REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 332 OF 2010

JAN BONDE NIELSEN..…..…..... PLAINTIFF

VERSUS

HERMAN PHILIPUS STEYN

Also known as Hermannus Phillipus Steyn.....… 1ST DEFENDANT

HEDDA STEYN..... 2ND DEFENDANT

NGURUMAN LIMITED..... 3RD DEFENDANT

RULING

INTRODUCTION

1. The 3rd Defendant's Notice of Motion dated 6th February 2014 and filed on 12th February 2014 was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 2 Rule 15 (1) (b), (c) and (d), Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, inherent powers of the court and all enabling provisions of the law. It sought the following orders:-

1. **THAT the Plaintiff's suit herein be struck out with costs for being an abuse of the court process.**
2. **THAT this Honourable Court does give such consequential, further or other order (s) as it may deem just.**
3. **THAT the costs of this application be provided for.**

THE 3RD DEFENDANT'S CASE

2. The 3rd Defendant's application was supported by the Affidavit of Moses Loontasati Ololowuaya that was sworn on 6th February 2014. The 3rd Defendant's Written Submissions, List and Bundle of Authorities were dated 31st March 2014 and filed on 1st April 2014. Its Supplementary Written Submissions, List and Bundle of Authorities were dated and filed on 30th May 2014 while its Supplementary List of Authorities was dated and filed on 12th May 2014.
3. The 3rd Defendant contended that the Plaintiff herein filed suit dated 17th May 2010 in which he pleaded that he had suffered legal injury by way of a violation of his rights that were legally

protected under a partnership between himself and the 1st Defendant herein.

4. He had sought certain relief *in personam* which included a declaration of a partnership between himself and the 1st Defendant on a 50:50 basis, a declaration that the shares held by the 1st and 2nd Defendants in the 3rd Defendant were held in a constructive trust being fifty (50%) per cent for the Plaintiff and the remainder for the 1st and 2nd Defendants herein, and an order that the fifty (50%) shares held by the 1st and 2nd Defendant, in the 3rd Defendant be transferred to him.
5. The 3rd Defendant averred that in his Notice of Motion application filed in court on 30th August 2010, the Plaintiff continued to present himself as having suffered a violation of his legal rights which gave rise to his claim to be granted interlocutory orders of an injunction restraining it from interfering with his homestead commonly known as Oldonyo Laro, which Odunga J granted.
6. It was its assertion that the Plaintiff swore the Supporting Affidavit in support of the said application in which there was use of such as **"me"** , **"my"**, **"myself"**, **"I"** amongst others which showed that the claim herein was his personal claim.
7. It said that new evidence had emerged showing that the Plaintiff did not and never had any legal or beneficial interest in any asset in Kenya and especially in the shares in the 3rd Defendant and that the suit as filed, was not a bona fide mistake in respect of which the court could exercise its discretion and order that any other person be substituted or added as a plaintiff herein. As a result, it contended that the Plaintiff did not have the *locus standi* to institute the proceedings herein.
8. In particular, the 3rd Defendant relied on the Plaintiff's proposal for an Individual Voluntary Arrangement (hereinafter referred to as "the IVA") dated 3rd December 1996 to his creditors, in which he stated that he had no personal assets or resources at the time and certified the information was true to the best of his knowledge and belief. It said that there was also confirmation of a Mark Rhodes, who was a friend of the Plaintiff, to the effect that the Plaintiff never any life insurance policies or pension funds.
9. The 3rd Defendant was emphatic that the said proposal did not contain any hint of the Plaintiff ever having engaged in any commercial activity in Kenya and that in fact, the Plaintiff had stated that together with other individuals, he had founded United Dutch Holdings in which he provided personal guarantees which were called when the said company went into liquidation in 1993 leaving him impecunious.
10. It did therefore appear from the documentation that was placed before this court that the 3rd Defendant's case was that if the Plaintiff's assertions in his suit herein were to be believed, then he had committed a serious offence in England as he had concealed in his Proposal and IVA dated 3rd December 1996 and the various Statements of Affairs that he had no assets, which information was the basis of his Bankruptcy Petition No 8891 of 1996 in the High Court in London and for which he would be liable for prosecution in England for non-disclosure and fraud.
11. It was its further assertion that the Plaintiff's solicitors' had made an unequivocal admission in their letter of 19th November 2013 that the Plaintiff does not and has never had any shares in the 3rd Defendant or any interest in the suit property herein. It said that the Plaintiff's assertions that the IVA was in respect of his personal liabilities and personal assets only and did not relate to other investments that were made by him on behalf of his family's trusts and companies and his contentions that his dealings with the 1st Defendant as an agent who was working on behalf of family trusts was sufficient to show that the Plaintiff had no *locus standi* to institute the proceedings herein as the same was brought contrary to the provisions of Order 1 Rule 8 of the Civil Procedure Rules, 2010.
12. Through Senior Counsel Pheroze Nowrojeewho was representing it in this matter, the 3rd Defendant therefore urged the court to dismiss the suit herein with costs to it as it was an abuse of the process of the court.

