

in

H.C.C.C. NO. 122 of 2011)

JUDGMENT OF THE COURT

This judgment relates to four interlocutory appeals that were consolidated on 21st January 2015 under **rule 103** of the **Court of Appeal Rules**. Three of the appeals, namely **Civil Appeal Nos. 242 of 2011, 186 of 2012 and 90 of 2012** arose from two rulings in **Kakamega High Court Civil Suit No. 122 of 2011**. The first' ruling was by **Kimaru, J.** and is dated 4th November 2011, while the second was by **Chitembwe, J.** and is dated 5th March 2012. Civil Appeal No. 198 of 2012 arose from the ruling and order of Chitembwe, J. dated 17th July 2012 in **Kakamega High Court Civil Suit No. 3 of 2012**.

The parties in all the appeals are the same, save in CA No 198 of 2012 where there are a few additional parties. The issues involved in all the appeals are fairly similar, intertwined and interrelated, all revolving around disputes in the sugar industry in Kenya and in particular the membership, management and operations of **Mumias Outgrowers Company (1998) Limited (MOCO)**. With the consent of the parties, it was agreed that the four consolidated appeals, be heard and determined in Civil Appeal- No. 242 of 2011.

Before we consider the appeal on merit, it is apposite to set out briefly the relevant background so as to put the issues in dispute in their proper context and perspective. What is readily apparent is the unnecessary multiplicity of suits and applications that have plagued this litigation, obfuscating the real issues in dispute and perpetuating the instability of the involved companies to the detriment of the sugar industry. Instead of prosecuting the main suit to determine with some finality the real dispute between the parties, the parties have instead opted to file, with abandon, suit after suit, application after application, while the real dispute remains unresolved in the High Court.

In Civil Appeal No 242 of 2011, the nine respondents, **James Kutsushi Atindo, Musa Chichole Mahero, David Ashiali Ajuma, Isaiah Musungu Nambikhwa, Columbus Makhokha Shiundu, Fredrick Mumia Wangara, Zadock Waywera Okamulo, Priscillah W. Wamukoyah and Martin Kadima Mulama** (who we shall henceforth for convenience refer to as the respondents), filed Kakamega HCCC No 122 of 2011 on 21st September 2011 against the eight appellants, **Patrick Okuku, Kennedy Echesa, Gabriel Atoko, George Ambuche, Basil Khalumi Misango, Francis Washika, Alphonse Bwire and MOCO**, (hereafter the appellants). Also sued with the eight appellants was the **Kenya Sugar Board**. At the material time, the appellants were directors of MOCO.

The respondents pleaded that as sugarcane farmers contracted to supply sugarcane to **Mumias Sugar Company Ltd (Mumias Sugar)**, they were long- term shareholders or members of MOCO. They alleged that the appellants' term as directors of MOCO had expired on 31st July 2011 but, illegally and in breach of MOCO's Articles of Association, they had continued in office. Such illegal continuation in office and purported discharge of the duties of directors of MOCO, it was further pleaded, was fraudulent and calculated to defraud MOCO and its shareholders.

Accordingly the respondents prayed for various reliefs, primary among them being declarations that the appellants' continuation in office was In violation of MOCO's Articles of Association; that the

Board of Directors of MOCO lacked the quorum to transact business and that all acts and decisions of the appellants on behalf of MOCO were a nullity. A permanent injunction was also sought to restrain the appellants from acting as directors of MOCO, as was a mandatory injunction to compel them to relinquish, produce and deliver to MOCO all its properties, assets, books, records and a true record of its financial affairs. Lastly the respondents prayed for an order directing the appellants to appoint a committee to conduct elections of directors of MOCO within 90 days; general damages and indemnity of MOCO by the appellants against any liability incurred after the end of their term as directors.

By a defence filed on 17th October 2011 the appellants denied that the respondents were sugarcane farmers contracted by Mumias Sugar or shareholders and members of MOCO. The appellants' standing in the suit was questioned and the particulars of fraud were traversed. Lastly the appellants pleaded that they were in office as directors of MOCO lawfully, their tenure of office having been extended to December 2012 by an Annual General Meeting of MOCO held on 29th December 2010.

For its part the Kenya Sugar Board filed its defence on 18th October 2011, the thrust of which was that its role in MOCO was in law limited to appointing a director to the Board of Directors and having discharged that duty, it was itself not a director of MOCO. Otherwise the rest of the defence was similar to that of the appellants, questioning the standing of the respondents in the suit and as sugarcane farmers and members of MOCO and asserting that the directors of MOCO were in office lawfully.

