IN THE MATTER OF TATU CITY LIMITED & KOFINAF COMPANY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

RULING
INTRODUCTION

1. This ruling is in respect of two winding up petitions. The first one, **Winding Up Cause No. 29 of 2010, In the Matter of Tatu City Limited**, was filed by **Stephen Mbugua Mwagiru** and **Rosemary Wanja Mwagiru**, hereinafter jointly referred to as "**the petitioners**". The petitioners are described in the petition as the founding directors of **Waguthu Holdings Limited,** the former name of **Tatu City Limited**, hereinafter referred to as "**Tatu City**".

2. The second petition, **Winding Up Cause No. 30 of 2010, In the Matter of Kofinaf Company Limited,** hereinafter referred to as "**Kofinaf**", was also filed by the petitioners but in this one **Stephen Mbugua Mwagiru** is described as a shareholder and director while **Rosemary Wanja Mwagiru** is described as a shareholder of the company. The two companies, Tatu City and Kofinaf will be referred to jointly as "**the companies**".

3. These two petitions were filed on 8th October, 2010 but could not be disposed of expeditiously because of a multiplicity of interlocutory applications that were filed by both the petitioners and the companies, some of which went up to the Court of Appeal. I may also add that the court's concerted effort to have the petitions and several other related cases between these same parties referred to arbitration were rebuffed by the parties. **Article 159 (2) (c)** of the **Constitution of Kenya, 2010,** requires the court to promote alternative forms of dispute dissolution, which include mediation and arbitration, but that cannot be imposed upon parties to a dispute who are unwilling to embrace an alternative form of dispute dissolution.

THE TATU CITY PETITION

4. In February 2007 the petitioners incorporated Waguthu Holdings Limited. The nominal capital of the company was Kshs.1,575,000/= divided into 1,575,000 ordinary shares of Kshs.1/= each. The petitioners have now alleged that by way of a letter from the companies' advocates dated 3rd September, 2010, learnt that the name of the company had been changed to Tatu City Limited without any reference to them. That allegation was denied by the Company, which stated that the change of name was agreed upon by resolution of the shareholders.

5. On 16th June, 2008 the shareholding of Waguthu Holdings Limited changed after the petitioners transferred five shares to the following:

i) **Judith Wanjiku Nyaga - 1 share**

ii) **Bhimji Depar Shah – 1 share**

iii) Tarunkumar Bhimji Shah – 1 share

iv) Vimalkumar Bhimji Shah – 1 share

v) Dipak Rameshchandra Shah – 1 share

The petitioners retained 787,498 and 787 497 shares respectively. (The petitioners' shareholding has since changed as will be shown later, they now hold only one (1) share each in the company).

6. In June 2008 or thereabout Waguthu Holdings Limited purchased from Socfinaf Company Limited (as it was known then), several parcels of land which were managed together under the name of Tatu Estate. On these pieces of land were coffee plantations and coffee processing facilities.

7. Tatu City owns four parcels of land measuring a total of **2860 acres** or **1,158 hectares** or thereabout. The parcels are known as:

i) L.R. No. 91 which contains by measurement 420 hectares or 1,037 acres or thereabout,

ii) L.R. No. 104 which contains by measurement 263 hectares or 650 acres or thereabout,

iii) L.R. No. 11538/2 which is 456 hectares or 1,127 acres or thereabout,

iv) L.R. No. 8182 which is 19.0 hectares or 47 acres or thereabout.

8. Tatu City has since changed the user of its land from agricultural to housing development. The petitioners stated that the change of user has increased or will increase the value of the land substantively. Financial projections showed that the value of the company's land as at 2010 was approximately **USD 982 Million** which at an exchange rate of **Kshs.80/=** to a dollar was the equivalent of **Kshs.78,560,000,000/=.** The petitioners alleged that through their proprietary interest in subsidiary companies as well as individuality, have **14.5%** or thereabout equity in the company and are the second largest beneficial shareholders.

GROUNDS FOR SEEKING WINDING UP ORDER

9. The petitioners alleged that the principles of good governance and fair management of the company had been deliberately and consistently violated and/or set aside by the majority members of the Board of Directors. The 1st petitioner, **Stephen Mbugua Mwagiru,** who at all material times was a director or *de facto* director of the company, alleged that he had been illegally excluded from taking part in the management of the company. He cited particulars of illegal exclusion from the management of the company as follows:

a) He had not been provided with any:

i) Minutes of the meetings of beneficial shareholders or directors,

ii) Books of account, business and financial information of the company, and

iii) Records of any transactions of the company that are ordinarily provided to beneficial shareholders and directors,

b) Some major decisions affecting the company have been made without any notice to him or consultation or participation in the making of the same,

c) The petitioners have individually been threatened by one Nahashon Nyaga, a

director and current Chairman of the company, with physical bodily harm unless they desist from demanding their rights as shareholders and a director respectively.

10. The petitioners further alleged that the company is being managed oppressively as against them and their equity in the company is at risk of being wasted or misappropriated without their knowledge. Particulars of acts of oppression were stated as follows:

a) Exclusion from participation of Mr. Mwagiru, as the petitioners' representative, in the decision making and management of the company as was the policy and implemented practice at all material time prior to June 2010

b) Failure to furnish minutes of shareholders' and directors' meetings despite request since the beginning of June 2010.

c) Failure to render to the petitioners pertinent business and financial information which ought to be availed to shareholders and directors including annual accounts, quarterly accounts, management accounts and material indebtedness.

d) Changing the name of Waguthu Holdings to that of the company without any reference whatsoever to any of the petitioners which is a clear act of bad faith and contemptuous disregard of the petitioners.

e) Threats to petitioners of physical bodily harm as aforesaid.