THE 1ST AND 2ND DEFENDANTS' CASE

13. The 1st and 2nd Defendants, who were represented in this matter by Senior Counsel Ahmednasir Abdullahi, did not file any papers in response to the present application as they were not opposed to the same. They, however, filed their Written Submissions dated 5th May 2014 on 7th May 2014.

THE PLAINTIFF'S CASE

14. In response to the said Application, on 10th March 2014, the Plaintiff swore a Replying Affidavit that was filed on even date. His Written Submissions and Supplementary Written Submissions together with his List of Authorities therein, filed on 6th May 2014 and 21st May 2014 respectively were both undated. However, as the Plaintiff's counsel, Mr Walter Amoko orally highlighted the said submissions during the hearing of the application herein, the court deemed it fit to admit and consider the same.
15. The Plaintiff averred that the 3rd Defendant had previously made a similar application for striking out of the suit that was disallowed by Mabeya J and that the said judge together with Odunga J who had also heard an application for an injunction pending appeal, had emphasised the suit herein be disposed of expeditiously.
16. He pointed out that one Ms Rachel Ellen McConahghie had, in response to an application by the Defendant to inspect court records in London, disclosed that the Statement of Affairs prepared for purposes of the IVA did not contain particulars of his partnership with the 1st Defendant herein. It was therefore his contention that no new evidence had been obtained herein for the reason that the same had been within the knowledge of the Defendants for over a year before the present application was filed.
17. He was categorical that the assets in the 3rd Defendant were not subject of his claim and that he did not have any beneficial interest in the shares in the 3rd Defendant. He, however, said that he was bringing the claim herein as an agent of the family trusts on whose behalf the investments in the 3rd Defendant were made.
18. He stated that assertions by both Mr Ololowuaya'sand Mr Rhodes that he had no assets in the 3rd Defendant were consistent with his position that he was holding assets in a non-beneficial capacity and that given his having non- beneficial interest in the partnership and assets, it would have been inappropriate to refer to the same in the IVAand that in any event, no action had been taken against him in London for having stated that he did not have assets in Kenya.
19. He further stated that there was no obligation on a person acting as an agent to disclose with whom he deals with, that he is acting in that capacity or to disclose that capacity when engaged in legal proceedings.
20. He alluded to several family trust structures in his Replying Affidavit to demonstrate that investments to the 3rd Defendant were made through his family. He stated that payments to the 3rd Defendant were made through these Trusts upto the period ending 1991.
21. It was his further contention that the present application and the harassment he was facing at the Oldonyo Laro homestead were all calculated at intimidating him so that he could give up his claim. He therefore urged the court to dismiss the 3rd Defendant's application with costs to him.

LEGAL ANALYSIS

22. It is apparent from the length of the proceedings and the time that has lapsed since the matter was filed herein that it is a hotly contested and highly contentious matter. Several applications have been filed herein. At different times, the Plaintiff and the 3rd Defendant filed applications seeking injunctive orders against each other.
23. In his Ruling of 30th March 2012, Odunga J did not determine the rights of the parties but rather restrained the Defendants, their agents and/or nominees from interfering with the Plaintiff's homestead aforesaid pending the hearing and determination of the suit herein.
24. The learned judge opined that it was in the interests of justice that all related suits be consolidated and the same be disposed of as soon as possible and reminded parties to note the provisions of Order 40 Rule 6 of the Civil Procedure Rules.
25. The interpretation of the said order was a subject of lengthy submissions by the parties herein as the 3rd Defendant argued that the injunction was only in respect of the Plaintiff's homestead but that the Plaintiff had continued to occupy over and above what was ordered by the court. The order by the learned Odunga J was subsequently overturned by the Court of Appeal in its Ruling of 4th April 2014.