The respondents did not file any reply to defence.

Contemporaneously with their suit, the respondents applied to the High Court for leave to prosecute the suit on behalf of MOCO and its shareholders (derivative action), a temporary injunction restraining the appellants from exercising authority of the Board of Directors of MOCO; an order suspending all internal decisions made by the appellants as directors of MOCO with effect from 1st August 2011 and appointment of a receiver to run and manage the affairs of MOCO.

The appellants resisted that application by a replying affidavit sworn on 14th October 2011 by **Justin Rapando**, MOCO's company secretary and legal officer. The grounds upon which the application was opposed were essentially those raised in the defence, though in addition it was alleged that the respondents were not bonafide members of MOCO but rather were busy bodies and surrogate litigants for and on behalf of Mumias Sugar, for purposes of obstructing, undermining and thwarting an ongoing arbitration in which MOCO was claiming more than Kshs 3 billion from Mumias Sugar.

Kenya Sugar Board too opposed the application through a replying affidavit sworn on 17th November 2011 by **S. Odera**, its Acting Chief Executive Officer, who reiterated that the Kenya Sugar Board was not a director of MOCO but merely a body mandated to appoint a director.

The application was heard interpartes by Kimaru, J. who on 4th November 2011 held that the respondents were members and shareholders of MOCO with *locus standi* to sustain the suit. The learned judge accordingly issued a slew of orders including striking out the name of Kenya Sugar Board from the suit; allowing the respondents to bring the suit on behalf of MOCO and its shareholders; annulling the extension of the tenure of the appellants as directors of MOCO; restraining the appellants from discharging the duties of directors of MOCO and directing that elections of directors of MOCO be held within 60 days in the manner provided in its Articles of Association. That ruling is the subject of CA No 242 of 2011.

As regards Civil Appeal No 186 of 2012, the same arises from the same ruling by Kimaru, J. dated 4th November 2011. It was filed on 20th July 2012 by the respondents, who for reasons we cannot readily fathom, opted to file a separate and independent appeal instead of filing a cross-appeal in CA No 242 of 2011 as required by **rule 93 of the Court of Appeal Rules**. Be that as it may, the only issue in this appeal is whether Kimaru, J. erred by striking out Kenya Sugar Board from HCCC No

Civil Appeal No. 90 of 2012 also arose from HCCC No. 122 of 2012 but from the ruling and order of Chitembwe, J. dated 5th March 2012. After the ruling by Kimaru, J. aforesaid, MOCO scheduled elections on 3rd January 2012 as ordered. On 27th December 2011 the respondents filed a notice of motion seeking, in the main, an order suspending the scheduled elections for 60 days or such other period as the court may deem necessary; an order directing MOCO to update its elections register to include all farmers who have supply contracts with Mumias Sugar and an order for the respondents to inspect and make copies of the updated register of voters. .

The respondents contended that by the order of 4th November 2011, Kimaru J. had "expressly, unequivocally and clearly adjudged" that any farmer who has a cane supply contract with Murnias Sugar was an automatic member or shareholder of MOCO and therefore eligible to vote.

On 29th December 2011 the respondents appeared before Sitati, J. in the High Court at Kisii and obtained an *ex parte* order suspending, for 40 days, the elections scheduled for 3rd January 2012. At the interpartes hearing of the application, the applicants resisted the same contending that under MOCO's Articles of Association, only shareholders are eligible to vote and that the respondents were not such members.

By the ruling dated 5th March 2012, Chitembwe, J. held that Kimaru, J. had ordered that the elections of MOCO should be held in accordance with its Articles of Association and that under the said Articles of Association, only members of MOCO were eligible to vote. To qualify to be a member of MOCO, the learned judge continued, Article 3 required one to have a sugarcane-farming contract; to apply for membership in the prescribed form; to have a minimum of 500 shares in the company or to be a director appointed under Article 84(b) and (c). Accordingly, the learned judge ordered MOCO to publish a fresh election notice and to register persons qualified as voters under the Articles of Association as members to participate in the elections. Aggrieved by that ruling, the respondents lodged CA No. 90 of 2012.

The last appeal, CA No 198 of 2012 arises from a ruling of Chitembwe, J. in Kakamega HCCC No. 3 of 2012. The respondents, together with ten other persons, filed that suit on 11th January 2012 against the appellants and two others. It was pleaded that during their tenure as directors of MOCO, and in breach of their common law duty as directors, the appellants had mismanaged the affairs of the company and misappropriated its funds thus making it heavily indebted to its employees, creditors, sugarcane farmers and several statutory authorities.

