REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 46 OF 2015

TATU CITY LIMITED …….…….…….……. 1ST PLAINTIFF

KOFINAF COMPANY LIMITED ……..…….. 2ND PLAINTIFF

NAHASHON NGIGE NYAGAH ……..…….……..... 3RD PLAINTIFF

VIMALKUMAR BHIMJI DEPAR SHAH ……..…..…… 4TH PLAINTIFF

-versus-

STEPHEN JENNINGS …..…….…. 1ST DEFENDANT

FRANCES HOLLIDAY ……...……..…… 2ND DEFENDANT

HANS JOCHUM HORN …..……..…..…. 3RD DEFENDANT

PIUS MBUGUA NGUGI …..……..…….……..…. 4TH DEFENDANT

FRANK MOSIER …….…..…. ……..……. 5TH DEFENDANT

ANTHONY NJOROGE ……...……..…… 6TH DEFENDANT

CHRISTOPHER BARRON …..…...…….…… 7TH DEFENDANT

R U L I N G

INTRODUCTION

1. This ruling is pursuant to the inter partes hearing of the Notice of Motion Applications dated 5th February 2015 and filed in court on 6th February 2015 and amended on 23rd February 2015 (hereinafter called the **"First Application"**) and another dated and filed in court on 19th March 2015 (hereinafter called the **"2nd Application"**). Both applications are by the Plaintiffs. These applications were heard together because they seek accommodating orders, and are supportive of each other. It is, however, important to note and to clarify that exparte interim orders were granted in the First Application on 23rd February 2015 in favour of the Plaintiffs. This did not please the defendants who, on 26th February 2015, filed an application seeking to set aside the said interim orders. The defendants aforesaid application dated 26th February 2015 was heard and

a ruling was delivered on 6th March 2015. In determining the defendants' aforesaid application, some of the issues raised in the First application were by necessity of the process also determined, and the court on its aforesaid ruling stated at paragraph 46 thereof that:

"After this Ruling the parties will be at liberty to proceed with the hearing of the Plaintiffs application for a consideration of the prayers thereof which may remain outstanding after this ruling".

2. It is on the above premises that the Plaintiffs now want the First application to be heard inter partes, and in addition the Plaintiff has filed the Second application. Although the prayers to the First Application, and the history of the matter is contained in the ruling of this court dated 6th March 2015, for chronology and clarity purposes, I will briefly reproduce the same in this ruling.
3. The prayers in the First Application are as follows:

"1. This Application be certified as urgent and heard ex-parte.

1A. Leave be granted to continue this suit as a derivative action.

2. Pending the hearing and determination of this Application, this Suit or further Orders, the Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from acting upon the resolutions made on the 5th day of February, 2015 by the 1st to 3rd Defendants, in respect of the 1st Plaintiff, purporting to appoint the 4th and 5th Defendants as directors of the 1st Plaintiff, revoke the appointment of the 3rd Plaintiff as the Chairman of the Board of Directors of the 1st Plaintiff, appoint the 4th Defendant as the Chairman of the Board of Directors of the 1st Plaintiff, terminate the employment of the 1st Plaintiff's Chief Executive Officer, Lucas Akunga Omariba, appoint Anthony Njoroge as acting Chief Executive Officer of the 1st Plaintiff, terminate the employment of John Ngahu and Elizabeth Ndichu as employees of the 1st Plaintiff, remove Lucas Akunga Omariba, John Ngahu and the 3rd Plaintiff as signatories to the 1st Plaintiff accounts and replace them with the 6th and 7th Defendants and in respect of the 2nd Plaintiff purporting to appoint the 4th and 5th Defendants as directors of the 2nd Plaintiff, revoke the appointment of the 3rd Plaintiff as the Chairman of the Board of Directors of the 2nd Plaintiff and appoint the 4th Defendant as the Chairman of the Board of Directors of the 2nd Plaintiff.

3. The 1st to 3rd Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 1st and 2nd Plaintiffs without the consent and concurrence of the 3rd and 4th Plaintiffs, pending the hearing and determination of this Application, this Suit or further Orders.

4. The 4th to 7th Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from acting as, holding themselves out as officers or directors of the Plaintiffs, taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 1st and 2nd Plaintiffs, pending the hearing and determination of this application, this Suit or further Orders.

5. The 4th to 7th Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from accessing and operating account numbers 1000143867 and 1000180072 operated by the 1st Plaintiff at the the Mall, Westlands Branch of NIC Bank Limited and 1002095738 1002095676 operated by the 1st Plaintiff at the Village Market Branch of NIC Bank Limited, and account number 0100003674295 and 0100003674309 operated by the 1st Plaintiff with CFC Stanbic Bank Limited, pending the hearing and determination of this

Application, this Suit or further Orders".

4. The prayers in the Second Application are as follows:

> *"1. This Application be certified as urgent and heard exparte.*
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> *2. The Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from effecting any changes in the memorandum and articles of association of the 1st and 2nd Plaintiffs and the shareholding and directorship of the 1st and 2nd Plaintiffs, pending the hearing and determination of this application and/or this suit.*
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> *3. The Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from deliberating agenda items numbers 1, 2, 4, 5, 6, 9 and 11, being the election of Chairman of the Board of Directors of the 1st and 2nd Plaintiffs, Minutes of previous meeting and written resolutions of the 28th day of January and the 5th day of February 2015, Special audit of loan, Review of articles and memorandum of association and proposed amendments, calling of Extra Ordinary General Meeting to approve amendments to the memorandum and articles of association, review of the meeting of the Board of Directors Meeting of the 1st and 2nd Plaintiffs on 24th March, 2015, pending the hearing and determination of this application and/or this suit.*
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> *4. The Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from effecting any payments on account of the alleged loan, from the accounts of the 1st and 2nd Plaintiffs or from any monies of the 1st and 2nd Plaintiffs wheresover held, pending the filing in Court of the report on the in-depth audit of the loan, resolved by the 2nd Plaintiff on the 28th day of January, 2015, to be undertaken by PriceWaterHouseCoopers Certified Public Accountants (Kenya), pending the hearing and determination of this application and/or this suit.*
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> *5. The Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from dealing, advertising, charging, selling, mortgaging, transferring in any manner whatsoever properties held by the 1st and 2nd Plaintiffs wheresoever, pending the filing in Court of the report on the in-depth audit of the loan resolved by the 2nd Plaintiff on the 28th day of January, 2015, to be undertaken by Price WaterHouseCoopers Certified Public Accountants (Kenya), pending the hearing and determination of this application and/or this suit.*
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> *6. The 1st to 3rd Defendants be directed to account to the 1st and 2nd Plaintiffs for the sum of United States Dollars thirteen Million Five Hundred and Forty thousand and Three (US$ 13,540,003.00) in respect of which the loan is overpaid referred to paragraph 17 of the Amended Plaint, pending the hearing and determination of this suit.*
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> *7. The 1st to 3rd Defendants be directed to deposit in Court, the sum of United States Dollars Thirteen Million Five Hundred and Forty Thousand and Three (US$ 13,540,003.00) in respect of which the loan is overpaid as security for their appearance in this matter.*
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> *8. The audit by PriceWaterHouseCoopers Certified Public Accountants (Kenya) directed to be undertaken in terms of the order of 6th March, 2015, be undertaken by the said Price WaterHouseCoopers Certified Public Accountants (Kenya) as resolved in the minutes of the Board of Directors Meeting of the 2nd Plaintiff held on 28th January, 2015 as finalized by John L. G. Maonga and signed by the 3rd Plaintiff".*

5. Both applications are premised on the grounds set out therein and both are supported by the affidavits of NAHASHON NGIGE NYAGAH sworn on 5th February 2015; 23rd February 2015; 19th March 2015; and a Supplementary Affidavit filed in court on 25th February 2015.
6. Both applications are opposed by the Respondents. Firstly the Respondents through their

application dated 26th February 2015 sought to have the interim exparte orders given pursuant to the First Application to be set aside. The application is supported by the affidavit of STEPHEN ARMSTRONG JENNINGS dated 26th February 2015. Mr. JENNINGS also filed a Replying Affidavit dated 20th March 2015 and filed in court on 23rd March 2015 in opposition to the Second Application herein, and a Further Replying Affidavit filed in court on 27th March 2015. In addition the defendants filed a notice of Preliminary Objection in court on 20th March, 2015 objecting to the Second Application.