11. The petitioners contended that the relationship between themselves and other beneficial shareholders and/or directors has broken down irretrievably and their participation in the decision making and management of the company as shareholders and director has become impossible owing to lack of mutual trust and confidence.

12. They averred that by an e-mail dated 3rd September, 2010, one **Chris Baxter**, purportedly on behalf of the other shareholders and the company, offered to purchase their equity in the company but refused and/or neglected to respond to the petitioners' counter offer for the valuation of their equity to determine the amount payable to them.

RELIEF SOUGHT

13. For the aforesaid reasons the petitioners contended that it is just and equitable that the company be wound up.

14. In the alternative, the petitioners stated, "**if this court finds that it would be just and equitable that the company be wound up, but that to do so would prejudice the petitioners and that part of the members, then, in that event, the petitioners' equity or proprietary interest in the company should be sold to other members of the company at such price, either in cash or in kind, or partly in cash and partly in kind, as may be agreed by the parties or as the court may deem fit."**

15. The petitioners further urged the court to make such alternative orders as may be deemed fair and just. They also sought costs of the petition out of the assets of the company on priority basis.

KOFINAF PETITION

16. **Socfinaf Company Limited,** hereinafter referred to as **"Socfinaf",** was incorporated in April 1950 under the Companies Act. However, the petitioners alleged that by an advertisement in the "Daily Nation" newspaper issue of 21st September, 2010 learnt that the name of that company had been changed to **Kofinaf Company Limited**. The nominal capital of the company is Kshs.90,000,000/= divided into 4,500,000 ordinary shares of Kshs.20/= each.

17. The company owns large tracks of land scattered in various places in Thika District where there stands large coffee plantations, coffee factories, coffee mills, residential houses, workshops and garages, pump houses, water supply facilities, social amenities including schools, shops, nurseries, churches, medical facilities, electric power supply facilities and means of communication including roads and telephone installations.

18. The aforesaid pieces of land are managed in blocks which are referred to as Estates. There are five estates namely:

a) Oaklands Estate comprising of three parcels of land with an aggregate of 675 hectares of 1,667.3 acres known as L.R. No. 117, L.R. No. 11294/2 and L.R. No. 247/1 and 248/5,

b) Ruera Estate comprising of four parcels with an aggregate of 1,121 hectares or 2,768.9 acres of land known as L.R. Nos. 11285, 11287, 11288 and 11289,

c) Gethumbwini Estate comprising of three parcels of land with an aggregate of 751 hectares or 1,855 acres known as L.R. Nos. 10883/2, 11428 and 11486,

d) Mchana Estate comprising of five parcels of land with an aggregate of 907 hectares or 2,240.3 acres being L.R. Nos. 113/1, 113/2, 7386, 111/2 and 7192, and

e) Karangaita Estate comprising of one parcel of land known as L.R. No. 10877 measuring 284 hectares of 701.5 acres.

19. In addition, the company owns all the shares in Garton Limited, which owns and operates Mtaro Estate comprising of a parcel of land measuring 346 hectares or 854.6 acres.

20. The company also owns 61.7% of the equity in Eaagads Limited, which owns Eaagads Estate comprising of one parcel of land measuring 385 hectares or 951 acres or thereabout.

21. According to a valuation carried out in September 2009 the open market value of the real properties owned by Kofinaf is **Kshs.8,093,325,500/=** or thereabout.

22. The petitioners alleged that individually and through their proprietary interests in subsidiary companies hold **15.8%** or thereabout of the equity in the company and are the second largest beneficial shareholders.

GROUNDS FOR SEEKING WINDING UP ORDER

23. As in the first petition, the petitioners alleged that the principles of good governance and fair management had been deliberately and consistently violated and/or set aside by the majority members of the Board of Directors. The 1st petitioner stated that as a director of the company, he had been illegally excluded from taking part in the management of the company. He set out particulars of the illegal exclusion as follows:

a) It was resolved at a meeting of directors held in April 2010 that the directors' meeting would henceforth be held monthly but not quarterly as was the practice before, since June 2010, no notice of a monthly meeting had been given to him contrary to provisions of Article 111 (d) of the Company's Articles of Association and he has, consequently, not attended any meeting since that date,

b) The 1st petitioner has not been provided with any minutes of the meetings of beneficial shareholders or directors, books of account, business and financial information of the company as well as records of the company transactions that are ordinarily provided to beneficial shareholders and directors,

c) Major decisions affecting the ownership or user of the company properties have been made without the 1st petitioner's notice or consultation. Such decisions include:

i) The sale or attempted sale of about half of the company's real properties,

ii) Change or attempted change of user of the company's properties,

iii) The company has borrowed or is in the process of borrowing large loans or has otherwise incurred substantial debts without any reference to him or approval of the petitioners,

iv) The petitioners have individually been threatened by Nahashon Nyaga, a director and current chairman of the company, with physical bodily harm unless they desist from demanding their rights as shareholders and a director respectively.

24. The petitioners further alleged that the company is being managed oppressively as against them and their equity in the company is at risk of being wasted or misappropriated without their knowledge. They added that the relationship between themselves and other beneficial shareholders and/or directors has broken down irretrievably and their participation in the decision making and management of the company has become impossible owing to lack of mutual trust and confidence.