The respondents therefore sought, among other reliefs, a declaration that the appellants were in breach of their common law duties as directors of MOCO; a permanent injunction prohibiting the appellants and the additional two persons sued with them from vying as directors or officials of MOCO or incorporating any Out growers Company in the Republic of Kenya or offering themselves as directors or officials of such a company for a period of ten years or such other period as the court may deem fit; in the alternative an order directing the appellants to render a full account of the funds collected from Mumias Sugar or to refund to MOCO some Kshs 19 million; general damages and costs.

On the same day the suit was filed, the respondents applied by Motion for various interim reliefs, including leave to prosecute the suit as a derivative action on behalf of MOCO and its shareholders; an injunction restraining the appellants from vying as directors of MOCO; an injunction restraining the two additional parties sued together with the appellants from exercising the authority of chief executive officer or company secretary of MOCO; appointment of a receiver manager for MOCO by the Kenya Sugar Board and an order directing the Registrar of Companies to investigate the affairs of MOCO and report to court.

On 17th July 2012, Chitembwe, J. found that the respondents had not established a *prima facie* case with a probability of success to warrant the orders sought and dismissed the application with costs,

thus provoking CA NO 198 of 2012.

At the hearing of the appeals, we dispensed with the requirements of **rule 27 of the Court of Appeal Rules** on the order of address and opted to hear the respondents first as they were the parties raising most of the issues in the appeal. Hearing the appellants first would have required them to spend considerable time at the final reply, answering to issues raised by the respondents.

Prof. Tom Ojienda, learned Senior Counsel, appeared for the respondents whilst Mr. **Patrick Lutta**, learned counsel appeared for the appellants. There was no appearance for Kenya Sugar Board, though their advocates, **Messrs. Mohammed & Kinyanjui** had been duly served with a hearing notice on 18th December 2014.

Save for the order striking out the Kenya Sugar Board as a party to HCCC No 122 of 2011, the respondents fully supported the ruling of Kimaru, J. dated 4th November 2011. Prof. Ojienda submitted that the learned judge had correctly found that the respondents were shareholders and members of MOCO by virtue of the sugarcane supply contracts they had with Mumias Sugar and on account of moneys deducted from them by Mumias Sugar and paid to MOCO, as evidenced by retention slips produced by the respondents.

It was senior counsel's further submission that MOCO was a company *sui generis*, incorporated to represent and protect the interests of sugarcane farmers who had supply contracts with Mumias Sugar. Accordingly, it was argued, MOCO was not a private company, but a public company with over 70,000 members and benefitting from public funds such as the Sugar Development Fund and loans from the Kenya Sugar Board. To prove membership in MOCO therefore, it was submitted, a share certificate was not necessary, or even the only evidence required and that other evidence such as a supply contract with Mumias Sugar could suffice to establish shareholding and membership in MOCO.

The judgment of the former Court of Appeal for East Africa in **MAWAGOLA FARMERS LTD V KAYANJA [1971] EA 272** was relied upon to support the proposition that East African conditions allowed a person whose name was not in the company's register of members to prove by other means that he was a shareholder of that company.

Prof. Ojienda next challenged the validity of Article 3 of MOCO's Articles of Association as amended on 4th May 2006. As amended, that Article provides as follows:

"3. Any person who:-

(a) For the purposes of joining the company, has entered into a sugar-cane farming contract with the company or supply contract with the miller and

(b) Has made an application to become a member in the form from time to time prescribed by the Board and,

(c) Has acquired a minimum of five hundred (500) shares in the Company or,

(d) Is a director appointed under Article 84(b) and (c)

Shall accordingly be registered as a member of the company with effect from the date of compliance with the requirements of sub paragraphs (a), (b) and (c) of this article;

Provided that the minimum number of shares to be held by any member may be reviewed by an ordinary resolution from time to time on recommendation from the board."

Senior counsel submitted that the requirement of a minimum 500 shares was introduced by the 2006 amendment. That requirement, it was further contended, was null and void because the amendment

could only introduce a new class of members but could not take away the membership of existing members. **Section 24 of the Companies Act** was invoked in support of the argument that members of MOCO before the 2006 amendment were not obliged to comply with the requirements of that amendment. **Sheridan, Ag. C.J** 's judgment in **WINKLAIMER & OTHERS V EAST AFRICA PLANS LTD & ANOTHER [1969] 415** was also relied upon in support of the argument that amendments to Articles of Association creating a new class of members could not displace existing members.