26. On 10th December 2012, Mabeya J delivered a consolidated Ruling in respect of an application for consolidation of what the Plaintiff referred to as Nakuru suits with the suit herein, the 3rd Defendant's application seeking to be struck off from the suit herein and its application seeking injunctive orders against the Plaintiff herein.
27. This last application was allowed for a period of twelve (12) months.The learned judge clarified that the orders issued were only to restrain the Plaintiff from interfering with the 3rd Defendant's right to ownership and enjoyment of its property save for the Plaintiff's area covered by the order of Odunga J that was delivered on 30th March 2012.
28. In Paragraph 50 of the said Ruling, the learned judge observed as follows:-

Before concluding this ruling, there is one issue the court has to address. It would seem that the parties to the suit herein are content in filing one application after another. I get the feeling that the parties have no interest whatsoever to fixing this matter for trial. I believe it is only the route however, the parties seem afraid to take. In this regard, as Hon Odunga J limited the order of 30th March, 2012 to 12 months in his penultimate paragraph so do I in this ruling. Further, in order to bring the parties to their senses as to prosecuting this matter, I direct that parties do take steps to conclude pre-trials within 90 days of today, in default either of the parties is at liberty after complying to invoke the provisions of Order 11 Rule 2(o) (ii) of the Civil Procedure Rules."

29. On 1st March 2013, Mabeya J also observed as follows:-

"On the issue of the Plaintiff's rights, it is common position that in the statement of claim the Plaintiff's claim is ownership in the 3rd Defendant and not its assets of which the suit property is one of them."

30. Unfortunately, neither of the parties set down the suit for pre-trial as had been directed by Mabeya J. Instead, the 3rd Defendant filed the present application which had sought similar orders as its application dated and filed on 12th July 2012 in which it had sought to strike out the Plaintiff's suit as against it and which Mabeya J declined to so grant.
31. As can be seen hereinabove, the 3rd Defendant's argument was that the 2nd Plaintiff lacked the *locus standi* to bring, maintain and prosecute this suit. It submitted that the suit herein was instituted in the name of the wrong person and that the same was frivolous, scandalous, vexatious and an abuse of the court process.
32. It was also its contention that Plaintiff's case showed that the case herein was his personal claim as he had stated that he had provided finances in excess of Kshs 1 billion for the joint venture with the 3rd Defendant and that the remedies he had sought in the Plaint herein were attached to his person. It added that the Plaintiff did not at any given time make reference to the family trust's claim or that he had made his claim on behalf of the family trust.
33. The 3rd Defendant averred that the Plaintiff had sought the return of the monies in his personal capacity and not in any other capacity. This, it stated, was evident from the Verifying Affidavit, which the Plaintiff had sworn on oath verifying the correctness of the averments in his Plaint.
34. It referred the court to several documents that he had annexed to its Supporting Affidavit and the averments on the Plaint to support its argument and contended that if the Plaintiff was suing in any other capacity, he was required to state in his Plaint the capacity in which he was suing and also state how that capacity had arisen.
35. On his part, counsel for the 1st and 2nd Defendants submitted that that the Plaintiff had a split personality and had three (3) distinct causes of actions. He stated that the Plaintiff had pleaded in his documentation before court that he was the owner of fifty (50%) of the suit property that was registered in the name of the 3rd Defendant, that he paid the money, yet he had filed Bankruptcy proceedings in the High Court in London, and that he was a partner in the 3rd Defendant.
36. The 1st and 2nd Defendants were emphatic that the Plaintiff could never have paid any monies towards the joint venture as he had in his own pleadings had made no mention of personal assets in Kenya and had in fact admitted that he entered into a of voluntary arrangement in the aforesaid Bankruptcy proceedings.