25. The petitioners also alleged that by an email dated 3rd September, 2010 Chris Baxter, purportedly on behalf of other shareholders and the company, offered to buy their equity in the company but refused and/or neglected to respond to the petitioners' counter offer for valuation of the same to determine the amount payable.

RELIEF SOUGHT

26. In the circumstances as aforesaid, the petitioners contended, it is just and equitable that the company be wound up. In the alternative, the petitioners urged, "**if this court finds that it would be just and equitable that the company be wound up but that to do so would prejudice your petitioners and that part of the members, then, in that event, the petitioners' equity or proprietary interest in the company should be sold to the company at such price, either in cash or in kind, or partly in cash and partly in kind, as may be agreed by the parties as the court may deem fit."** The petitioners also prayed for such further or alternative order as the court may deem fair and just as well as the costs of the petition.

27. The two petitions were supported by affidavits sworn by the 1st petitioner.

THE COMPANIES' RESPONSE TO THE WINDING UP PETITIONS

28. **Josphat Kibogo Kinyua**, a director of both Tatu City Limited and Kofinaf Company Limited, was authorized by the Board of Directors of the companies to file a replying affidavit in response to the two petitions.

29. Mr. Kinyua set out the background leading to the filing of the two petitions, stating that in or about 2007 a company by the name **Renaissance Partner Capital Limited**, hereinafter referred to as "**Renaissance**", was approached by Messrs Nahashon Nyaga, Stephen Mwagiru and Vimal Shah, hereinafter referred to as "**local partners**", to jointly acquire 100% interest in Socfinaf. The local partners had secured a right to acquire from Socfinaf the rights resided in Waguthu Holdings Limited, hereinafter referred to as "**WHL**", in which the petitioners held the entire shareholding at the time and were the founding directors.

30. Renaissance undertook legal due diligence and after completing the same it was unable to participate in the transaction because of global market conditions and because the transaction as

structured did not meet its investment criteria.

31. Consequently, the local partners re-negotiated with Socfinaf and agreed on a two step process for the completion of the transaction:

i) Waguthu Holdings Limited to acquire the several parcels of land that comprised Tatu Estate from Socfinaf for USD 20,000,000, and

ii) Waguthu Holdings Limited to get an option to buy 100% of Socfinaf before 31st December, 2009 for between USD 62,000,000 to USD 65,000,000.

32. The consideration for the purchase of Tatu Estate was USD 20,000,000 and an additional sum of USD 800,000 was required for stamp duty.

33. The local partners did not have the necessary funding to complete that acquisition and once again invited Renaissance to participate in the revised structure, which invitation was acceptable to Renaissance.

34. In consultation with all the partners, Mr. Kinyua stated, it was agreed that:

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, hereinafter referred to as "Cedar IV".

ii) Renaissance, through a Cypriot subsidiary known as SCF II Holdings Limited, hereinafter referred to as "SCFII Holdings", would and did subscribe 52% of Cedar IV shares by paying USD 10,800,000.

iii) The local partners also registered a special purpose vehicle in Manhattan called Manhattan Coffee Investment Holdings Limited, hereinafter referred to as "MCIH".

iv) To enable the local partners to participate in the acquisition, Renaissance loaned MCIH USD 9,900,000 to subscribe for 48% of Cedar IV shares.

v) Cedar IV then loaned USD 20,800,000 to WHL to pay the agreed consideration for the purchase of Tatu City (USD 20,000,000 and the stamp duty of USD 800,000).

vi) Renaissance also agreed to pay Black Knight Holdings Limited, a Mauritian holding company of some of the local partners, a deferred finders and re-introduction fee in the sum of USD 10,000,000.

vii) The shareholders of Cedar IV entered into a shareholders' agreement where all matters were to be governed by English Law and subject to the exclusive jurisdiction of English courts and the London Court of International Arbitration.

35. Mr. Kinyua added that 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. Consequently, WHL was converted into a public company with 1,570,000 issued shares which were distributed and held as follows:

a) Cedar IV …. 1,569,993 shares
b) Stephen Mwagiru ….. 1 share
c) Rosemary Wanja Mwagiru…… 1 share
d) Judith Nyaga …. 1 share
e) Vimal Shah ….. 1 share
f) B.D. Shah …. 1 share

g) Tarun Shah …… 1 share
h) Deepak Shah ….. 1 share

As a result of that arrangement Cedar IV became 99.999% owner of WHL with the other seven shares divided among the local partners and their nominees.

36. Mr. Kinyua further explained that since Cedar IV had loaned WHL the entire amount required for the acquisition of Tatu, it required and obtained the following security documents:

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 transfer forms,

v) Signed resignation letters by the petitioners from directorship of WHL,

vi) Signed resolutions by the petitioners required to effect all the necessary changes in WHL,

vii) Signed letter appointing Messrs Josephat Kinyua, Nahashon Nyaga, Vimal Shah and Maina Mwangi as directors of WHL.,

viii) Signed sale of shares agreement between the petitioners and Cedar IV.

37. The companies further averred that soon after completing the acquisition of Tatu in June 2008, the 1st petitioner approached the shareholders of WHL and offered to act as the Chief Executive Officer of the company until the company finalized its business plan for development of Tatu City. The company agreed and the 1st petitioner was so engaged at a salary of Kshs.500,000/= per month plus a performance based bonus.

38. One of the 1st petitioner's responsibilities included appointing a consultant to procure a change of user for Tatu from agricultural to commercial. A conditional change of user approval was granted on 15th October, 2008 but WHL could not be issued with new titles because the 1st petitioner had misplaced Tatu's deed plans and the company had to apply for provisional titles.