On whether Kimaru, J. had erred by granting the respondents leave to prosecute the suit on behalf of MOCO after the same had been filed, Prof. Ojienda submitted that leave to prosecute a derivative action can be sought and granted either before or after the filing of the suit. In support of that proposition counsel relied on the decisions of the High Court in **DADANI V MANJI & 3 OTHERS [2004] 1 KLR 95** and **KULDEEP SINGH SEHRA & ANOTHER V BULLION BANK LTD" & 2 OTHERS, HCCC NO. 560 OF 2000 (MOMBASA).**

Next, it was contended on behalf of the respondents that Kimaru, J. had not erred by nullifying the special resolution of MOCO that had, on 29th December 2011, extended the term of office of the directors. Firstly it was submitted that the extension of the term of directors was in violation of Articles 83, 84, 85(d), 86(a) and 88 of MOCO's Articles of Association. Secondly it was urged that the resolution for extension of the term of directors was null and void because no notice thereof was given for the period (28 days), and in the manner required by section 142 of the Companies Act.

Accordingly, it was submitted that the resolution could not take effect by reason of noncompliance with section 142. The decision of the High Court of Uganda in **MWANYI DEALERS LTD & OTHERS V SEZIBWA UNITED FARMERS LTD & OTHERS [1970] EA 299** was relied upon for the proposition that notice of a special resolution must be issued in accordance with the procedure set out in the Articles of Association and sent to all members. Having failed to issue the notice in accordance with the Articles and further having failed to send it to all members, it was submitted, the learned judge had rightly nullified the resolution resulting from the meeting held on 29th November 2011.

Regarding the order of Kimaru, J. 's directing that elections of directors of MOCO be held within 60 days; the respondents defended the same on the basis of **section 135 of the Companies Act** which empowers the Court to order a meeting of a company to be called if it is impracticable to call or conduct a meeting of such company in the manner prescribed by the Articles of Association. **Wynn-Parry, J.**'s decision in **REEL SOMBRERO LTD [1958] 3 ALLER 1** was relied upon to emphasize that the court had jurisdiction to order a meeting to be held in the circumstances stipulated in section 135 of the Companies Act.

The only ground upon which the respondents assailed the ruling of Kimani J. was the order striking out the Kenya Sugar Board from the suit. The respondents contended that Kenya Sugar Board was a necessary party to the suit and for proper determination of all the issues in dispute because under Article 84 of MOCO's Articles of Association, the Board is required to appoint one of MOCO's directors.

Such director, it was further submitted, was an agent of the Kenya Sugar Board, thus making the Board a necessary and interested party. It was lastly argued that in law the Board was a separate personality from its nominated director and that if an irregularity were found concerning MOCO directors, the Kenya Sugar Board would be affected. Consequently, it was asserted that by striking out a necessary and interested party from the suit, the learned judge had erroneously exercised his discretion, thus warranting intervention by this Court. The decisions of the High Court in **MULTI-CHOICE KENYA LTD V MAINKAM LTD & ANOTHER, HCCC NO. 492 OF 2012** and **DOUGLAS KIPCHUMBA RUTTO V KENYA ANT-CORRUPTION COMMISSION & 8 OTHERS, HCCC NO. 356 OF 2011** were relied upon regarding who constitutes a proper party in a suit.

As regards the ruling and order of Chitembwe, J. of 5th March 2012, the respondents submitted that the learned judge had erred by holding that only members of MOCO under its Articles of Association were eligible to participate in the election of its directors. In the respondents view, Kimaru, J. had in the ruling of 4th November 2011 conclusively and finally determined that the respondents and all other persons who had sugarcane supply contracts with Mumias Sugar were members of MOCO. By restricting the members of MOCO eligible to vote to only those recognized by Article 3 of the MOCO's Articles of Association, it was submitted, Chitembwe, J. had purported to sit on appeal on the ruling of Kimaru, J. and that being a judge of coordinate jurisdiction, he could not do so.

Lastly, regarding the ruling of 17th July 2012 by Chitembwe, J. in which he declined, among other reliefs, an injunction prohibiting the appellants from vying for offices in MOCO, an order appointing a receiver for MOCO and an order directing the Registrar of Companies to investigate the affairs of MOCO, the respondents contended that they had made out a prima facie case to entitle them to the above orders. It was further submitted that the refusal by the learned judge to grant the above orders was a wrongful exercise of discretion and that this Court should interfere. Accordingly we were urged to dismiss CA No 242 of 2011 with costs and allow CA Nos. 186 of 2012, 90 of 2012 and 198 of 2012 with costs.