7. The First Application was substantially dealt with in the ruling of this court on 6th March 2015, and the only pending issues therein are this court's resolution on the prayers (a) and (b) which were given for a period pending the hearing inter partes of the application and determination – which is this ruling. Prayers (c) and (d) were given pending the tabling of a Report to be prepared by PriceWaterHouseCoopers (PWC), a matter which is yet to take place. To that extent the First Application herein is limited to the determination of the orders (a) and (b) of the ruling of 6th March 2015. The Second Application, however, is entirely fresh and will be fully considered.

THE APPLICANTS' CASE AND SUBMISSIONS:

8. The Plaintiffs claim as contained in the Amended Plaint filed in Court on 19th March 2015 is mainly premised on alleged breach of fiduciary duty and fraud allegedly perpetrated by the defendants against the Plaintiffs. It is alleged that the 1st Plaintiff is the registered owner of property Land Reference Number 28867/1 measuring about 996.6 hectares on which a project by the name Tatu City is to be undertaken. The project is being undertaken as venture of investors represented on the Board of Directors of the 1st Plaintiff by the 3rd and 4th Plaintiffs on the one hand, and the 1st to 3rd Defendants on the other hand. The 3rd Plaintiff has been the Chairman of the Board of Directors of the 1st Plaintiff since the commencement of the project. The 2nd Plaintiff is the registered owner of the following 9 properties on which is undertaken coffee farming and processing: L.R. Nos. 117, 11294, 11285, 113/1, 113/2, 7386, 7192, 111/1 and 110/2.
9. The activities of the 2nd Plaintiff are undertaken as venture of investors represented on the Board of Directors of the 2nd Plaintiff by the 3rd and 4th Plaintiffs on one hand and the 1st to 3rd Defendants on the other hand. The 3rd Plaintiff has been the Chairman of the Board of Directors of the 2nd Plaintiff since the year 2010. At an offshore level, the partners through a special purpose vehicle, Cedarsoc Limited, jointly secured a loan in the sum of (US$ 62,500,000.00) for the purchase of the 2nd Plaintiff. The loan was secured by a charge over the shares and properties of the 1st Plaintiff through the agency of Renaissance Partners Investment Limited, a company alleged to be under the control of the 1st, 2nd, 3rd and 5th Defendants. It is alleged that several properties of the 2nd Plaintiff have been sold and the proceeds thereof utilized towards the repayment of the loan. The sales were sanctioned by a resolution of the Board of Directors of the 2nd Plaintiff made on the 7th day of May, 2010 to raise up to US$ 62,500,000.00 and related to the following properties, L.R. Nos. 8749 (Wango Estate); 10083 (Mtaro Estate); 10883/2, 11486 and 11428 (Gethumbwini Estate); 10887 (Karangaita Estate) and 11285, 11287, 11288 and 11289 (Ruera Estate).
10. It is alleged that the 1st, 2nd, 3rd and 5th Defendants have total control over the details of repayment of the loan and have despite requests from the Plaintiffs refused and or failed to account for the amount repaid. That notwithstanding, the Plaintiffs allege that the properties mentioned in paragraph 16 of the Amended Plaint have all been sold realizing US$ 75,325,128.00 all of which was appropriated towards the repayment of the loan thereby fully satisfying any liability on the loan. In confirmation of this fact, it is alleged that a Business Plan prepared by the 1st Defendant on the 29th day of May, 2014 indicates that there exists no loan to a third party and that the entire land sale process is intended to increase the 1st, 2nd, 3rd and 5th Defendants control over the 1st an 2nd Plaintiffs' assets and to undermine the Plaintiffs. The Plaintiffs' reconstruction of the loan account based upon, amongst others, the sum of US$. 75,325,128.00 utilised towards the repayment of the loan indicates that the loan has been overpaid by US$. 13,540,003.00.
11. Based on the above, the applicants further allege that the 1st to 3rd Defendants have, in breach of their fiduciary duties as directors of the Plaintiffs, fraudulently continued to misrepresent the status of the loan, bound the 1st and 2nd Plaintiffs on further obligations to repay the already repaid

loan and make demands on the same to justify further sale of the properties of the 2nd Plaintiff.

12. The Applicants provided details of the alleged breach of fiduciary duty and fraud, stating that On the 1st day of June, 2012, the 3rd Defendant acting without authority of the Board of Directors of the 1st and 2nd Plaintiffs, unilaterally executed a Master Intra-Group Loan Agreement committing the 1st and 2nd Plaintiffs into further loan agreements and repay the same. On the 14th day of September, 2012, the 1st and 3rd Defendants appropriated US$. 2,215,000.00 to their personal use or use by third parties associated with them. On 7th day of November, 2012, the 1st and 3rd Defendants requisitioned US$. 5,800,000.00 on behalf of the 1st Plaintiff, remitted US$. 300,000.00 and appropriated US$. 5,500,000.00 to their personal use or use by third parties associated with them. On the 26th day of September, 2014, an agent of the 1st to 3rd Defendants drew and presented to the 1st and 2nd Plaintiffs a loan statement indicating the outstanding liability thereunder as US$. 83,946,677.00 when no such amount or any part thereof was outstanding. On the 12th day of December, 2014, the 3rd Defendant acting on his own and on behalf of the 1st and 2nd Defendants executed a document binding the 1st Plaintiff to a waiver of interest on account of default in repayment in sum of US$. 6,339,320.00 when there was no such default; and On the 28th day of January, 2015, the 1st to 3rd Defendants misrepresented to the 2nd Plaintiff that there was an outstanding liability on the loan in the sum of US$. 94,000,000.00 and committed the 2nd Plaintiff to a further sale of property for a sum of US$. 48,000,000.00 towards the alleged liability. On the foregoing basis, the 1st and 2nd Plaintiffs claim an account of and/or special damages against the 1st to 3rd Defendants in the sum of US$. 13,540,003.00 arising out of the breaches particularised hereinabove.