39. On 31st March, 2009 the 1st petitioner's engagement as CEO was terminated because WHL was not satisfied with his performance. Consequently, WHL entered into a one year Farm Licencing Agreement with Waguthu-Tatu Limited, (WTC), a company managed by the 1st petitioner.

40. In mid 2009 the shareholders of WHL commenced the process of raising capital to complete the acquisition of Socfinaf. WHL turned to Renaissance to assist in the capital raising exercise. Renaissance was able to raise a total of USD 70,000,000 as follows:

a) USD 62,500,000 as senior debt from a consortium of offshore lenders and

b) USD 7,500,000 from two offshore equity investors.

41. Having raised sufficient capital, the acquisition of Socfinaf was effected via a Mauritius registered entity known as Cedarsoc Limited whose shareholders initially were SCFII (45%) and MCIH (55%) but which now stands at SCFII (42%), MCIH (51%) and other minority shareholders (7%).

42. Cedarsoc used the funds raised by Renaissance to complete the acquisition of Socfinaf and to meet

the transaction costs.

43. The companies further stated that because of the provisions of **Section 56** of the **Companies Act** which prohibit 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 documents:

a) Pledge of all Socfinaf shares,

b) Pledge of all WHL shares,

c) Debenture over WHL assets,

d) Charge over WHL (Tatu's) properties,

e) Cancelation of all the previous charges and debentures on WHL assets.

The 1st petitioner, Vimal Shah, Nahashon Nyaga and Arnold Meyer and Josephat Kinyua were then appointed directors of Socfinaf.

44. With respect to the aforesaid facility, **Renaissance Partners Investment Limited** (RPIL) was appointed as facility agent. The facility was for one year at a rate of 33%. The payments schedule for the facility included payments in September 2010, December 2010 and a final payment in March 2011. The payment schedule was well known to the 1st petitioner as he was party to all the negotiations and a signatory to the facility documents, Mr. Kinyua stated. The repayments were predicated on Socfinaf being able to sell some identified parcels of land to interested parties and had indeed already signed a number of agreements for sale.

45. The companies stated that the 1st petitioner was an active participant in the process of identifying and selling the land and was aware of all the enquiries and agreements for sale that were signed.

46. Further, Renaissance and Black Knight re-negotiated the Incentive Letter and the deferred finder's fee was reduced to USD 5,500,000 which was immediately paid to the 1st petitioner.

47. On 31st March, 2010 WTC's licence expired and WHL took back the management of Tatu Estate and licenced it to Socfinaf. The board also asked the 1st petitioner to remove his relatives who were squatting in some of the houses in the estate without the board's authorization but the 1st petitioner refused to do so.

48. The board commissioned an audit of the farm which established that more than 300 trees had been cut down during the period that the 1st petitioner was running the farm, in addition to pumps and other properties being either vandalized or stolen, Mr. Kinyua stated. He added that after that finding the 1st petitioner became despondent and started missing some of the shareholder representative meetings.

49. In June 2010 the companies obtained new deed plans for Tatu Estate and submitted the original titles to the Ministry of Lands so that new titles could be issued with the approved change of user. The process took unusually long period of time and when the company set out to find out the reason it ascertained that the 1st petitioner was attempting to collect the titles from the lands office, which was highly irregular since the titles constituted security for the aforesaid lending.

50. New titles were eventually obtained on 2nd July, 2010 and the process of registering the lenders' security commenced but unknown to the companies, the petitioners had placed caveats on the titles. The caveats were registered on 17th June, 2010.

51. The companies alleged that the timing of the caveats and selection of properties for which the caveats were lodged was deliberate and malicious because:

i) The caveat on L.R. No. 11538/6 (now L.R. 28079) was intended to prevent the companies from amalgamating the titles as well as stop the lenders from charging properties.

ii) The caveats on L.R. No. 10877, L.R No. 10883, L.R. No. 11285, L.R. No. 11288 and L.R. No. 11287 were intended to stop the companies from honouring signed agreements for sale in respect of which purchasers had already paid deposits which were held in escrow.

iii) The caveat on L.R. No. 11294 was intended to stop Socfinaf from securing a financing facility with Middle East Bank.

iv) The timing of the caveats was intended to frustrate the companies from completing any of the agreements for sale before mid September 20th when interest fell due on the facility and therefore trigger a default on the offshore facility.

v) In registering the caveats the petitioners had stated that they were the 100% owners and sole directors of the company, which was not true.

52. Regarding change of the companies' names, Mr. Kinyua deponed that the process commenced in July 2010 for the reasons that:

a) The other shareholders of WHL did not want the company to be associated with WTCL and Waguthu Farmers Limited, which are associated with the petitioners and their family. A resolution was passed by the shareholders that WHL becomes Tatu City Limited.

b) Socfinal, the Belgium vendors, requested that Socfinaf be changed to Kofinaf Company Limited.

53. The companies further denied that they had excluded the 1st petitioner from taking part in the management of the companies. They stated that the 1st petitioner deliberately decided to exclude himself from further participation in the affairs of the companies and failed to respond to invitations to attend directors' and shareholders' meetings.

54. Regarding the allegation that the companies had commenced sale of some properties without the 1st petitioner's consent, Mr. Kinyua stated that the 1st petitioner participated in all decisions relating to the proposed transactions and approved the decisions relating to the borrowings which were necessary to finance the companies' activities.

55. Mr. Kinyua termed as preposterous the allegation that the petitioners had been threatened with physical bodily harm since there was no documented evidence to that effect. To the contrary, he alleged, it is the 1st petitioner who had threatened one of the companies' managers, **Mr. Fabian Philipart.**

56. The companies further denied that they had conducted their affairs in a manner that was oppressive to the petitioners, pointing out that the petitioners were not the only minority shareholders and that if it was the case that all the minority shareholders were being oppressed, the others would have joined in this petition. The companies further stated that if the relationship between the petitioners and the other shareholders had broken down irretrievably as alleged, such breakdown had been deliberately orchestrated by the petitioners in order to allow them to exit from their shareholding in the companies and attempt to force a buy out without regard to the debt obligations of the companies and the companies' business plans which were premised on a long term investment with heavy capital expenditure in developing infrastructure.

57. It was further pointed out that all the shareholders including the petitioners have charged their

shares as security for the loan facilities advanced to the companies and such shares therefore constituted a continuing security for the payment and discharge for the secured obligations and are accordingly not available to the petitioners as the basis for mounting these petitions.

58. The companies contended that a case for their winding-up had not been made out and added that the petitioners themselves acknowledge that their remedy lies in exiting from the companies and having their shareholding purchased. The companies indicated that they are prepared to facilitate purchase of the petitioners' shareholding which, in accordance with the records held at the office of the Registrar General, are one share each in Tatu City and Kofinaf and not otherwise.

59. The companies urged the court to dismiss the petition as they are without any merit.

PETITIONERS' SUPPLEMENTARY AFFIDAVITS

60. The petitioners filed several supplementary affidavits in response to the affidavit sworn by **Josphat Kibogo Kinyua** on behalf of the companies. Mr. Kinyua was also cross examined on his affidavit when these petitions came up for hearing.

61. In a supplementary affidavit sworn by the 1st petitioner on 31st October, 2012, he made reference to his earlier affidavit sworn on 3rd June, 2011 where he averred that Cedar IV holds its shares in Tatu City upon trust for the petitioners, Renaissance Group, Nahashon Nyaga, Vimal Shah and family, Etienne Delbar and GLG Partners. He thus reiterated that the petitioners hold 14.5% of the allotted shares in Tatu City and 15.8% in Kofinaf and not one share each in each of the companies.

62. At paragraphs 171 and 172 of the supplementary affidavit, the 1st petitioner stated as follows:

"171. THAT Cedar IV holds in trust the shares of the following ultimate beneficial shareholders of Tatu City whose respective shareholdings are shown below:

Shareholder		Percentage of Shares
a.	**Renaissance Group**	**48.8%**
b.	**Rosemary Njau Mwagiru**	**13.9%**
c.	**Stephen Mwagiru**	**0.5%**
d.	**B.D. Shah, V. Shah & T. Shah**	**14.0%**
e.	**Nahashon Nyaga**	**10.6%**
f.	**Etienne Delbar**	**7.5%**
g.	**G.L.G. Partners**	**4.7%**

172. THAT Cedarsoc holds in trust the shares of the following ultimate beneficial shareholders of Kofinaf whose respective shareholdings are shown below:

Shareholder		Percentage of Shares
a.	**Renaissance Group**	**44.2%**
b.	**Rosemary Njau Mwagiru**	**15.3%**
c.	**Stephen Mwagiru**	**0.6%**
d.	**B.D. Shah, V. Shah & T. Shah**	**15.3%**
e.	**Nahashon Nyaga**	**11.7%**
f.	**Etienne Delbar**	**8.2%**

g. G.L.G. Partners 4.7%"

63. The 1st petitioner further stated that the offer made by the majority shareholders to purchase their shares in the companies was neither fair nor reasonable as it was incorrect in respect of the petitioners' shareholding and did not reflect the value of the companies as aforesaid.

64. The 1st petitioner reiterated that all the alleged acts that precipitated the filing of the petitions amounted to oppressive conduct on the part of the companies.

65. With reference to the petitioners' exclusion from the conduct of the companies' affairs, the 1st petitioner pointed out four specific incidents:

a) Tatu City had changed its Board of Directors without any notice, consultation or participation of the petitioners.

b) On 26th October, 2012 Tatu City project was officially launched and presided over by Renaissance and other local partners but the petitioners were not invited.

c) On 15th September, 2011 Tatu City signed a memorandum of understanding with Vision 2030. That function was attended by all shareholders except the petitioners who were neither invited nor informed of the same.

d) On 10th August, 2011 Tatu City held a symposium at the Strathmore Business School. The function was attended by all the shareholders except the petitioners who were neither invited nor informed of the same.

66. The petitioners further lamented that the companies had entered into various contracts involving colossal sums of money without their consultation or participation.

SUBMISSIONS AND DETERMINATION OF THE ISSUES RAISED

67. Both parties filed comprehensive written submissions and list of authorities. **Dr. Kamau Kuria, S.C.** who led **Mr. Wamae, S.C.** and **Mr. Mutula Kilonzo Junior** for the petitioners, highlighted the petitioners' submissions while **Mr. Ohaga**, learned counsel for the companies, did likewise on behalf of his clients.

68. **Section 211** of the **Companies Act** states as follows:

"1. Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling with subsection (2) of section 170, the Attorney-General, may make an application to the court by petition for an order under this section.

2) If on any such petition the court is of opinion –

a) that the company's affairs are being conducted as aforesaid;

and

b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just equitable that the company should be wound up,

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase

of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital or otherwise."

69. The petitioners' contention is that:

a) They have established on a balance of probabilities that it is just and equitable to wind up the companies because their affairs are being conducted in a manner oppressive to them.

b) There is no alternative remedy available.

c) The offer made to them by the companies for purchase of their shares is not reasonable.

d) They hold, individually and as beneficial owners, 14.5% and 15.8% of the allotted shares in the companies.

70. The first issue for this court's consideration is whether the affairs of the companies as explained by the petitioners are being conducted in a manner oppressive to them. What is oppressive conduct of a company's business in the context of **Section 211** of the **Companies Act?**

71. The Supreme Court of India answered that question in **S.P. JAIN vs. KALINGA TUBES LIMITED [1965] AIR 1535, [1965] SCR (2) 720**. Commenting on **Section 397** of the **Indian Companies Act** which is the equivalent of our **Section 211** of the **Companies Act**, the court held that for a petition under **Section 397** to succeed it is not enough to show that there is just and equitable cause for a winding-up of a company, though that must be shown as preliminary. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this require, that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of the petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members.

72. Further, the conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders could not be enough unless lack of confidence springs from oppression of the minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of proprietary rights as a shareholder.

73. **Halsbury's Laws of England, 4th Edition Volume 7 (2) at page 1095,** the learned author states that the words "**just and equitable"** in **Company Law** are a recognition of the fact that a limited liability company is more than a "**mere judicial entity with a personality in law with its own: behind or among it there are individuals with rights, expectations and obligations inter se which are not necessarily submerged in the company structure."** The court must therefore subject the exercise of legal rights by various shareholders to equitable considerations of a personal culture arising between the shareholders in order to determine whether any of the actions are unjust or inequitable.

74. In the same text at page 1096 several examples have been cited to further illustrate instances where it may be just and equitable to wind up a company. The examples **include**:

1. Where the substratum has gone.

2. Where it is impossible to carry on a company's business owing

to internal disputes which have produced a state of deadlock (see RE-YENIDJE TOBACCO CO. LTD. (1916) 2Ch 426).

3. Where directors withhold information from shareholders in circumstances which give rise to suspicion that they are attempting to buy their shares at an under value.

75. However, even if the court were to establish that any or all of these instances referred to hereinabove or any other as would be sufficient to warrant a winding up order being made has taken place, a winding up order may not be made if there is an alternative remedy available.

76. It is therefore necessary to examine the various complaints raised by the petitioners against the majority shareholders to determine whether they satisfy the provisions of **Section 211** of the **Companies Act**.

77. The 1st petitioner complained that he has been left out in the decision making process and management of the companies and cited various instances. In response to that allegation the companies stated that they had all along involved him in decision making and cited several e-mails contained in Mr. Kinyua's replying affidavit. Mr. Kinyua added that meetings in relation to the affairs of the company were being conducted mostly by conference calls and by e-mail, with each participant required to dial in in order to participate in the meetings.

78. I do not think that there was anything wrong with that mode of conduct of the meetings, as long as all the directors had agreed on the same. In this era of modern technology it may not be necessary for directors to conduct a meeting when they are all assembled in one room, particularly in instances where they are residing in different parts of the world. They may discuss and/or consult in any other acceptable mode of communication apart from the traditional boardroom conferences. What is not clear is whether the 1st petitioner was invited to all the company meetings and involved in decision making process.

79. When Mr. Kinyua was cross examined on his affidavit regarding the alleged invitations to the 1st petitioner to attend the companies' board meetings, he stated that the 1st petitioner declined to attend such meetings on a number of occasions after 31st May, 2010. Mr. Kinyua was however unable to refer the court to any other invitation that was extended to the 1st petitioner between **1st June, 2010** and **8th October, 2010** when these petitions were filed. There is no indication whether the 1st petitioner has been invited to any of the company's meetings after 31st May, 2010. Over that period of time the companies have taken several major decisions and the 1st petitioner rightly believes that he has been completely left out.

80. Although the companies allege that the 1st petitioner deliberately excluded himself from participating in the affairs of the companies, a close reading of the various affidavits filed by all the parties to this dispute reveal that even before the filing of the winding-up petitions from the date when the companies made a criminal complaint against him leading to his arrest and arraignment in court their relationship got so strained that it was not possible for the petitioners and the other shareholders and directors to hold any meaningful discussions regarding management of the companies. Shortly thereafter caveats were filed against the properties of the companies.

81. The allegation regarding threats of physical violence was not proved and the court must disregard it.

82. As regards the petitioners' allegations that the companies' names were changed without his consultation, I do not agree with the petitioners at all. There are various board resolutions that were arrived at in meetings that were attended by the 1st petitioner where the issue of change of the companies' names was discussed and agreed upon. For example, the minutes of the board of directors' meeting held on 8th April, 2010 where the 1st petitioner was present, with particular reference to Socfinaf, the record shows that:

"The Chairman informed the board that we urgently need to change the name of Socfinaf as the existing shareholders had indicated that they wanted to use the name for other operations. The

following names were suggested because they retained association with the Socfinaf name:

1. **Kofinaf Company Limited**
2. **Kofenaf Company Limited**
3. **Koffeenaf Company Limited.**

It was agreed that the names be reserved as a matter of urgency."

83. It is my considered view that the relationship between the petitioners and the majority shareholders is so strained that it is impossible to carry on business together. The deadlock can only be unlocked by disengaging these two opposing sides. There are several cases that have been filed before this court and other courts which have almost stagnated the operations of the companies. The caveats that have been filed by the 2nd petitioner and her two daughters have made it impossible for the companies to perfect the securities that were created with a view to acquiring funds to enable the companies develop the envisaged modern housing complex and other operations that had been planned. Since there is a pending suit before this court where the companies are seeking removal of the caveats, **HCCC No. 561 of 2010,** where it has been contended that they were illegally and maliciously filed, I do not wish to say much regarding the caveats.

84. In view of the existing deadlock occasioned by the many serious internal disputes between the parties, and in view of what I have stated in paragraph 79 above, it would be just and equitable that the companies be wound up but that can only be done if there is no other available remedy.

ALTERNATIVE REMEDY

85. **Section 222** of the **Companies Act** states as follows:

"(1) On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.

(2) Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion –

(a) that the petitioners are entitled to relief either by winding up the company or by some other means; and

(b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,

shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

86. The petitioners urged the court to wind up the two companies or in the alternative direct that their equity be sold to other members of the company. Long before these petitions were filed there had been an attempt to discuss this latter option but parties could not agree on the value of the petitioners' shares. The petitioners insisted that they owed 14.5% of the allotted shares in Tatu City and 15.8% of the allotted shares in Kofinaf. On the other hand, the companies maintained that the petitioners owed only 1 share each in the companies.

87. The petitioners made reference to an e-mail sent by Chris Baxter to the 1st petitioner on 3rd September, 2010 which stated as follows:

"SUBJECT: BKH SHAREHOLDING
Steve,

We had a call with the other Kenyan partners and we agree that an amicable separation makes sense. We understand that the net equity interest of you and your group (the "S" group) in Soc and Tatu is approx. 10 pct. The simplest solution would be for the "S" group to take a single title with value of approx. 10 pct of the total and simultaneously to discharge 10 pct of the total original debt and associated interest. I believe we could persuade the lenders to agree such transaction although we have not yet approached them. The title which appears to fit best this proposal is the 1184 Ruera title, previously set aside for the church. Let us know if this proposal would work for you in principle. If so the next step will be for you and your partners to figure out the required arrangements in BKN and MSIH after which we can solve the mechanics between the Cedar companies and MSIH. I expect the detailed conditions may involve some complexities but there is no point in solving those unless we agree the basic deal.

Thanks.
Chris"

88. That offer of 10% of the value of the two companies was rejected by the petitioners. Mr. Ohaga for the companies submitted that the discussions regarding possible buy out of the petitioners were on a without prejudice basis. That may have been the intention of the companies, even if the words "**without prejudice**" were not indicated on the e-mail. Reasonable business people often attempt to resolve commercial disputes out of court and it would be unreasonable for a court to hold that they cannot depart from offers made in such discussions.

89. **Dr. Kuria** on behalf of the petitioners, urged the court to find that, for purposes of finding an alternative remedy by way of sale of the petitioners' shareholding in the two companies, the petitioners' shares in reality are 14.5% and 15.8% respectively and not as indicated in the companies' returns filed with the Registrar of Companies which show that the petitioners hold only 1 share each in each of the companies. He urged the court to apply equitable doctrines in determination of the shareholding since the petitioners through associated companies, in particular Cedar IV and Cedarsoc, are the beneficial owners of the shares they claim. Counsel sought to rely on **O'NEIL & ANOTHER vs. PHILLIPS, [1999] 1 WLR 1092.**

90. On the other hand, the companies contended that the petitioners' shareholding is as stated in the aforesaid returns. **Mr. Ohaga** submitted that the court should have no regard to the petitioners' shareholding in Cedar IV since the petitions before the court relate to Tatu City and Socfinaf only. He referred to **Section 2** of the **Companies Act** which defines a company to mean:

"A company formed and registered under this Act or an existing company."

An existing company means **"a company formed and registered under any of the repealed ordinances".** Counsel further urged the court to reject the petitioners' assertion that they hold the additional shares in the two companies as beneficial owners through the various offshore special purpose vehicles.

91. **Section 119** of the **Companies Act** states that:

"No notice of any trust, expressed, implied or constructive shall be entered on the register, or be receivable by the registrar."

In **VADAG ESTABLISHEMENT vs. YASHVIN NUMISED AG & OTHERS [Civil Appeal No. 83 of 2001],** the Court of Appeal 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 petitioners that they hold more than 1 share each in each of the companies is unsustainable in view of the express provisions of **Section 119** of the **Act**.

92. The court must emphasize that the petitions before the court relate to Tatu City and Kofinaf only and it has no jurisdiction to make any orders in respect of Cedar IV or any other company that is incorporated overseas. After all, the shareholders of Cedar IV have an agreement that all the affairs of the company, including disputes, are governed by English Law and shall be subject to the exclusive jurisdiction of English Courts and the London Court of International Arbitration.

93. In the celebrated decision of **OWNERS OF MOTOR VESSEL "LILIAN S" vs. CALTEX OIL (K) LIMITED [1989] KLR 1**, the Court of Appeal held that:

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

94. The shareholders of these two companies, Tatu City and Socfinaf, must be deemed to have taken proper legal advice when they chose to incorporate the companies and allot shares where several other companies are the majority shareholders thereof or have substantial equity. The complex layers of corporate ownership of the two companies as shown in paragraph 14 of Mr. Kinyua's affidavit was deliberate and the court has no power to interfere with the same.

95. Cedar IV Limited which holds about 99% shares of the two companies is a company incorporated in Mauritius and the two shareholders of Cedar IV are two other companies known as SCFII Holdings Limited, a company incorporated in Cyprus and Manhattan Coffee Investment Holdings Limited. The petitioners claimed to have beneficial shareholding through Manhattan Coffee Investment Holdings Limited which was incorporated in Mauritius. From some exhibits in Mr. Kinyua's affidavit, Manhattan Coffee Investment Holding is owned by Redline Investment Corporation (50%) and Black Knight Holdings (50%).

96. In an affidavit sworn by the 2nd petitioner on 10th June, 2010 in support of the lodgments of the caveats, she stated at paragraphs 5 and 6 as follows:

"6. That by virtue of a share transfer and shareholders' agreement dated 8th March, 2010 executed between SCF Holdings II Limited a company organized under the Laws of Cyprus and Manhattan Coffee Investment Holding a company organized under the Laws of Mauritius I became a shareholder. I became a shareholder by virtue of my interests in Black Knight Holdings of Socfinaf Company Limited as follows:

a) By the said agreement between SCF Holding II Limited and Manhattan Coffee Limited dated 8th March, 2010, Manhattan Coffee Limited acquired 550,000 ordinary shares of Cedarsoc Limited, the majority shareholder of Socfinaf Company Limited (annexed hereto is a copy of the said agreement marked 'RWM2')

b) That Black Knight Holding is a 50% shareholder in Manhanttan Coffee Investment Limited of which I am the majority shareholder of Black Knight Holding (annexed hereto are notarized copies of share registers of Manhattan Coffee Investment Holding and Black Knight Holdings dated 13th June, 2008 and 16th April, 2010 respectively marked 'RWM3').

c) That by virtue of the above shareholding I am therefore a shareholder of Socfinaf Company Limited"

97. Given the complex ownership structure of the two companies as aforesaid, the court must decline the invitation made by the petitioners' counsel, to pierce the corporate veil and assume that the petitioners are beneficial owners of substantial shares in the two companies, other than the 1 share for each one of them as disclosed in the records held at our companies' registry.

98. All these other foreign companies where the petitioners have some interest in and all of which converge at Cedar IV are not parties to these petitions and this court has no jurisdiction to make any orders regarding their shareholding. According to the agreement entered into by Cedar IV shareholders, English Courts and London Court of International Arbitration have exclusive jurisdiction to handle any dispute that may arise among the company's shareholders. Since the petitioners have manifested their desire to exit from Cedar IV and the other foreign companies where they have financial interest, in my view, unless an amicable buy out settlement is arrived at, they should consider commencing arbitral proceedings at the London Court of International Arbitration. If this court were to purport to pierce the corporate veil of Cedar IV, Cedarsoc and the other foreign companies as prayed by the petitioners, it would be engaging in an illegality since it has no jurisdiction to do so.

99. In **VTB CAPITAL PLC vs. NUTRITEK INTERNATIONAL CORP. AND OTHERS [2011] EWHC 3107 (Ch.),** the court set out very comprehensive review of various authorities relating to piercing the corporate veil which may be summarized as follows:

a) Ownership and control of a company are not of themselves sufficient to justify piercing the veil.

b) The court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice.

c) The corporate veil can be pierced only if there is some impropriety.

d) The court cannot pierce the corporate veil merely because the company is involved in some impropriety, the impropriety must be linked to the use of the company structure to avoid or conceal liability.

e) If the court is to pierce the corporate veil it is necessary to show both the control of the company by the wrongdoers and the impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing.

f) The court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done.

100. Dr. Kuria referred the court to the judgment of Lord Hoffman in the case of **O'NEIL & ANOTHER VS. PHILIPS (*Supra*)** where the court described the elements of a reasonable offer of an alternative remedy for the purpose of **Section 222 (2)** of the **Companies Act.** The elements were stated as follows:

i) The offer must be to purchase the shares at a fair value;

ii) If not agreed the value must be determined by a competent expert;

iii) The offer should include to have the value of the shares determined by an expert;

iv) The offer should provide for the equality of arms between the parties; Both should have the same right of access to information about the company which bears upon the value of the shares.

101. While I agree with the above elements that constitute a reasonable offer of an alternative remedy, in the context of this case and due to jurisdictional limitation, the said elements can only apply to the extent of the petitioners' actual shareholding in the two companies and no more.

DISPOSITION

102. Having considered all the affidavits and submissions by counsel, I have come to the conclusion that the petitioners have established some of the grounds in their petitions and are entitled to some relief. I will however not make a winding-up order since there is an alternative remedy available and that is acquisition of their shares by the majority shareholders at a fair value. The petitioners are acting unreasonably by seeking to have the companies wound up so as to force a buy out on their terms, even where the court has no jurisdiction to make such orders regarding foreign registered companies. The petitioners should pursue the alternative remedy, both here in Kenya and at the London Court of International Arbitration. The value of the petitioners' shares in the companies shall be determined by a reputable firm of Accountants to be agreed upon by parties, failing which the firm shall be appointed by the Chairman of the Certified Public Accountants of Kenya. The costs of that exercise shall be borne by the Companies. Each party shall bear its own costs of these petitions.

103. Lastly, I am grateful to all the advocates in this matter for their industry and very commendable manner in which they made their written and oral submissions.

WRITTEN AND SIGNED BY JUSTICE D. MUSINGA

DATED, DELIVERED AND COUNTERSIGNED ON THIS 18TH DAY OF JANUARY 2013 BY THE HONOURABLE JUSTICE J. KAMAU FOR AND ON BEHALF OF JUSTICE D. MUSINGA, PURSUANT TO THE PROVISIONS OF ORDER 21 RULE 3 (2) OF THE CIVIL PROCEDURE RULES.

SIGNED:

……