For the appellants, Mr. Lutta, learned counsel assailed Kimaru, J. 's ruling of 4th November 2011, for among other things, ignoring MOCO's Articles of Association and purporting to create for the Company a class of members or shareholders which were not provided for in the Articles of Association. In counsel's view, shareholding in and membership of MOCO could only be determined on the basis of article 3 of its Articles of Association.

Mr. Lutta further submitted that the validity of MOCO's Articles of Association as amended on 4th May 2006 had never been called into question or challenged in any court. Neither Kimaru, J. nor Chitembwe, J., it was urged, had pronounced himself on the validity of the Articles of Association and therefore the issue could not be raised in this appeal. As far as counsel was concerned, section 24 of the Companies Act had no application as it related to liability of members.

On the question of the respondent's shareholding in and membership of MOCO, learned counsel submitted that there was absolutely no evidence, prima facie or otherwise upon which the High Court could find that the respondents were shareholders and members of MOCO, with sufficient standing to sustain the suit. In counsel's view, the only semblance of evidence placed before the court was the appellants' purported retention certificates. The majority of those exhibited certificates, it was submitted, beyond the fact that they did not mention MOCO anywhere, were not even in the names of the appellants. Some of the slips, it was pointed out, bore the names of more than one purported member, thus raising profound doubts about their authenticity.

It was also argued that other than only one respondent, **Colombus Makhokha Shiundu**, all the other respondents had inexplicably failed to exhibit their cane-farming contracts with Mumias Sugar as prima facie evidence of their membership. It was Mr. Lutta's further submission that in the circumstances of this appeal, a cane-farming contract with Mumias Sugar alone could not prove membership and shareholding in MOCO because Mumias Sugar purchased sugarcane from many farmers, dealers and middlemen who were neither members of Mumias Sugar nor MOCOs.

Next, the appellant's submitted that the purported 2 page cane-farming contract relied upon by the respondents on page 16 of the record was not the genuine standard form cane-farming contract. The genuine contract, it was submitted, was the 10 page contract on page 512 of the record of appeal, which mentions both Mumias Sugar and MOCO.

On leave to prosecute the suit as a derivative action, the appellant's contended that such leave should have been applied for *before* the suit was filed and that Kimaru, J. had erred by purporting to grant leave at the *inter partes* hearing, long after the suit was filed.

Next the appellant's faulted the order by Kimaru, J. nullifying the resolution made on 29th December

2010 to extend the term of MOCO's directors. It was submitted that the respondents had not prayed for such nullification and that the directors were taken by surprise and denied a proper opportunity to be heard on the issue.

The order of Kimaru, J.'s directing the holding of elections for MOCO's directors was assailed as gratuitous, having not been applied for and in excess of the court's powers. In Mr. Lutta's view, in the circumstances of this appeal, the High Court could not invoke section 136 of the Companies Act, which relates to calling a meeting, to otherwise order an election of Directors.

On the whole, the appellants criticized the ruling of 4th November 2011 as one in which definitive findings and orders were made at the interlocutory stage on affidavit evidence without the benefit of full hearing and cross-examination.

The learned judge's order striking out Kenya Sugar Board from the suit was however, supported as proper, on the basis that the Board had no interest in the suit. It was contended that Mumias Sugar also was required under Article 84 of MOCO's Articles of Association to appoint a director, yet the respondents did not sue Mumias Sugar. Mr. Lutta submitted that the directors appointed by the sugar company and by the Kenya Sugar Board did not serve for a limited time like the elected directors; their terms had not expired and that they therefore were not involved in the dispute so as to justify making the Kenya Sugar Board a party to the suit.

The appellants vigorously supported the order of Chitembwe, J. of 5th March 2012 holding that voting members of MOCO would be determined in accordance with Article 3 of its Articles of Association. It was argued that the learned judge had not in any way reviewed or overturned the orders of Kimaru, J. who in any event had directed that MOCO's elections be held in accordance with its Articles of Association. All that Chitembwe, J. had done, it was argued, was implement Kimaru, J.'s order of 4th November 2011.

Lastly, the appellants supported the ruling of Chitembwe, J. dated 17th July 2012 in which he declined to debar the appellants and others from contesting as directors of MOCO, to order appointment of a receiver for MOCO and to direct the Registrar of Companies to investigate the affairs of MOCO. It was submitted that there was no prima facie evidence to substantiate the serious allegations made in the application and that the learned judge was justified in declining to grant debilitating orders at an interlocutory stage. Accordingly, the appellants urged us to allow C.A. No. 242 of 2011 with costs and to dismiss Civil Appeals Nos. 186 of 2012, 90 of 2012 and 198 of 2012 with costs.