37. They pointed out that in Paragraph 41 of his Replying Affidavit, the Plaintiff had stated that Happy Valley, United Dutch and Chester Court, which were part of what the Plaintiff referred to as the Trust Structure, made payments towards the Nguruman project between 1988 and 1991.
38. It was therefore their submission that the aforesaid companies were distinct personalities which ought to have come to litigate in this matter in their own right. They were categorical that the Plaintiff could not purport to represent the said companies and that the Plaintiff was attempting to introduce a new narrative that was not pleaded in his affidavit. It was their further argument that in any case, there was nothing known as an "agent of Family Trust" in law and that it was only a trustee who had capacity to sue or be sued on behalf of a trust.
39. Both Senior Counsel representing the Defendants herein pointed out that the Plaintiff obtained injunctive orders against the Defendants based on suppressed information in respect of the bankruptcy proceedings that he was facing in London, which it submitted, was material and relevant as the same could have affected the weight of his evidence or his right to bring the suit herein.
40. It was the 1st and 2nd Defendants' contentions that the Plaintiff's dealings with United Dutch Holdings had no relevance to this case as did many other averments the Plaintiff had made in his Replying Affidavit.They termed the Plaintiff's assertions in the Plaint as uncoordinated lies and posed the question as to whether or not the Family Structure Companies the Plaintiff had alluded to in Paragraph 26 of his Replying Affidavit were in existence or had been wound up or dissolved.
41. It was also their argument that if the trustees the Plaintiff had referred to as International Fiscal Services of Netherlands were the trustees, then that was the only party that had *locus standi* to come to this Court and that in any event, the Plaintiff did not appear either as a trustee or beneficiary in the Deed of Appointment, the beneficiary having been given as Lone Bonde Nielsen, the Plaintiff having clearly stated that he made payments from monies that had been given to him.
42. They referred the court to the case of **Yaya Towers Limited versus Trade Bank Limited (in liquidation) [2000] KLR** that was relied upon by the Plaintiff in which the Court of Appeal held as follows:-

"The power to strike out pleadings is one which should be exercised only in plain and obvious cases. The summary remedy of its striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the process of the court or that it is unarguable. It has nothing to do with a case being complex or difficult or that it requires a minute or protracted examination of the documents and the facts of the case."

43. The 1st and 2nd Defendants also placed reliance on the case of **Swain v Hillman [2001] 1All ER 91,94 and 95** that was cited with approval in the case of **Clarke v Marlborough Fine Art Limited (Ch D) [2002] 1 WLR** that had relied upon by the 3rd Defendant in which Lord Woolf MR (as he then was)rendered himself as follows:-

"It is important that a judge in appropriate case should make use of the powers contained in part 24. In doing so, he or she gives effect to expedition, it avoids the court's resources being used up on cases where this serves no purpose and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position."If a claim is bound to succeed, a claimant should know that as soon as possible. Useful though the power is under part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submission, the proper disposal of an issue under part 24 does not involve the judge conducting a mini trial,that is not the object of the provisions, it is to enable cases where, there is no real prospect of success either way, to be disposed of summarily…To that rule, there are some well recognized exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in providing all the facts that he offers to prove, he will not be entitled to the remedy that he seeks…"In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of the court as soon as possible. In other cases it might be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be

clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case, the easier it is likely to take that view and resort to what is probably called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf CJ said in Swain's case, that is not the objective of the rule. It is designed to deal with cases that are not fit for trial at all."

44. They were categorical that no matter how much evidence the Plaintiff would bring, he could not succeed in his claim against them for the reason that he was not a trustee and that in any event the trusts and companies that he had introduced in the proceedings herein had been dissolved or wound up. It was their submission that the Plaintiff had had his day in court and it was now time to strike out the suit herein for the expeditious disposal of the matter herein.
45. On his part, the 3rd Defendant averred that the present application was not based on the Plaintiff's financial difficulties but rather that the same was based on the fact that the Plaintiff had now stated that he had no beneficial interests in Kenya, a fact that was contained in a solicitor's statement of 21st of November 2013.
46. It further submitted that the monies that were advanced were advanced through other companies and that those companies advanced the monies from the trading profits. It emphasised that the beneficiaries were only shareholders while the Trusts were the shareholders in the companies. It was therefore its contention that the Trusts did not therefore constitute the parties having directly forwarded the money and advanced the moneyand that the investments were of the companies and not of the shareholders or of the Trusts.
47. The 3rd Defendant further submitted that neither the shareholders nor the Trusts could sue as plaintiffs as it was only the trustees or the companies who could do so. However, the companies that advanced monies had been dissolved which in effect meant that they no longer had capacity to sue as plaintiffs in respect of any monies which allegedly they had advanced.
48. The 3rd Defendant was categorical that there was new evidence that was neither available to it when it filed the second application seeking to strike out the Plaintiff's suit against it on the 12th of July 2012 nor was it available to it when it prosecuted its application before Mr. Justice Mabeya on 11th of October 2012. It was therefore its contention that there was no abuse of process or litigation by instalments on its part.
49. On his part, the Plaintiff told the court that there was a lot of misrepresentation of his case. He denied that he was flip-flopping as had been suggested by the 1st and 2nd Defendants and contended that Moses Ololowuaya was a front acting for the Defendants.
50. He averred that this was not the first time the 3rd Defendant had sought to strike out his suit against it. He stated that the application herein had substantively sought the same prayers although the grounds relied upon were different from those that were relied upon in the first application for striking out the suit herein.
51. He was categorical that the 1st Defendant herein had since 1991 been aware of his financial difficulties when payments ceased, which payments did not commence again until 2002and pointed out that the Kenyan assets, the Kenyan partnerships had not been mentioned in the papers filed in the IVA and returns had been filed during this period.
52. He averred that payments were made from company funds by United Dutch, Chester Court and Happy Valley and that he never made any payments in his personal capacity.He referred the court to several documents demonstrating that certain payments had been made to the 1st Defendant.
53. He questioned the relevance of the bankruptcy proceedings during this period as the Plaintiff never contended that he had made payments to the Defendants in the period between 1992 and 2001 and that in fact, the Plaintiff's financial difficulties did not culminate in bankruptcy proceedings but rather in an IVA which ran from 1996 to 2003.
54. It was his further submission that the Defendants had failed to adhere to the peremptory orders of Mabeya J requiring parties to prepare for trial which was undermining the very overriding objectives prescribed in Section 1A and 1B of the Civil Procedure Act.
55. He was emphatic that the issues herein could only be resolved by hearing *viva voce* evidence as he would be cross-examined on the evidence that he would tender during the hearing of this case.
56. The court deemed it necessary to set out the parties' respective cases to demonstrate the nature of

the contentions that they had advanced in this case. As was rightly pointed out by Senior Counsel Ahmednasir Abdullahi, this could be one of the most voluminous cases relating to an application for striking out. The court merely took the highlights of each party's submissions and summarised the same.

57. The setting out of the parties' respective cases was therefore by no means exhaustive because if the court was to detail each and every assertion in the affidavits, the documentary evidence and the case law that was relied onand presented by each party, this Ruling would no doubt run into hundreds of pages. Evidently, the proceedings since this court took over this matter ran to almost a hundred (100) pages which led it court to suggest to the parties toconsider hiring a stenographer to assist in taking the proceedings, which they graciously all obliged.
58. It is for that reason that the court only concerned itself with the task before it, which was to satisfy itself whether or not the 3rd Defendant had demonstrated a good case for the striking out of the suit herein against it for it being an abuse of the court process.
59. Whilst the court agreed with both Senior Counsels' submissions that *locus* is a preliminary issue that has to be dealt with first, it was evident from the submissions hereinabove that the issues were not as straightforward as the Defendants had contended.
60. The Plaintiff had argued that he had no obligation to disclose the capacity under which he had instituted the proceedings herein while the 3rd Defendant was contended that he had an obligation to set out the basis and genesis of his claim herein.
61. It was the considered view of the court that an application for striking out a suit would not be a proper forum for it to consider whether or not the suit herein had been properly instituted. Indeed, this was not an issue that can be dealt with in an interlocutory stage based on the affidavit evidence that is placed before a court especially where such an issue of the capacity of a plaintiff has been highly contested.
62. It is ideally a task for a trial court unless of course an application has specifically been brought to address the issue of the *locus standi* of a party to a suit. If a trial court were to find that a plaintiff had no *locus* to institute the proceedings, nothing would stop that court to make such a finding and downing its tools in the first instance and therefore decline to consider the merits of the case before it.
63. It was also not lost to the court that both Senior Counsel for the Defendants advanced very strong arguments why this court should strike out the suit herein. However, the court noted that the Plaintiff had in his Plaint dated 17th May 2010 contended that he had provided the architectural designs, all finances to construct the company and that he had a fifty (50%) share of the subject parcel of land.
64. In Paragraph 17 of his said Plaint, the Plaintiff had stated as follows:-

"The Plaintiff from time to time remitted monies to the 1st and 2nd Defendants upon the request of the 1st Defendant for the purposes of the joint venture and more specifically to operate the affairs of Nguruman.

65. The source of the monies was not disclosed. It was only in response to the present application that the Plaintiff disclosed that the monies he invested in the 3rd Defendant came from other sources and not directly from him.
66. The court found and held that this was also an issue that could only be resolved during a full trial. It would be greatly prejudicial to stop the Plaintiff in his tracks on the basis of information regarding the IVAfor the reason he had contended in Paragraph 16 of his Plaint that he incorporated a company known as Oldonyo Laro Estate for purposes of making further contributions to the 3rd Defendant.
67. It is trite law that a party cannot approbate and reprobate as was contended by the Defendants and as could be seen in the holdings in the cases of **Kibaki vs Moi (2000) 1 EA 115** and **Dodhia vs National & Grindlays Bank Limited & Another (1970) EA** that were relied upon by the 3rd Defendant. See also **Halsbury's Laws of England 4th Edition Reissue Vol. 16(2) Paragraph 962 at pp 416-419**.
68. Be that as it may, the questions of whether or not the suit was truly based on a trust and on the companies' funds on behalf of the trust, the credibility, admissibility or relevance of evidence the

Plaintiff furnished the court to demonstrate where the monies for the investment came from, whether or not he was a trustee of the family trust, whether or not he had authority to act on behalf of the family as a trustee, whether or not there was a contractual, quasi-contractual or non-contractual fiduciary relationship between himself and the family trust structure, the fact that the beneficiary of the trust was Lone Bonde Nielson and not him, the fact that the trustee was International Fiscal Services (Antilles) NV and not him and generally, the question of whether or not the trusts that were in existence and who had capacity to sue in such circumstances were all issues this court found would need further interrogation during trial and could not be dealt with at this interlocutory stage.

69. The court noted the several cases that were relied upon by the 1st and 2nd Defendants on the question of trusts (See- **Paquin Ltd vs Beauclerk (1904-07) All ER Rep 729** , **Bowstead and Reynolds on Agency 18th Edition by F.M.B. Reynold**, **Teheran-Europe Co vs S.T. Belton Ltd (1968) 2 All ER 886**as were those that were relied upon by the Plaintiff) and found that analysing the weight, relevance and admissibility of the said evidence based on affidavit evidence that was presented to the court by all the parties in respect of the capacity of the Plaintiff to institute the suit herein would ideally be encroaching on the jurisdiction of a trial court.
70. It would be prudent to let the trial court decide on the agency relationship between the Plaintiff and Happy Valley N.V, Chester Court N.V., United Dutch Holdings Limited and United Dutch UK Limited be determined by the trial court that has the full mandate and jurisdiction to consider that question.
71. Indeed the important position that is accorded to a trial court was also underscored in the case of**Civil Appeal No 77 of 2012 Nguruman Limited vs Jan Bonde Nielsen & Others** (unreported) where the Court of Appeal rendered itself thus:-

"Ordinarily this court would not express any concluded views of the dispute between the parties and must also not form a distinct impression as to the merits of the suit at this stage since the determination is reserved for the trial court after the interlocutory appeal had been disposed of. More restraint is called for in this appeal in view of the various pending suits…"

72. For the foregoing reasons, although the court noted the Defendants' submissions and the extensive case law that they relied upon that largely touched on the merits or otherwise of the case herein, it was apprehensive that it could be considering the merits or otherwise of the case at an interlocutory stage and thus only addressed itself to the principles of striking out a suit.
73. It is a common thread of the cases on striking out of pleadings that were presented by all the parties that such striking outshould be exercised cautiously and with a lot of restraint because the main aim is to sustain rather than terminate a suit.
74. This was a position that was espoused in **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR**whereMusinga J (as he then was) had the following to say:-

"**It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."**

75. The seriousness with which the court takes regarding striking out of pleadings was also considered in the cases of **DT Dobie & Co (Kenya) Ltd vs Muchina (1982) KLR**and that was relied upon by the Plaintiff herein.In thatcase,the Court of Appeal held as follows:-

"a cause of action will not be considered reasonable if it does not state such facts as to support the claim…. "cause of action" means an act on the part of the defendant which gives the plaintiff his cause of action. As the power to strike out pleading is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously. The court should aim at sustaining rather than terminating a suit…As long as a suit can be injected with life by amendment, it should not be struck out…"

76. The court was thus not persuaded by the 1st and 2nd Defendants' submissions that if evidence is such that only one conclusion can be drawn, then judgment may be entered without referring the

case to trial as was held in the case of **Paquin Ltd vs Beauclerk** (Supra) they relied upon for the reason that there were several issues that needed to be ventilated during trial.