13. It is further alleged that the 1st, 2nd and 3rd Defendants have in further breach of their fiduciary duties as directors of the 1st Plaintiff purported to donate to the 7th Defendant a power of attorney giving him draconian powers to unilaterally deal with the assets and affairs of the 1st Plaintiff. A meeting of the Board of Directors of the 1st and 2nd Plaintiffs was held on the 28th day of January, 2015. During the presentation of the 1st Plaintiff's Chief Executive Officer's report, it was noted that there was interference by the 1st, 2nd and 3rd Defendants in the management of the 1st Plaintiff. It is alleged that the meeting became disorderly, unruly and aborted on account of the 1st Defendant's attempt to take unilateral control of the deliberations and resolutions of the Board of Directors. Prior thereto, the meeting of the Board of Directors of the 2nd Plaintiff had proceeded, deliberations on the issue of the claimed outstanding loan taken and a resolution in the following terms made under MIN 12/2015 (e):-

"Appointment of PricewaterhouseCoopers (PwC) to carry out Audit on the loan account

It was resolved:-

i. ***to appoint an independent auditing firm to carry a comprehensive and detailed audit of the Company's loans account and the reconciliation of the loan repayments thereon.***
ii. ***that Messrs PricewaterhouseCoopers (Pwc), Certified Public Accountants, be and are hereby appointed to carry out the required independent audit of the loans account.***
iii. ***that the objective of this audit exercise was to determine the total loan amounts secured by the Company from inception to date and the reconciliation on the repayments thereon.***
iv. ***that the Chairman and Mr Robert Reid be and are hereby authorised to discuss and agree with PwC on the Terms Of Reference (TORs) and the Fees to be charged by PwC.***
v. ***that thereafter, PwC to proceed and start the audit process with immediate effect.***
vi. ***that the Chairman and Mr Robert Reid to provide required documentations to PwC for the required audit."***

14. A reconvened meeting of the Board of Directors of the 1st Plaintiff was held on the 5th day of February, 2015 to transact the unfinished business of the meeting of the 28th day of January, 2015. It is alleged that the 1st Defendant again, disrupted the proceedings seeking to introduce a new

agenda to elect a new chairman of the Board of Directors, an issue that could not lawfully be deliberated at the reconvened meeting. The meeting ended prematurely without any resolutions. A few minutes thereafter, it is alleged the 1st, 2nd and 3rd Defendants emailed the 3rd and 4th Plaintiffs resolutions to sign. The resolution in respect of the 1st Plaintiff purported to appoint the 4th and 5th Defendants as directors of the 1st Plaintiff, revoke the appointment of the 3rd Plaintiff as the Chairman of the Board of Directors of the 1st Plaintiff, appoint the 4th Defendant as the Chairman of the Board of Directors of the 1st Plaintiff, terminate the employment of the 1st Plaintiff's Chief Executive Officer, Lucas Akunga Omariba, appoint Anthony Njoroge as acting Chief Executive Officer of the 1st Plaintiff, terminate the employment of John Ngahu and Elizabeth Ndichu as employees of the 1st Plaintiff, remove Lucas Akunga Omariba, John Ngahu and the 3rd Plaintiff as signatories to the 1st Plaintiff bank accounts and replace them with the 6th and 7th Defendants. The resolution in respect of the 2nd Plaintiff purported to appoint the 4th and 5th Defendants as directors of the 2nd Plaintiff, revoke the appointment of the 3rd Plaintiff as the Chairman of the Board of Directors of the 2nd Plaintiff and appoint the 4th Defendant as the Chairman of the Board of Directors of the 2nd Plaintiff. It is alleged that the matters set out in the two resolutions had not been the subject matter of any meeting of the shareholders or of the Board of Directors of the 1st and 2nd Plaintiffs. They were unlawful and ultra vires the memorandum and articles of association of the said 1st and 2nd Plaintiffs.

15. It is also the applicants' case that subsequent to the filing of this suit and the issuance of an order on the 6th day of March 2015, that the audit of the loan account be undertaken and a report be filed in Court within 45 days, the Defendants have frustrated the efforts to commence the audit and have taken further unlawful actions to exclude the 3rd and 4th Plaintiffs from the management of the 1st and 2nd Plaintiffs. The issue of the audit is now the subject of a separate application by the 3rd defendant filed in court on 23rd April 2015, and therefore I will not deal with it in this ruling.
16. It is also the Applicants' case that the Defendants have called for a meeting of the Board of Directors of the 1st and 2nd Plaintiffs on 24th March, 2015 with the intention of amongst others, removing the 3rd Plaintiff as Chairman of the Board of Directors and as one of the persons designated to liaise with PWC in the proposed audit, ratifying the unlawful alterations to the minutes of 28th January, 2015 and altering the memorandum and articles of association of the 1st and 2nd Plaintiffs to further their intended unilateral control of the 1st and 2nd Plaintiffs.
17. It is the Applicants' case that the 1st, 2nd and 3rd Defendants' actions aforesaid are intended to give them exclusive control over the affairs of the 1st and 2nd Plaintiffs in order that they may continue pilfering the capital and income of the Plaintiffs whilst asset stripping the Plaintiffs. It is alleged that there is real danger that the 1st, 2nd and 3rd Defendants' actions will leave the Plaintiffs exposed because the properties of the 1st and 2nd Plaintiffs would have been sold, the proceeds therefore siphoned out of the Country and beyond reach because the said 1st, 2nd and 3rd Defendants are not Kenyan Nationals and cannot be readily available to account should the project stall or fail. In view of the foregoing, the Plaintiffs are apprehensive that the Defendants will, unless restrained by an order of this Court, continue with their unlawful actions and the Plaintiffs will suffer irreparable loss and damage to their businesses.

THE RESPONDENTS' CASE AND SUBMISSIONS:

18. The Respondents have challenged the Applicants' case by affidavits of STEPHEN ARMSTRONG JENNINGS who provided a detailed chronology and history of the 1st and 2nd Plaintiff companies so that what he called misinformation by the applicants may be cleared. Mr. Jennings stated that in or about 2007 Renaissance Partners Investment Limited ("Renaissance") was approached by the 2nd and 3rd Plaintiffs together with one Steve Mwagiru (collectively 'the Local Partners') to jointly acquire 100% interest in the 2nd Plaintiff which was then known as Socfinaf Company Limited. The Local Partners had secured a right to acquire Socfinaf and these rights resided in an entity called Waguthu Holdings Kenya Limited (WHL") in which Steve Mwagiru and his mother, Rosemary Mwagiru held the entire shareholding and were the founding

directors. WHL is now known as Tatu City Limited, the 1st Plaintiff herein. Socfinaf owns various parcels of land in Thika and Ruiru Municipality some of which are detailed at paragraph 12 of the Amended Plaint. After completing due diligence, Renaissance was unable to participate in the transaction because of global financial market conditions as well as because the transaction as structured did not meet its investment criteria. The Local Partners therefore renegotiated with Socfinaf and agreed on a two (2) step process for the completion of the transaction: i. WHL acquires several parcels of land being LR No. 91, LR No. 104, LR No. 11538.2 and LR No. 8182 jointly known as Tatu Estate ("Tatu") from Socfinaf for US$ 20,000,000.00; and ii. WHL gets an option to buy 100% of Socfinaf, before 31st December 2009 for between US$ 62,000,000.00 to US$65,000,000.00 ("the Option") depending on the time of exercise of the Option. Renaissance paid US$1,000,000.00 Option Fee to secure the Option. The consideration for the purchase of Tatu Estate was US$20,000,000.00 and an additional US$ 800,000.00 was required for stamp duty. The Local Partners did not have the necessary funding to complete this acquisition and once again invited Renaissance to participate in the revised structure; this time Renaissance agreed to participate. In consultation with all the Partners, it was agreed that the transition would be structured as follows:

i. A Special Purpose Vehicle (SPV) would be incorporated and registered in Mauritius to hold the interest of all the parties. This entity was known as Cedar IV Limited ("Cedar IV").
ii. Renaissance through a Cypriot subsidiary known as SCF II Holdings Limited ("the Renaissance SPV") would and did subscribe for 52% of Cedar IV by paying US$10,800,000.00;
iii. The Local Partners also registered a Special Purpose Vehicle in Mauritius called Manhattan Coffee Investment Holdings Limited ("MCIH");
iv. To enable the Local Partners to participate in the acquisition, Renaissance loaned MCIH US$9,900,000.00 to subscribe for 48% of Cedar IV;
v. Cedar IV then loaned US$20,800,000.00 to WHL to pay the agreed consideration for the purchase of Tatu (US$20,000,000.00) and the stamp duty (US$ 800,000.00);
vi. The shareholders of Cedar IV entered into a Shareholders' Agreement where all matters were governed by English Law and subject to the exclusive jurisdiction of English Courts and the London Court of International Arbitration.

19. Because Cedar IV was a foreign entity, the Partners were advised that it could not hold an equity interest in a private company owning agricultural land. Accordingly WHL was converted into a public company with 1,570,000 issued shares which were distributed and held as follows:

Cedar IV (Mauritius) Limited	1,569,993 shares
Stephen Mwagiru	1 share
Rosemary Wanja Mwagiru	1 share
Judith Nyagah	1 share
Vimal Shah, [the 4th Plaintiff]	1 share
B D Shah	1 share
Tarun Shah	1 share
Deepak Shah	1 share

Cedar IV therefore became the 99.999% owner of WHL with the other seven (7) shares divided among the Local Partners and their nominees. As Cedar IV had loaned WHL the entire amount required for the acquisition of Tatu, it required and obtained the following security:

i. Custody of all original share certificates;

ii. A charge over all the shares of WHL;
iii. Debenture and Mortgage over WHL's assets;
iv. Blank share transfers forms;
v. Signed resignations letters by the Mwagirus from directorship of WHL;
vi. Signed resolutions by the Mwagirus required to effect all the required changes in WHL;
vii. Signed letter appointing Messrs. Josphat Kimyua, Nahashon Nyaga, Vimal Shah and Maina Mwangi as directors of WHL;
viii. Signed sale of shares agreement between the Mwagirus and Cedar IV.

20. Mr. Jennings stated that in mid-2009, the shareholders of WHL commenced the process of raising capital to complete the acquisition of Socfinaf. The Partners jointly engaged Equity Investment Bank Corporate Finance to raise funding from the local banks. However, the amount to be raised was too high for the local market and the local banks were hesitant to finance real estate projects at the time. Accordingly, Renaissance took upon itself the responsibility for raising the amount required and was able to raise US$70,000,000.00 in March 2010 as follows:

i. US$62,500,000.00 as senior debt from a consortium of offshore lenders, including Renaissance affiliates;
ii. US$7,500,000.00 from two offshore equity investors, including Renaissance affiliates;

21. The acquisition of Socfinaf was effected via a Mauritius registered entity called CedarSoc Limited ("CedarSoc") whose shareholders initially were SCFII (45%) and MCIH (55%). CedarSoc used the funds raised by Renaissance to complete the acquisition of Socfinaf and to meet related transaction costs. The total purchase price was US$65,668,103.00. Because Section 56 of the Companies Act, Chapter 486 prohibits a buyer of a company from using the company's assets as security, the consortium of lenders insisted on WHL being a guarantor to the facility and also asked for the following security:

i. Pledge of all Socfinaf shares;
ii. Pledge of all WHL shares;
iii. Debenture over WHL assets;
iv. Charge over WHL (Tatu's) properties;
v. Cancellation of all the previous charges and debentures on WHL assets.

22. Mr. Jennings stated further that Steve Mwagiru, the 2nd and 3rd Plaintiffs as well as Arnold Meyer and Josphat Kinyua were appointed directors of Socfinaf. With respect to the facility, Renaissance was appointed as the facility agents. The facility was for one (1) year at the rate of 33% per annum. The 3rd and 4th Plaintiffs were the directors who were present at the meeting of the 1st Plaintiff's board of directors held on 11th March 2010 when the facility of US62,500,000 was approved including interest on the loan at 33% per annum. Thus, the loan was accruing over US$20,500,000.00 of interest per annum. The term of the loan was to be 365 days from the date of drawdown. This court has noted that all these allegations clearly appear from Minutes 5.3, 5.4 and 5.6 of the extract from the minutes dated 11th March 2010 and duly signed by both the 3rd and 4th Plaintiffs and was produced marked as pages 1-3 of the exhibit 'SAJ 1'. The deponent stated that the repayments on the loan were predicated on Socfinaf being able to sell some identified parcels of land to interested parties and that the 3rd and 4th Plaintiffs were well aware that the repayment of this loan was frustrated by the Winding Up Petitions No. 29 and 30 of 2010 which was brought by another group of minority shareholders being Stephen Mwagiru and his mother Rosemary Mwagiru. During the pendency of the Winding Up Petitions, the Companies had no way of raising any money because of the effect of Section 224 of the Companies Act and the debt ballooned out of control. It was only after the Winding Up Petitions were dismissed by the Court on 18th January, 2013 that the Companies have been able to resume the transactions for the sale of some of the properties. However, the additional losses suffered by the Companies during the pendency of the Winding Up Petitions necessarily meant that the Companies were compelled to sell more properties than had previously been contemplated in order to pay off the additional liabilities which were incurred as a result of the winding up petitions. Mr. Jennings

further stated that because the debt was in default and over collateralized, the lenders insisted on repayment and the only way out was for the shareholders to buy the debt. Shareholders were therefore offered pro rata participation in buying the debt but the 3rd and 4th Plaintiffs repeatedly declined to participate and they have not disclosed this to the court but are seeking to project the 1st to 3rd Defendants as individuals who seek to exaggerate the indebtedness of the Companies. Mr. Jennings stated that given the size of the interest charge on the outstanding debt it is clear to see that reducing the loan principal should be the overriding commercial imperative of the Companies and each of the shareholders. Restating the finding of the Court in its ruling delivered on 6th March 2015 Mr. Jennings asserted that it is not possible that the 1st to 3rd Defendants could seek to act against the interests of the Companies in view of the amounts of money that have already been raised for the purpose of undertaking the infrastructure works. He stated that the Defendants have no interest in frustrating or otherwise interfering with the audit to be undertaken by PWC and their only interest is to ensure that the audit is undertaken in a clear and transparent manner with the full knowledge and authority of the boards of directors of the Companies.

The Order given on 6th March 2015 was to the effect that PWC was to be appointed by the appropriate organs of the Plaintiff Companies. In view of the fact that the deliberations at the meetings of 28th January 2015 and 5th February 2015 were disputed as evidenced at paragraphs 20 and 21 of the Amended Plaint, Mr. Jennings stated that it was necessary, for the sake of proper corporate governance, to hold a meeting of the Boards of Directors of the Companies at which the terms of the audit including the terms of engagement of PWC could be ratified. Mr. Jennings confirmed in his affidavit that the Defendants have no intention of removing the 3rd Plaintiff from his position as Chairman of the Board of the Companies which has in any event been protected by the order of the Court made on 6th March 2015. However, Articles 109 and 111 of the Articles of Association of Companies contemplate the election of a Chairman for each meeting. The Companies are striving to follow their constitutions as closely as possible in order to ensure proper corporate governance.

23. On the issue of rendering accounts, Mr. Jennings submitted that the prayer for an account is mischievous and is in any event already the subject of the audit to be undertaken by PWC. With respect to the proposed amendments to the Articles of Association of the Companies, the intention is to strengthen the governance structures of the Companies and to enable them to operate more efficiently. There is nothing sinister about the proposed amendments and the 3rd and 4th Plaintiffs have not pointed out what they consider to be objectionable. To alleviate any fears on their part, Mr. Jennings produced and marked as exhibits 'SAJ 2' a schedule showing all the proposed amendments to the Articles of Association of the Companies and deponed that there was no sinister in the agenda.
24. Mr. Jennings further deponed that this Court by its decision dated and delivered on 6th March 2015 gave the 3rd and 4th Plaintiffs leave to continue this suit as a derivative action. In these circumstances, he averred that the Companies cannot continue as Plaintiffs in this suit and must be joined as nominal defendants.

ANALYSIS:

25. Counsel also made oral submissions before the court in which most of the issues above were reiterated. I have carefully considered the applications before the court, and below is the brief summary of how I understand the case:

Corporate structure of Tatu City Limited and Kofinat Company Limited:

26. The 1st and 2nd Plaintiffs, Tatu City Limited and Kofinaf Company Limited are public limited liability companies registered in Kenya. They are engaged in a city development project called Tatu City. The directors of the 2 companies are Hans Jochum Horn, Stephen Armstrong Jennings, Frances Holliday, Nahashon Ngige Nyagah and Vimalkumary Bhimji Depar Shah. Save for Vimal Shah, the rest of the directors are not shareholders of the 2 companies. (**The CR 12 in respect of the 2 companies are at pages 33 to 34 and 64 to 65 respectively, of the plaintiffs'**

Bundle of Documents dated 5th February, 2015). The majority shareholder of Tatu City Limited is Cedar IV Limited, a company registered in Mauritius. The shareholders of Cedar IV Limited are SCF Holdings II Limited with 500,001 shares and Manhattan Coffee Investment holdings with 459,999 shares. The majority shareholder of Kofinaf Company Limited is CedarSoc Limited, a company registered in Mauritius. The shareholders of CedarSoc Limited are SCF Holdings II Limited with 450,000 shares and Manhattan Coffee Investment Holdings with 550,000 shares. (**This information is contained at pages 71 to 74 of the Plaintiffs' Bundle of Documents dated 19th March, 2015, the share certificates and corporate structure at pages 1 to 10 of the Plaintiffs' Bundle of Documents dated 24th March, 2015**). Stephen Armstrong Jennings, Hans Jochum Horn, Frances Holliday are the 1st to 3rd Defendants. They represent the interests of the so called foreign partners in the 2 companies. Nahashon Ngige Nyaga and Vimalkumar Bhimji Depar Shah are the 3rd and 4th Plaintiffs. They represent the interest of the so called local partners.

The Loan:

27. The investment venture of Tatu City Limited and Kofinaf Company Limited was financed by a loan of US$. 62,500,000.00 secured through Renaissance Partners Investment Limited, a company associated with the 1st to 3rd Defendants. On 7th May, 2010 it was resolved by the board of directors of Kofinaf Company Limited, to sale some out of 10 identified properties, for the purpose of raising US$ 62,500,000.00 towards the repayment of the loan. (**The resolution is at page 1 to 3 of the Plaintiffs' Bundle of Documents dated 19th March, 2015**). It was a unanimous resolution of the directors of the Kofinaf Company Limited.

Genesis of dispute:

28. The local partners allege that they have since September, 2013 sought to know from the foreign partners, a true and correct account of the loan repayment supported with necessary statements. The claim is based on the fact that the foreign partners have exclusive knowledge and control of the status of repayment of the loan and have not provided details of the same to the local partners. (**The correspondences in evidence of this claim are at pages 4 to 17 of the Plaintiffs' Bundle of Documents dated 19th March, 2015**). The local partners' position is that 8 out of the identified properties have been sold for US$ 75,325,128.00 way above the target set on 7th May, 2010 and the proceedings of the sale utilized towards the repayment of the loan. The list of sold properties is at page 18 of the Plaintiffs' Bundle of Documents dated 19th March, 2015. The local partners claim that their reconciliation of the loan account indicates an overpayment by US$ 13,540,003. The reconciliation is at pages 19 to 20 of the Plaintiffs' Bundle of Documents dated 19th March, 2015.
29. The directors of the 2 companies worked harmoniously and made decisions unanimously until 28th January, 2015 when the foreign partners outvoted the local partners in a resolution of the 2nd Plaintiff to sale Ruera 1, a property of the 2nd Plaintiff for US$. 48,000,000.00 towards the repayment of the loan which the 1st to 3rd Defendants claimed stood at US$. 94,000,000.00 on the same date, there was a unanimous resolution, prompted by demands by the 3rd and 4th Plaintiffs, that PwC audits the loan account. The resolutions are at pages 63 to 65 of the Plaintiffs' Bundle of Documents dated 19th March, 2015.
30. On 5th February, 2015, the 1st to 3rd Defendants without calling for any meeting of the board of directors of the 1st and 2nd Plaintiffs, unilaterally resolved to remove the 3rd Plaintiff as Chairman of the board of directors of the 1st and 2nd Plaintiffs and replace him with the 4th Defendant whom they appointed a director of the 1st and 2nd Plaintiff on the same date. The 5th Defendant was also appointed a director of the 1st and 2nd Plaintiffs. The 3rd Plaintiff was removed as a signatory to the accounts of the 1st and 2nd Plaintiffs. The 5th to 7th Defendants were included as signatories to the said accounts. This decision prompted the filing of this suit.

Claims in Court:

31. The prayers in the Plaint sought to declare null and void and reverse the changes intended to be

effected on the 1st and 2nd Plaintiffs pursuant to the resolutions made by the 1st to 3rd Defendants on 5th February, 2015. An application for injunction was filed simultaneous with the Plaint. On 6th March, 2015, the Court directed that the audit of the loan be undertaken and a report in respect thereof filed in Court in 45 days. The Court further directed that the 3rd Plaintiff remains as chairman of the board of directors of the 1st and 2nd Plaintiffs until the hearing and determination of the application for injunction.

32. PwC was engaged to undertake the audit in terms of a meeting held on 10th March, 2015 and letter of instructions from the 2nd Plaintiff dated 11th March, 2015. The minutes are at pages 94 to 96 whilst the instruction letter is at page 99 of the plaintiffs' Bundle of Documents dated 19th March, 2015. The audit was stopped by the 1st to 3rd Defendants on 12th March, 2015, on the claim that there was a disagreement on who should instruct pwC and that the issue need be resolved by the board of directors of the 2nd Plaintiff. The email in that regard is at page 101 of the Plaintiffs' Bundle of Documents. Thereafter, there were attempts by the 1st to 3rd Defendants to alter the minutes of the resolution of the board of directors of the 2nd Plaintiff made on 28th January, 2015 on the audit, limit the scope thereof and exclude the 3rd Plaintiff from participation. The attempts were resisted by the Plaintiffs. The correspondences and minutes in that regard are at pages 137 to 173 of the plaintiffs' Bundle of Documents dated 19th March, 2015.

33. On 17th March 2015, the 1st to 3rd Defendants gave notice of a meeting of the board of directors of the 1st and 2nd Plaintiffs to be held on 24th March, 2015. The agenda included amongst others, the election of chairman, review of the minutes of 28th January, 2015 and resolutions of 5th February, 2015, audit of the loan, review of the articles of association and proposed amendments thereto and land sales. The notices also proposed amendments to articles as shown at pages 174 to 247 of the Plaintiffs' Bundle of Documents dated 19th March, 2015 and pages 278 to 314 of the Plaintiffs' Bundle of Documents dated 24th March, 2015.

34. The 1st to 3rd Defendants' actions referred to hereinabove prompted the filing of the Amended Plaint and an application for injunction, accounts, security for appearance and settlement of terms of the audit on 19th March, 2015. The Plaintiffs' complaints as against the Defendants are set out in detail, in 4 Affidavits sworn by the 3rd Plaintiff on 5th February, 2015, 23rd February, 2015, 19th March, 2015 and 24th March, 2015. The Defendants have not filed a defence to the main claim. Their response to the Plaintiffs' complaints are set out in 3 Affidavits sworn by the 1st Defendant on 26th February, 2015, 20th March, 2015 and 27th March, 2015.

Issues for determination by this Court:

i. Whether this court can enquire into the make-up of the offshore entities or contribution to the capitals of the 1st and Plaintiff Companies.
ii. The removal of the 3rd Plaintiff as Chairman of the Board of Directors of the 1st and 2nd Plaintiffs and other matters connected with the resolutions of 5th February 2015 aforesaid.
iii. Whether the appointment of the 4th to 7th Defendants as officers of the 1st and 2nd Plaintiffs should be revoked.
iv. Whether the proposed meetings of the 1st and 2nd Plaintiffs called for on 24th March 2015 should be revoked.
v. Whether this court should stop or stay further loans repayment and further land sales.
vi. Order for accounts and security by the 1st to 3rd defendants.
vii. Order on costs.

35. In answer to issue number one whether this court can enquire into the make-up of the offshore entities or contribution to the capitals of the 1st and 2nd Plaintiffs, it is the finding of this court that the share certificate issued by the Registrar of Companies is the final authority in determining the share qualifications of shareholders. This is expressly stated under Section 119 of the Company's Act as follows:

Section 119:

"No notice of any trust expressed, implied or constructive shall be entered on the

register, or be receivable by the registrar".

This is an express denial of beneficial ownership of shares.

To fortify the above express provision of the law the Court of Appeal in **VADAG ESTABLISHMENT VS. YASHVIN NUMISED AG & OTHERS (Civil Appeal No. 83 of 2001)** rejected the doctrine of beneficial ownership of shares with specific reference to Section 119 of the Act. That being the case, the contention by the applicants that they own more shares than the registrar of companies may have indicated in the register is untenable. Further, the submission that appears to invite the court to enquire into the make up of the offshore entities or contribution to the capitals of the 1st and 2nd Plaintiff companies is beyond the scope of this ruling. Indeed, as Mr. Ochieng Oduol submitted, the issue of shareholding in the Plaintiff companies was determined in the Winding Up Petitions Nos. 29 and 30 of 2010. Mr. Havi for the applicants had urged that the parties before the court should be treated equally, noting that the 1st defendant is not a shareholder of the 1st and 2nd Plaintiffs and, just like the 3rd Plaintiff, their interests are in the offshore.

I do appreciate the offshore interest of both parties in this matter. However, a proper determination of the issues before this Court shall not involve any accurate determination of the said offshore interest beyond the facts sustaining this case and opposition or defence to it.

36. The second issue concerns the purported removal of the 3rd Plaintiff as chairman of the Board of Directors of the Plaintiff companies. The removal of the 3rd Plaintiff as chairman and replacement with the 4th Defendant was done on 5th February, 2015. The resolutions in that regard are at pages 181 to 184 and 185 to 187 of the Plaintiffs Bundle of documents dated 5th February, 2015. The action is challenged by the Plaintiffs for the reason that it is unlawful and ultra vires the articles of association of the 1st and 2nd Plaintiffs. The action is defended by the Defendants on the claim that articles 109 and 111 of the 1st and 2nd Plaintiffs empowered them to remove the 3rd Plaintiff at will, through a majority resolution. The articles which are similar, read as follows:

"The Directors may elect a Chairman and Deputy-Chairman for their meetings and determine the period for which they each hold office, but if no such Chairman or Deputy Chairman is elected, or if at any meeting neither the Chairman nor the Deputy-Chairman is present within five minutes after the time appointed for holding the same, the Directors present may choose one of their number to be Chairman of the meeting".

37. There is no dispute that the 3rd Plaintiff has been the chairman of the board of directors of the 1st and 2nd Plaintiff since the commencement of the investment venture for the development of Tatu City. That being so, and in the ordinary cause of business, it is only in his absence that one of the directors present may be chosen to chair a particular meeting. Though the term of the 3rd Plaintiff's office appears not to have been determined, he can be replaced only in an election as set out in articles 109 and 111. The Defendants cannot claim that there was a re-convened meeting of the 1st and 2nd Plaintiffs on 5th February, 2015 to back their unilateral resolutions on the issue of election of chairman. The board of directors meeting of the 2nd Plaintiff was successfully held and concluded on 28th January, 2015 as evidenced by the minutes in respect thereof at pages 53 to 65 of the Plaintiffs' Bundle of Documents dated 19th March, 2015. The fact is pleaded in the Amended Plaint and deponed to in the various affidavits of the 3rd Plaintiff. It has not been disputed. The board of directors meeting of the 1st Plaintiff aborted on 28th January, 2015. A notice reconvening the meeting for 5th February, 2015 was issued on 29th January, 2015. The notice is at page 179 of the Plaintiffs' Bundle of Documents dated 5th February, 2015. The agenda for the meeting did not include the election of chairman or appointment of the 4th Defendant as a director. It did not include any of the matters contained in the 2 resolutions made on 5th February, 2015. The reconvened meeting was chaotic and aborted without any resolution. This fact is deponed to in the affidavit of the 3rd Plaintiff sworn on 5th February, 2015. The deposition is not traversed. It follows therefore, that there was no decision by the directors of the 1st and 2nd Plaintiffs on 5th February, 2015 for the election of chairman for the board of directors

of the 2 companies.

38. The decision making process by directors of a company is a matter that has been set clear in Halsbury's Laws of England, 5th Edn. Vol. 14 para. 527 in the following words:

"A company's articles of association usually contain provisions as to the way in which directors at their meetings may conduct business and make decisions, including allowance for decisions to be taken instead by way of directors' written resolutions. Directors may validly act only when assembled at a board meeting, unless the articles otherwise provide, and subject to the qualification that the directors (provided they are unanimous) may determine the matters within their jurisdiction by informal means ...

If a power is given to directors by an article of association, the decision of the directors to exercise it should, it seems, be unanimous unless on the true construction of the articles of association a majority decision is enough".

39. The exercise of the power of election of chairman are clearly spelt out in the articles of the 2 companies. There was no such election on 5th February, 2015. The Defendants cannot rely upon the purported unilateral resolution by the 1st to 3rd Defendants as the basis of replacement of the 3rd Plaintiff with the 4th Defendant. The action was conducted in contravention of articles 109 and 111 of the 1st and 2nd Plaintiffs and is prima facie, unlawful.

40. Again, the 4th Defendant could not replace the 3rd Plaintiff as chairman on 5th February, 2015 being the same date he is purported to have been appointed a director. The Defendants have not given any evidence that the 4th Defendant is a director of the 1st and 2nd Plaintiffs. There is no Form 203 A filed in that regard. The 4th Defendant was not one of the directors from whom a chairman could be elected or chosen. His assumption to office of chairman of the board of directors of the 1st and 2nd Plaintiffs is therefore, prima facie, ultra vires and unlawful.

41. The 1st to 3rd Defendants' decision of 5th February, 2015 of removing the 3rd Plaintiff as a signatory to the accounts of the 1st and 2nd Plaintiffs was not preceded with a notice, deliberations and decisions reached upon after carrying a vote. It contravened the rule against discrimination of directors as set out in **Musa Misango vs. Eria Musigire and Others (1966) 1 EA 390 (HCU).**

42. A case for an injunction in terms of sections of prayer 2 of the First Application, limited to protection of the 3rd Plaintiff as chairman of and signatory to the accounts of the 1st and 2nd Plaintiffs has been demonstrated.

43. Pursuant to the above, and in the light of this suit where the main controversy appears to be on directorship and shareholding, it would not be prudent for the Defendants to effect any changes in the Memorandum of Articles of the 1st and 2nd Plaintiffs and the shareholding and directorship of the 1st and 2nd Plaintiffs pending the hearing and determination of this suit. In that regard prayer 2 of the Second Application is allowed.

44. The Applicants also objected to the appointment of the 4th to the 7th Defendants as officers of the 1st and 2nd Plaintiff. The 4th to 7th Defendants assumed office as officers of the 1st and 2nd Plaintiffs on the basis of the unilateral resolutions made by the 1st to 3rd Defendants on 5th February, 2015. It has been demonstrated how those resolutions did not accord with the requirements as to the calling and holding of meetings of the board of directors and decision making process of the 1st and 2nd Plaintiffs. The Plaint and Amended Plaint has sought to declare the entire resolutions as null and void. A prima facie case to restrain the 4th to 7th Defendants from holding themselves out as officers of the 1st and 2nd Plaintiff has been demonstrated. However, there is already a dispute in court between these two groups. In as much as this court has established that the said resolutions may not have been merited pending the determination of this suit, the granting of this order will paralyse the operations of the said companies, and would give undue advantage to one group pending the hearing of this matter. It is to be noted that in matters like this the court will consider as paramount the interest of the company, and will avoid issuing an order which may paralyse the business of the company or render performance severely difficult. Therefore, pending the finalization of this matter in a full hearing, the status quo of the company as it is today shall be preserved, except that the 3rd

and 4th Plaintiffs shall forthwith resume their positions obtaining before 5th February 2015. As regards the employees who were sacked by the said resolutions of 5th February 2015, this court observes that those employees were neither shareholders nor directors, and having been sacked, the determination of the legality of that decision remains with the Industrial and Labour court, and this court has no jurisdiction to entertain their alleged grievances. In any event, those employees have not complained to this court. The 4th to 7th Defendants will therefore remain as directors pending the hearing of this suit except that the chairmanship of the boards of those companies shall revert to the 3rd Plaintiff, with the 4th Plaintiff remaining a director.

45. The third issue concerned a proposed meeting meant to make changes in the memorandum and articles of association and shareholding and directorship of the 1st and 2nd Plaintiffs. The Defendants did not object to the grant of the order on this issue in terms of prayer 2 of the Second Application pending the conclusion of the audit by PwC. However, there is need to maintain the structure of the companies until the hearing and determination of the suit. The intended alterations to the memorandum and articles of association appears to have been initiated by the 1st to 3rd Defendants without consultation with the 3rd and 4th Plaintiffs or the directive by the shareholders of the 1st and 2nd Plaintiffs. A raft of changes is intended in the proposed amendments, including giving exclusive control powers to the 1st to 3rd Defendants and limiting shareholders' rights. The Defendants have not demonstrated how these changes are beneficial to the 2 companies or necessary in view of the current management dispute between the foreign and local partners.

46. The exercise of powers of alteration and amendments to memorandum and articles of association of a company is by law, vested in the shareholders. It cannot be lost that there is a veiled scheme by the 1st to 3rd Defendants to exercise those powers, make resolutions on the same and submit the issue to the shareholders for perfunctory ratification. That is not permissible in law.

47. In Halsbury's Laws of England, 5th Edn. Vol. 14 para. 323 the prohibition against alteration and amendments was stated in the following words:

"Directors cannot by resolution alter the articles ..."

48. See also, Halsbury's Law of England, 5th Edn. Vol. 14 para. 235 that:

"Any alterations to a company's articles must be made in good faith for the benefit of the company as a wrole, that is of the corporation as a general body. Subject to this, articles may be freely altered. It is for the shareholders and not the court to determine whether or not the alteration is for the benefit of the company; and the court will not readily interfere with an alteration made in good faith unless it is of such a character that no reasonable person could have regarded it as made for the benefit of the company".

49. At paragraph 39 of his Supplementary Affidavit, the 3rd Plaintiff has detailed the prejudice and lack of bona fides in the intended alterations. There is reasonable apprehension on the part of the plaintiffs that the alterations are intended to further the exclusive control of the 1st and 2nd Plaintiffs by the 1st to 3rd Defendants to the exclusion and detriment of the 1st and 2nd Plaintiffs. In the circumstances, it is necessary that a restraining order be issue in terms of prayer 2 of the Second Application pending the hearing and determination of the suit.
50. Prayer 3 of the Second Application has singled out issues that need not be deliberated upon for the reason that those issues are the subject matter of the dispute pending before this Court. The issues are the election of chairman of the board of directors, minutes of the meeting of 28th January, 2015 and resolutions of 5th February, 2015, audit of the loan account, alterations to the memorandum and articles, calling of an extra ordinary general meeting and land sales. The Defendants did not object to the grant of the order on these issues in terms of prayer 3 of the Second Application pending the conclusion of the audit by PwC. However, there is need to maintain the entire status quo on those issues pending the hearing and determination of the suit.
51. The fourth issue is whether this court should stop or stay further loans repayment or land sales. The proposed audit by PwC is intended to verify the Plaintiffs' claim that the loan is repaid in full

and that there is no need for further land sales and payments to the lender. The Plaintiffs position is that the resolution of 7th May, 2010 by the board of directors of the 2nd Plaintiff was exhaustive of the amount to be raised from land sales towards the repayment of the loan. The Plaintiffs have provided a detailed list of properties sold and the amount of US$ 75,325,128.00 realised and utilized towards the repayment of the loan. Other than the resolution of 7th May, 2010, there has been no other unanimous resolution for further land sales and repayment of the loan. The dispute on the issue culminated in the two resolutions of 28th January, 2015. The resolution to audit the loan was unanimous. The resolution to continue land sales was by the foreign partners alone. It was strongly objected to by the local partners.

52. The 1st to 3rd Defendants have identified Ruera 1 for sale for US$ 48,000,000.00 towards the repayment of the loan which they claim is outstanding at US$. 94,000,000.00. The Defendants have in their meetings of 28th January, 2015, 5th February, 2015, 12th February, 2015 and 24th March, 2015 continued to list the land sales and payments to the lender as agenda items. The Plaintiffs' position has been that the lender has not made any formal demand of any outstanding loan to the 1st and 2nd Plaintiffs or sought to realize the various securities given in respect thereof. They are concerned by the 1st to 3rd Defendants insistence on repayment from their position as directors of the 1st to 2nd Plaintiffs. The Plaintiffs are of the view that the audit of the loan be completed first, to establish if there is any outstanding liability before any further land sales and payments can be made to the lender. The Plaintiffs submitted that the request is not unreasonable, bearing in mind the fact that the audit is to be completed within 45 days as directed by the Court on 6th March, 2015.

53. I have carefully considered this request. It is clear the 3rd and 4th Plaintiffs have deep reservations about how the Plaintiff companies finances are being applied, and it is within their rights to demand full accounts. They have alleged that the entire loan has been repaid and indeed overpaid by about US$ 14 million. However, the issue of the said loans having been paid, or even being overpaid is seriously disputed, and with good reasons. It is instructive, however, that the 3rd and 4th Plaintiffs have not denied that the loans were given. If that is still correct, then it follows that the said loans must be repaid to the extent provided for in the various contractual documents securing the same. The fact that there has been no demand by the lenders does not mean that the borrowers are not in default. The prayer to stop the repayment of the loans can only be considered seriously by this court where there is a corresponding undertaking by the 3rd and 4th Plaintiffs to bear the loss which may arise from failure to repay the said loans. Without such undertaking, the consequences of failure to repay the loans would be visited against the Plaintiffs companies, which in itself would be against the interests of those conpanies. A prolonged period to abstain from repaying the loan would therefore not be allowed. I am however cognisant that this prayer is only for the duration pending the tabling of the said PWC Report. Initially this was 45 days from 6th March 2015, a time which has already lapsed without the report being tabled and there is no evidence that the same may happen anytime soon. So that the parties may see the sense to carry out the said audit sooner, rather than later, I am inclined to order that the repayment of the said loans be suspended until the PWC or equivalent report is tabled on filed in this court for further directions.

54. The 3rd and 4th Plaintiffs also prayed for orders to stop the dealings in land and/or any other transactions by the defendants involving dealing, advertising, charging, selling, mortgaging, transferring in any manner whatsoever properties held by the 1st and 2nd Plaintiffs wheresoever, pending the filing in court of the said PWC Report, and pending the hearing and determination of this suit.

55. This is another prayer which if granted without serious consideration, may bring to a halt legitimate business of the Plaintiff companies. It is noted that these companies deal in land. They sell and acquire land, and stopping them from doing that business would amount to serious interference with their business. It is also possible that, because that is their business, there could be ongoing transactions at various stages of completion which a restraining order could severely compromise, and affect negatively to the detriment of the Plaintiff companies contracts involving third parties. While it is possible, at least for a limited period, to restrain the repayment of the loans because one would be dealing with known lenders which even this court now knows, a blanket order restraining all transactions on properties of the said companies would be seriously punitive and should not be entertained, even for a moment. Any misgivings and apprehensions by

the applicants are saved by the fact that such transactions take long, are public in nature and cannot be hidden. In whatever stages those transactions could be, they would be authorized and supervised by the legitimate organs of the 1st and 2nd Plaintiff companies, in which the 3rd and 4th Plaintiffs sit. Accordingly, prayer 5 of the Second application is denied.

Prayer for Accounts and Security for Appearance:

56. The Applicants have also at prayer 6 and 7 asked this court for orders directing the 1st to 3rd Defendants to account to the 1st and 2nd Plaintiffs for the sum of USD$ 13,540,003 in respect of which the loan is alleged to have been overpaid and to deposit in court the above said amount in respect of which the loan is overpaid as security for their appearance in this matter. I have carefully considered this prayer in light of the defendants response about the said loan facilities. As has been shown by the defendants the aforesaid loan facility of US$ 62,500,000.00 was intended as a term loan for a period of 365 days and was secured by a Charge over shares in Waguthu Holdings Kenya Limited (now Tatu City Limited) as evidenced by the Charge dated 15th March 2010 annexed at pages 154-170 of the Plaintiff's Further Supplementary Bundle of Documents; it was further secured by the Debenture dated 15th March 2010 which has been produced at pages 178-205 of the Plaintiff's Further Supplementary Bundle of Documents. There is no dispute that the facility was not repaid within the period agreed between the parties, being 365 days and it is self evident thereof that there has been default even if there has been no formal demand. As a matter of fact, under clause 19.7 of the original facility agreement, the fact that the Companies were facing winding up petitions is expressly deemed to be an event of default and therefore the loan was automatically in default during the entire period of the winding up petitions. The allegations of breach of trust and breach of fiduciary duties ignore the fact that the Defendants have in effect facilitated the 3rd and 4th Plaintiff's continued shareholding in the Companies by the indulgence extended notwithstanding the default. The tabulation of the proceeds realized from the sales of various properties as set out at paragraph 28 of the Supplementary Affidavit assumes that 100% of the proceeds from the sale of each property was applied towards reducing the principal amount of the loan. Mr. Jennings averred in his replying affidavit that as a matter of fact there was substantial interest expense on the loan so that for example in the first year during which the loan was outstanding, a total of US$14,092,031 in interest was accrued for the period from 10th March 2010 to 12th December 2010; additionally, there were transaction expenses such as professional fees and commissions and other like expenses which were attendant to each transaction and the assumption that the full purchase price would have been applied towards reducing the loan is naïve and simplistic. It must also be borne in mind that the Companies are going concerns with operating expenses which must be on a regular basis. The proposed audit will help to confirm these figures. In addition to the loan of US$62,500,000.00 the Companies continued to require further facilities as evidenced for example by the Further Debenture dated 13th September 2010 to secure loan facilities of an additional US$ 5,375,000.00. This Further Debenture appears at pages 206-234 of the Plaintiff's Further Supplementary Bundle of Documents. The allegation that the loan has been fully repaid is therefore without factual foundation and the alleged reconstruction undertaken by the Plaintiffs appears to be erroneous. The truth is that the loan, which was originally for 365 days has been outstanding for close to 5 years now. Mr. Jennings was surprised by the allegations at paragraph 32 of the Supplementary Affidavit because the 3rd and 4th Plaintiffs have been aware of the Master Inter-Group Loan Agreement executed between the Companies and Cedar IV Limited and CedarSoc Limited respectively. These Agreements have been in existence since 1st June 2012 and are for the benefit of the Companies because they allow the Companies to borrow from their respective majority shareholders on a revolving basis and therefore reduce the Companies' reliance on borrowings from commercial lenders who would otherwise require security. There is no proof that these Agreements have been abused in any way or have been used as vehicles for fraud and the allegations of breach of trust and fraud are unfounded. I am not satisfied that the order for accounts, or that for security, are merited or justified, and the same are denied.
57. In prayer 8 of the Second Application, the applicants have asked that the said audit by PriceWaterHouseCoopers be undertaken by the said firm as directed by this court and as resolved in the minutes of the Board of Directors meeting of the 2nd Plaintiff held on 28th January 2015 as

finalized by John L.G. Maonga and signed by the 3rd Plaintiff.

58. In response to this, I have seen in the affidavits of Mr. Jennings, and in the submissions of Mr. Ochieng Oduol, counsel for the Defendants, that they have no objection to this prayer, and that indeed, while the defendants are ready to commence the process, it is the Plaintiffs who are now delaying the commencement of the same. However, I am now aware of the application herein dated 23rd April 2015 by the 3rd Defendant herein which has this issue as the substantive issue. The application is coming for hearing on 30th April 2015 and this matter will be considered in that application.

59. In the upshot, I make the following Orders:

a. **The unilateral resolutions made by the 1st to 3rd Defendants on 5th February 2015 are prima facie unlawful.**

b. **The 3rd and 4th Plaintiffs shall resume their positions in the 1st and 2nd Plaintiffs Companies obtaining before 5th February 2015 pending the hearing and the determination of this suit, save and except that the 3rd Plaintiff shall not exercise or execute his bank account signatory powers, but he shall be consulted in all financial transactions involving the 1st and 2nd Plaintiff Companies.**

c. **For the sake of the Plaintiff companies, and for their continued business and good order, and notwithstanding order (a) above, the 4th to 7th Defendants will remain in their current positions and manage the business of the Plaintiff companies as they currently do pending the hearing and determination of this suit, except that the 4th Defendant shall not assume Chairmanship of the Boards of these Companies.**

d. **For the duration of the intended audit, and pending the filing of the said audit report in court and further directions from this court, the Defendants shall not effect any loan repayments by the 2 Plaintiff companies. The Plaintiff companies shall, however, continue to transact any legitimate business, including buying or selling of land.**

e. **The Defendants or their agents howsoever described are hereby restrained from effecting any changes in the Memorandum and Articles of Association of the 1st and 2nd Plaintiffs and the shareholding and directorship of the 1st and 2nd Plaintiffs, pending the hearing and determination of this suit.**

f. **The Defendants whether by themselves, agents, servants or otherwise howsoever are restrained from deliberating agenda items numbers 1, 2, 4, 5, 6, 9 and 11, being the election of Chairman of the Board of Directors of the 1st and 2nd Plaintiffs, Minutes of previous meeting and written resolutions of the 28th day of January and the 5th day of February 2015, Special audit of loan, Review of articles and memorandum of association and proposed amendments, calling of Extra Ordinary General Meeting to approve amendments to the memorandum and articles of association, review of the meeting of the Board of Directors Meeting of the 1st and 2nd Plaintiffs on 24th March, 2015, pending the hearing and determination of this suit.**

g. **Parties to bear own costs.**

DATED, READ AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Havi for Plaintiffs

Mr. Ouma for 1st, 2nd, 4th, 5th, 6th and 7th for Defendants.

Mr. Macharia for 3rd Defendant.

Teresia – Court Clerk