As we now turn to consider this appeal, we remind ourselves that this is an interlocutory appeal and that the main dispute is still pending for hearing and determination before the High Court in Kakamega. The approach of this Court as far as interlocutory appeals are concerned is that it will not express any concluded views on the issues in dispute, lest it prejudices or pre-judges the pending trial in the High Court. It is for the trial court, after a full hearing of the evidence duly tested by cross-examination, to make conclusive findings on the issues in dispute. In DAVID KAMAU GAKURU V. NATIONAL INDUSTRIAL CREDIT BANK LTD, CA No. 84 of 2001 this Court expressed itself thus on the approach:

"At the outset we must point out that this being an interlocutory appeal and the suit is yet to be tried in the superior court, we will refrain from expressing our concluded views on any issue which we think may arise in the intended trial."

(See also BP (KENYA) LTD V. KISUMU MARKET SERVICE STATION, CA No. 25 of 1992).

We shall also bear in mind that the granting or refusal of an injunction entails an exercise of judicial discretion and that this Court will not readily interfere with the exercise of discretion by the High Court unless it is satisfied that the discretion has not been exercised judicially. Madan, JA. (as he then was), expressed the circumspection with which this Court approaches the issue as follows, in

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

We are in agreement with both Prof. Ojienda and Mr. Lutta that the threshold issue in this appeal, upon which all the other issues hinge is whether the respondents are shareholders and members of MOCO. If there is prima facie evidence to show that the respondents are members and shareholders of MOCO, then the other issues such as whether they were entitled to the injunctions sought, whether they were entitled to leave to undertake a derivative action, whether the directors of MOCO were in office illegally, whether the Kenya Sugar Board was validly struck off the suit, whether the respondents ought to have been barred from contesting as directors and officers of MOCO and whether a receiver manager ought to have been appointed for MOCO, can be validly considered. If, on the other hand there was no prima facie evidence of such shareholding or membership, the other issues raised in the appeal need not be considered because only prima facie members and shareholders of MOCO are entitled to the interim reliefs and remedies sought by the respondents in the High Court.

To entitle the respondents to the interlocutory injunctions applied for in the High Court, they were required, under the test in GIELLA V CASSMAN BROWN [1973] EA 358, to show firstly, a prima facie case with a probability of success, secondly that they stood to suffer irreparable injury which could not be adequately compensated by an award of damages if the injunctions were not granted and thirdly, if the court was in doubt, it was to decide the application on a balance of convenience.

In NGURUMAN LTD V JAN BONDE NIELSEN & 2 OTHERS, CA NO 77 OF 2012 this Court considered the application of the Giella v Cassman Brown test in practice and stated as follows:

"It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between." (Emphasis added).

As regards what constitutes a prima facie case, **Bosire, JA** speaking for the Court in MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125, at page 137, stated as follows:

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an

explanation or rebuttal from the latter."

Later, in the same judgment, the learned judge added:

"But as I have earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case;"

In the cases before the High Court, the right or rights of the respondents that were alleged to have been infringed by the appellants had to be rights of the respondents as members and shareholders of MOCO. Those rights were not rights of the world in general; they were first and foremost the rights of shareholders and members of MOCO.

What *prima facie* evidence did the respondents place before the High Court to show their shareholding in and membership of MOCO? In paragraph 13 of the plaint in HCCC NO. 242 of 2011 the respondents pleaded that they were sugarcane farmers contracted to supply sugarcane to Mumias Sugar and that they were long-term shareholders and members of MOCO. And in paragraph 5 of the affidavit sworn by James Kutsushi Atindo on 19th September 2011 in support of the interlocutory application, it was deponed as follows:

"That the 2nd, 3rd, 4th, 5th 6th, 7th, 8th, 9th plaintiffs and I (the respondents) are sugarcane farmers and shareholders in the 9th defendant (MOCO): Now jointly produced and marked JKA-1 are copies of 15 per cent retention slips, sugarcane farming contracts and remittance advice slip by the 9th defendant evidencing the said membership in the 9th defendant."

The above evidence is found between pages 36 and 43 of the record of appeal in CA NO. 242 of 2011. There were five retention slips, one cane farming contract and two remittance advices.

A basic perusal of those documents indicates that of the five retention slips, none was in the names of the respondents as they appear in the plaint, although presumably they referred to the names of five of the respondents in abbreviated form. Save in respect of only one respondent (**Frederick M. Wangara**, presumably **Fredrick Mumia Wangara**, the 6th respondent), all the other retention slips were in the names of two or more persons. There was no retention slip in the names, in full or abbreviated, of four of the respondents.