77. There is therefore need for the Plaintiff to prove in the trial court that he had an enforceable interest in the subject matter of the claim by adducing oral evidence whose veracity will be tested during cross-examination.It would also be at point that the trial court would need to establish whether or not the Plaintiff had filed the suit herein as a representative suit in accordance with Order 1 Rule 8 of the Civil Procedure Rules and Order 4 Rule 4 of the Civil Procedure Rules to state the capacity in which he had filed the suit herein or if at the said submissions obtain in this particular case.
78. In addition, accepting the holding in the case of **Khan vs Roshan (1965) EA 289**and the numerous other cases that were relied upon by the 3rd Defendant in respect of the amendment of pleadings against the backdrop of the facts of this case, the court would be making an assumption that the Plaintiff might want to amend his suit but that that he should not even think of doing so because the court would not allow an amendment that would create an inconsistency in the pleadings already filed,, which it contended was the position herein.
79. It would be of paramount importance to leave the court considering an application for amendment of pleadings, if at all the same is filed, to make such a finding as the question of amendment of pleadings was not clearly before this court for determination.
80. Accordingly, having considered the pleadings herein, the affidavit evidence and the written submissions and case law in respect of the parties' respective case, the court found and held that the correctness and veracity of the averments in the Plaintiff's Plaint could only be tested, addressed, considered and determined in a full trial of the case herein.The several documents demonstrating that certain payments had been made to the 1st Defendant led this court to make a finding that this was not a clear and plain case that would warrant it striking out the suit herein. Whether the said payments were in respect of investments to the 3rd Defendant was a different matter altogether and would have to be proven to the required standard.
81. Indeed, as has been stated hereinabove, making a determination at this juncture would not only be pre-empting the parties' respective cases but the court would also be analysing affidavit evidence when it was quite clear to the court that therewere issues that would require to be ventilated in a full trial.
82. Save for the time spent in hearing this matter during trial, the court did not see any great prejudice to be suffered by the Defendants if the parties proceeded to full trial. It must be kept in mind that an act of striking out of pleadings by the court is a draconian step which must be used as a last resort.
83. Indeed, a party must be given a fair and reasonable opportunity to present its case. This is to afford such party that fair and reasonable opportunity to ventilate its case, no matter how weak his opponent perceives his case. The court was therefore not satisfied that this was a proper case for it to exercise its discretion and strike out the Plaintiff's suit herein as had been sought by the 3rd Defendant and supported by the 1st and 2nd Defendants as no abuse of the court process was adequately presented to this court.
84. Having said so, the court wishes to commend all counsel for the zeal and passion they exhibited in arguing their respective client's cases and in particular for accepting to incur huge expenses to hire a stenographer who definitely assisted in expediting the hearing of the application herein that was first placed before this court on 25th February 2014 and was concluded on 29th June 2015 when the Ruling herein was reserved.

DISPOSITION

85. Accordingly, the upshot of this court's ruling is that the 3rd Defendant's Notice of Motion dated 6th February 2014 and filed on 12th February 2014 was not merited and the same is hereby dismissed. Costs shall be in the cause.
86. As a parting short, this court wishes to fullyassociate itself with the views that were expressed by both Mabeya and Odunga JJ to the effect that it is high time that this matter proceeded for hearing for final determination so as to comply with the principle of the overriding objectives of expeditious and cost effective disposal of disputes.

87. Indeed, no good will come to expending over years in prosecuting applications as the matter could have been heard to conclusion by now. The court thus wishes to implore upon the parties to urgently take steps to fix this matter for hearing, unless of course there are orders from any court to the contrary. It will be for their own good.
88. It is so ordered.

DATED at **NAIROBI** this **25th** day of **September 2015**

J. KAMAU

JUDGE

READ, DELIVEREDand **SIGNED** at **NAIROBI** this **2nd day of October 2015**

F. AMIN

JUDGE