The single cane-farming contract that was presented before the court was in the name of Columbus Makhoha Shiundu, the 5th respondent. The other respondents did not present any cane farming contracts.

As for the two remittance advices that were produced, none was in the name of any of the respondents, abbreviated or in full. They were instead in the name of **Chuma C. Rodgers**, who was not a party to the suit.

The appellants contend that the above evidence did not constitute prima facie evidence of the respondents' membership in MOCO. It is contended that beyond the issue of the names, most of the retention slips presented were in the names of more than one person, which cannot happen in the case of a genuine or legitimate shareholder and member of MOCO. The remittance advices produced, the appellants argue, did not belong to any of the respondents and the single cane growing contract was a two-page basic document that did not make any reference to MOCO whilst the genuine cane growing contract (on page 512' of the record) was a ten-page detailed document referring to both Mumias Sugar and MOCO. Above all, the appellants contend that the evidence presented by the appellants cannot constitute evidence of shareholding or membership in MOCO because there are many other farmers, dealers and middlemen who have entered into sugarcane supply contracts with Mumias Sugar without necessarily being members of Mumias Sugar or MOCO.

The appellants further contend that the only way of establishing membership or shareholding in MOCO is pursuant to article 3 of MOCO's Articles of Association. Under that article, save for a director appointed under article 84(b) and (c), a member of MOCO is one who has satisfied the following three conditions:

(i) Has entered into a sugar-cane farming contract MOCO or supply contract with the miller (in this case Mumias Sugar),

(ii) has applied to be a member in the prescribed form;

and

(iii) has acquired a minimum of 500 shares in the Company.

A plain reading of Article 3 indicates that the three conditions are cumulative, rather than in the alternative, so that to be a member, a person must satisfy all three conditions.

Although the respondents have assailed the 2006 amendment of MOCO's Articles of Association which introduced article 3 in the above terms, no court has ever nullified the same and neither Kimaru, J. nor Chitembwe, J. pronounced themselves on the validity of the Articles as amended. If anything, both judges, by implication found no issue with MOCO's Articles of Association and that is presumably why they directed that election of MOCO's directors be held in accordance with its Articles of Association, the operating Articles of Association being as amended in 2006. We find that the issue of the validity of the Articles of Association was never raised in pleadings or placed by the parties before the two judges for determination. To that extent, it is not open to us to make any finding of invalidity of those Articles of Association.

But even if we assume, without deciding, that under section 24 of the Companies Act the 2006 amendment of MOCO's Article of Association did not affect the "shareholding and membership" of the respondents in MOCO, where is the prima facie evidence that they were members and shareholders of MOCO before 4th May, 2006? The only cane-farming contract that was produced for Columbus Makhoha Shiundu, other than being hotly disputed, was entered into on 22nd February 2007, after amendment of the Articles of Association.

In our respectful view, the evidence presented before the High Court to establish shareholding and membership of the respondents in MOCO; either before 4th May 2006 or subsequently, fell awfully short of prima facie evidence, which, as we have already noted, is more than evidence establishing an arguable case. Where is the evidence, even affidavit evidence, of the dates when each respondent became a shareholder and member of MOCO? Where is the evidence, of the period over which each has been a member and shareholder? Where is the evidence of the date that each respondent entered into a cane farming contract with Mumias Sugar? Where is the evidence of each respondent's ownership of a sugarcane farm or evidence of where he or she farms the sugarcane?

A basic comparison between the two-page cane growing contract relied upon by the respondents and the ten-page cane growing contract said by the appellants to be the genuine contract, discloses some fundamental differences. Whilst the former is only between Mumias Sugar and the farmer, with no reference to MOCO, the latter contract is also between Mumias Sugar and the farmer, but makes express references to the roles of MOCO in the contract.

Thus for example, in clauses 4 and 6 of the latter contract, upon termination of the contract, the farmer is obliged to repay in full all loans from MOCO. Under clause 10(g), MOCO is supposed to have a representative at the buying point when the farmer is delivering the sugarcane to witness the condition of the cane and confirm the net weight. Under clause 10 (m), the farmer undertakes to permit all moneys due from him or her to MOCO to be deducted from the proceeds of the cane supplied by the farmer to Mumias Sugar. Under clause 11(m) Mumias Sugar is entitled to deduct all moneys due from the farmer to MOCO. Lastly, under the second proviso to clause 11(o), Mumias

Sugar is required to inform MOCO of any changes to the charges levied on the farmer.

Prima facie, the contract relied upon by the appellants appears to be the contract that constitutes a farmer who is a party to it a member of MOCO by virtue of the contract, deductions and remissions. The contract relied upon by the respondent, makes no reference to MOCO and contains no provision on deductions and remissions to MOCO. It would appear, *prima facie* once again, that the contract relied upon by the respondents is the contract entered into between Mumias Sugar and other farmers, cane dealers and middlemen who are not necessarily members of MOCO.

Granted the serious challenge to the respondent's shareholding and membership in MOCO; the impeachment of the single cane farming contract produced and the drastic and far-reaching nature of the reliefs sought by the respondents, we would have expected some cogent evidence which would give a court of law some basic assurance that the parties seeking the remedies are bona fide members and shareholders of the Company they seek to place under receivership, or whose directors they seek to remove from office or to restrain from acting as directors. In our view, no such evidence was placed before the High Court. It was not enough, as the respondents appeared to think, that merely because MOCO is said to have over 70,000 members, any person would be presumed to be one of the 70,000 plus members, even without *prima facie* evidence of shareholding and membership.

We agree with the appellants, with respect, that Kimaru, J. exceeded his remit in an interlocutory application when he purported to determine highly contested issues with finality and on the basis of affidavit evidence only, without the benefit of hearing witnesses whose evidence has been tested by cross-examination. By holding, as he did, that **"This court therefore holds that the plaintiffs are members and shareholders of the 9th defendant"** the learned judge purported to make conclusive and final findings, raising the question, what will be the purpose of a hearing before the High Court where the shareholding and membership of the respondents in MOCO is one of the main issues for determination?

In AGIP (K) LTD V VORA [2000] 2 EA 285, this Court decried final determination of issues in dispute at an interlocutory stage in the following terms:

"With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a *prima facie* case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit." (Emphasis added).

(See also NGURUMAN LTD V JAN BONDE NIELSEN & 2 OTHERS (supra)).

Equally questionable in our view, was the determination with finality, at the interlocutory stage, that the appellants were in office illegally; that the extension of their term of office by the resolution of 29th December 2010 was null and void; and the order for holding of elections of directors of MOCO. The respondent's pleading had based the challenge of the appellant's continuation in office on allegations of fraud. By making the orders of 4th November 2011, the High Court effectively found the fraud alleged against the appellants proved.

We are not convinced that the High Court could make a definitive finding at the interlocutory stage that fraud was proved in this case. In the first place, this Court has in the past expressed the view that fraud cannot be proved on the basis of affidavit evidence only. In WESTMONT POWER KENYA LTD V FREDERICK & ANOTHER T/A CONTINENTAL TRADERS & MARKETING [2003] KLR 357, this Court stated that serious allegations of fraud and other wrong doing can only be decided during a proper trial and not on the basis of conflicting affidavit evidence.

There is also the not insubstantial question of the standard of proof required to establish fraud. It is accepted in our jurisdiction that the standard of proof of fraud is higher than on a balance of probabilities. In **R. G. PATEL VS LALJI MAKANJI [1957] EA 314**, the former Court of Appeal for Eastern Africa expressed itself as follows on the standard of proof where fraud is alleged:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

(See also **RICHARD AKWESERA ONDITI V KENYA COMMERCIAL FINANCE CO. LTD, CA No 329 of 2009** and **KOINANGE & 13 OTHERS-V- KOINANGE (1996) KLR 23**).

In view of our finding that the respondents did not make out a prima facie case of their shareholding in and membership of MOCO and accordingly that they had not made out a *prima facie* case to warrant the interlocutory relief they had sought in the High Court, we do not find it necessary to delve into the other issues raised in this appeal which all turn on that main finding. The appellant invited us to allow the appeal in CA No. 242 of 2011, set aside the order of 4th November 2011 and substitute therefor an order striking out HCCC No. 122 of 2011.

With respect we cannot do so since there was no application in the High Court to strike out the suit. All that we have found is that because the respondents did not establish a *prima facie* case, they were not entitled to the interim orders they obtained on 4th November 2011. Nothing stops them at the hearing of the suit from adducing proper and credible evidence of their shareholding and membership of MOCO.

In the circumstances, the orders that commend themselves to us are to allow CA No. 242 of 2011 with costs, set aside the ruling and order of 4th November 2011 and substitute it with an order dismissing the respondent's Notice of Motion dated 19th November 2011. CA Nos. 90 of 2012, 186 of 2012 and 198 of 2012 are hereby dismissed with costs. Those are our orders.

Dated and delivered at Kisumu this 25th day of March, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR