



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MILIMANI HIGH COURT

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 NJOROGI.....6TH DEFENDANT

CHRISTOPHER BARON.....7TH DEFENDANT

RULING

1. The Civil war in the Board Rooms of Tatu City Limited (the 1st Plaintiff herein referred to as **Tatu**) and Kofinaf Company Ltd (the 2nd Plaintiff herein referred to as **Kofinaf**) continues unabated. There is now a dispute as to the legal representation of Tatu and Kofinaf. This Court is asked to determine the Notice of Motion dated 29th September, 2015 in which the following prayers are sought:-

1. The Notice of Change of Advocates dated 24th September, 2015 filed by the firm of Ahmednasir Abdikadir & Company Advocates on behalf of the 1st and 2nd Plaintiffs be and is hereby struck out.

2. The costs of this Application be borne by Mr. Ahmednasir Abdulahi personally.

2. The Application is presented by the firm of Havi & Company Advocates who claim to be on record for all the Plaintiffs. Nahashon Ngige Nyagah (Nyagah) and Vimalkumar Bhimji Depar Shah (Shah) are the 3rd and 4th Plaintiffs respectively. In a Supporting Affidavit sworn by Nyagah on 29th September 2015 (whose contents are adopted in the Affidavit of Shah of the same day), the Deponent narrates the events leading to the Application before Court.

3. It is alleged by Nyagah that he is a Director and Chairman of the Board of Directors of Tatu and Kofinaf. He depones that the suit by the two companies was filed by Havi & Co. Advocates on written authority by the Companies duly signed by himself and Shah. He explains

that the suit is a challenge to some fraudulent actions and breach of trust by the 1st to 3rd Defendants and the unlawful appointment of the 4th and 5th Defendants as Directors of the Companies.

4. Nyagah depones that on 16th September 2015, the 1st to 5th Defendants passed an unlawful resolution appointing Ahmednasir Abdikadir & Company Advocates to take over the conduct of this litigation on behalf of Tatu and Kofinaf with a view to terminating or frustrating the claim against the Defendants.

5. There is another reason why Nyagah is of the view that the said firm of Ahmednasir Abdikadir & Co. Advocates should not act for the Companies. He states that Shah and himself had consulted the said firm with a view to the firm acting for all the Plaintiffs. Mr. Havi and himself had consulted Senior Counsel (S.C) Ahmednasir and instructed him to lead Mr. Havi in the matter. That Mr. Havi and himself disclosed substantial confidential information and material relating to the matter and dispute to S.C Ahmednasir to whom they also gave pleadings and documents in respect to thereof.

6. It was also deponed that S.C Ahmednasir requested and accepted to take the brief at a fee of Kshs.20,000,000 which he said needed to be paid in cash. That although the cash was raised and made available for his collection, counsel became evasive and refused to be involved in the matter. That Counsel nevertheless retained the confidential documents and information given to him on instructions.

7. Nyagah maintains that the Notice of Change filed by the firm of Ahmednasir Abdikar & Company subsequent to the unlawful resolution was scandalous and otherwise an abuse of Court process. In addition it was made in contempt of a Court Order of 6th March 2015 and was therefore null and void *abinito*.

8. In resisting the Application Mr. Stephen Armstrong Jennings (**Jennings**) swore an Affidavit on 6th April 2016. He began by emphasizing that he was duly authorized by the majority of the Board of Directors of Tatu and Kofinaf to swear the Affidavit. He also emphasized that Nyagah had no authority to instigate the filing of the instant suit.

9. Jennings averred that on 16th September 2015 the Board of Directors of the two companies resolved and determined that the law firm of Havi & Co. Adv had no authority or instructions to file the suit and act for the Companies. Jennings pointed out that both Nyagah and Shah participated in the Board meeting and deliberation of 16th September 2015. It was also in that meeting that the Board resolved and appointed the firm of Ahmednasir Abdikadir & Co. to act for the Company. Thereafter the said firm filed a Notice of Change of Advocates on 24th September 2015.

10. It was alleged by Jennings that Mr. Nelson Havi of Havi & Company Advocates is a prime suspect in the fraudulent transfer of properties beneficially owned by Tatu and Kofinaf. That the Companies have lodged a criminal complaint against Mr. Havi and Nyagah. It was averred by Jennings that in Nairobi High Court Civil case No.230 of 2015 (**Kofinaf Company Limited & another vs. Nahashon Ngige Nyagah & 20 others**)(herein after referred to as **Civil case No. 230 of 2015**) Hon. Justice Gikonyo, in a ruling dated 17th May 2015, found that Mr. Havi had questions to answer on the alleged fraudulent transfer of prime property valued at Kshs.5.1 Billion. Jennings thought that it was absurd for Mr. Havi to purport to act for the Companies which had defrauded.

11. The deponent also brought to the attention of Court a ruling of the Court of Appeal in Civil Application No. Nai 244 of 2015 (UR 203 of 2015) (**Tatu City & 3 Others vs. Stephen Jennings & 6 others**) (herein after referred to as **Civil Application No. Nai. 244 of 2015**). This was an application dated 24th September 2015 filed by the firm of Havi & Co. for an Injunction pending the determination of an intended appeal from the Ruling and Order of Justice Ogola dated 28th April 2015 herein. That pursuant to an oral application made by the firm of Ahmednasir Abdikadir & Company, the Court of Appeal held that the firm of Havi & Co. had no instruction as from 16th September 2015 to represent the two companies. Further that the Notice of Motion now before this Court is in contravention of the Resolution of the Boards of the two companies.

12. In respect to the allegation made against S.C Ahmednasir, Jennings had some damning things to say. He alleged that he was informed by S.C. Ahmednasir that Mr. Havi and Nyagah had told him that this suit had been allocated to Justice Farah Amin who had certified an Application herein as urgent but refused to grant any interim orders. That Mr. Havi and Nyagah had asked S.C.Ahmednasir whether he could “talk” to the Judge and persuade her to grant temporary relief. A request that was declined by S.C Ahmednasir who told Mr. Havi that he does not ‘talk’ to Judges and does not see Judges with a view to influencing them.

13. Jennings further depones that S.C Ahmednasir had advised him that at no point did they discuss anything to do with fees nor did he receive any documents of any nature as claimed by Nyagah.

14. The 6th Defendant opposed the application by filing Grounds of Opposition dated 29th June, 2016. Some of those Grounds repeat the averments contained in the Affidavit of Jennings. But in addition, the 6th Defendant points out that the Application is contrary to fundamental principles of Company Law because if allowed it will effectively be inviting Courts to participate in the day to day management of the affairs of a Company. Secondly that it is a clever attempt by the Applicants to bypass the Board of Directors as the decision making organ of the Company and was therefore contrary to the principles and practices of Corporate Governance.

Arguments by the Applicants

15. Mr. Havi asked Court to give regard to the decision made by Justice Ogola on 6th March 2015. That Ruling was in part an answer to the Application dated 26th February 2016 by the 1st to 15th Defendants seeking that the suit be struck out. The Court was told that paragraph 38 of that Ruling abides the trial in respect to the question as to who had authority to file the current suit.

16. It was submitted that a reading of Order 4 Rule 4 of the Civil Procedure Rules would lead to a determination that the 3rd and 4th Plaintiffs duly authorized the filing of the suit. It was argued that under the Memorandum and Articles of Association of both companies, the 3rd and 4th Plaintiffs had the prerequisite to constitute a quorum to take the action. That the Resolution was in writing and was duly signed and that the appointment of Havi & Company was ruled as valid by the Court in the aforesaid Decision.

17. It was further contended that Havi & Company were duly authorized under seal to act for the Companies as required by Order 9 Rule 2(c) of the Civil Procedure Rules. Havi posed the question, "is there similar authorization in respect to the firm of Ahmednasir Abdikadir & Co?" In respect to the meeting of 16th September 2015 it was argued that the "Resolutions" were not executed.

18. The Court was asked to apply the *ratio* in the decision of **John Shaw & Sons (Salford) Limited Vs. Peter Shaw & John Shaw** [1935] 2 KB 113 to find that where power of management of a Company is vested in the Board of Directors under the Articles of Association of the Company, and such power cannot be overridden except as provided in the Articles.

19. The Applicants argue that the cause of action is a challenge of unlawful acts of the 1st to 3rd Defendants arising out of a meeting of 5th February 2015. Further it is an action against those Defendants for fraud and breach of trust. It being argued that the 1st to 5th Defendants who had lost a challenge to the authority to bring this action could not purport to appoint an Advocate of their choice to terminate those proceedings. For this proposition the Court was referred to the decision in Kuri Tea Factory Ltd vs. KTDA [2013] eKLR. It was submitted that the intention was to defeat the Ruling of 6th March 2015 and that would amount to an abuse of process of Court.

20. In respect to the disqualification of the firm of S.C Ahmednasir Abdikadir & Co. Advocate, Mr. Havi argued that there existed an Advocate-Client relationship between that firm and the Plaintiffs which precluded the firm from taking parallel instructions from the Defendants to act for the Companies and to terminate the suit for the benefit of the Defendants. It was emphasized that the mischief and the prejudice of the entry of that firm is to countermand existing Court Orders herein by terminating the suit.

21. The Court was referred to a passage in Harsbury's Laws of England, 5th Edition Vol.65 where in paragraph 1187 the Authors state:-

"1187. Conflict of interest and client confidentiality. A practicing barrister must not accept any instructions if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients, unless all relevant persons consent to the barrister accepting the instructions. A barrister should always be alert to the possibility of a conflict of interests. If after a barrister has accepted a brief or instructions on behalf of more than one lay client, there is or appears to be a conflict or a significant risk of a conflict between the interests of an one or more of such clients, he must not continue to act for any client unless all such clients give their consent to his so acting. A barrister must also not accept instructions if there is a risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent".

Also cited to Court was the Decision in King Woolen Mills Limited – vs- Kaplan & Stratton Advocates (1993) eKLR.

22. Mr. Havi thought that the burden is on the Advocate accused of conflict to show that there was no conflict. In this regard the Court was asked to note S.C Ahmednasir had not filed any Replying Affidavit to refute the allegations and instead left it to Jennings. That Jennings was not in the meeting between Mr. Havi, Nyagah and S.C Ahmednasir and so the first hand testimony of Nyagah should be given greater weight than the hearsay accounts of Jennings.

23. In respect to the assertion by Jennings that the meeting was a request by Havi and Nyagah to S.C Ahmednasir to improperly influence the Judge, Counsel asked the Court to note that S.C Ahmednasir made this claim only after he had made his way into this matter in September 2015 and when a challenge to his entry had been mounted. The Court was asked to note that the meeting took place in February 2015 and the issue was raised by S.C Ahmednasir many months after. That the claim was clearly an afterthought and made in bad faith.

The Response

24. Senior Counsel Ahmednasir submitted that the application was an abuse of Court process and embarrassing to make. Counsel stated that given the history of the matter, the Advocate who did not deserve to act for Kofinaf and Tatu was Mr. Havi.

25. It was submitted that the Applicant had not demonstrated that the Resolutions of 16th September 2015 were unlawful. That to the contrary the meeting was properly convened and had quorum. Indeed the full Board was present including the 3rd and 4th Plaintiffs. Amongst the items on the Agenda of that full Board meeting were-

- a) Whether the appointment of Havi was regular or irregular.
- b) Whether a two member Board constituting of the 3rd and 4th Plaintiffs could properly authorize the filing of the suit.
- c) The appointment of the firm of Ahmednasir Abdikadir & Company to manage the law suits on behalf of the Company.

26. Giving graphic details from the minutes of the meeting, S.C Ahmednasir sought to demonstrate that not a single member raised the issue of conflict of interest between the company and his firm. An example is the following contribution of members of the Board :-

Hans Horn: I will repeat the proposal which I would like to propose that Ahmednasir who is an advocate with a good reputation and I would like to recommend him to the Board to represent the Board on this matters.

Nahashon Nyagah: Is he at the moment representing a faction of the Board? Just asking.

Hans Horn: I do not know whether he represents, because I have not been told. Others will have to give an answer to that.

Nahashon Nyagah: Oho! Sorry. Okay. Let's vote first.

Counsel posed the question, 'why did Nyagah not disclose that S.C Ahmednasir was his Lawyer?

27. That finally the matter was put to vote and his firm was duly appointed. It was contended that Mr. Havi was well aware of the Resolutions and had infact annexed an extract of the Board meeting to the Affidavit in support of the Application. S.C Ahmednasir thought it bewildering that Counsel could insist on his participation in these proceedings when he was aware that there was a Resolution that said he had no such authority.

28. In respect to the Ruling of 6th March, 2015 it was argued that paragraph 38 of the ruling that was relied on by the Applicants was obiter. That the Court did not hold that Mr. Havi could be a permanent 'fixture' in the proceedings.

29. It was further submitted that the Ruling in Hcc. 230/2015 (*supra*) made damning findings against the conduct of Mr. Havi, that Mr. Havi had undertaken a scheme in which Tatu and Kofina flost billions of shillings. That Mr. Havi could not insist on appearing for parties who allege that he was the fulcrum of a scheme to defraud them.

30. As to the provisions of Order 9 Rule 4, Counsel thought them to be irrelevant because it was in respect of recognized agents and not Advocates.

31. As to whether he was conflicted, Senior Counsel submitted that Nyagah had failed to produce any documents to show that he gave instruction to his law firm. He also failed to show existence of a Retainer between Counsel and Client. Nyagah did not show any fee agreement or document. Further in respect to documents said to have been left with Senior Counsel, the Client failed to show a receipt of documents by the law firm. The Court was asked to notice that Nyagah did not raise the issue when an opportunity presented itself during the Board meeting. Lastly a question was posed as to what was the confidential information that the firm is said to have.

32. The Respondents relied on the following authorities in support of the above arguments:-

- Delphis Bank Ltd vs. Channan Singh Chatthe & 6 Others [2005] eKLR.
- Charles Gitonga Kariuki vs. Akuisi Farmer Co. Ltd [2007] eKLR.
- Tom Kusienya & Other vs. Kenya Railways Corporation & Others [2013] eKLR.
- Lalchand Fulchand Shah & Another vs. I & M Bank Ltd [2014] eKLR.
- Shalimar Limited & 2 Others vs. SadrudinKurji & Another [2015] eKLR.

33. Finally the Respondents urged Court to find that the question of representation was res-judicata as it had been adjudicated upon by the Court of Appeal in Civil Application No. Nai. 244 of 2015 (*supra*). It was argued that, that decision was binding on this Court. It is in that decision that the Court of Appeal found that as from 16th September 2015, Havi & Company had no instruction to represent the two Companies.

Of a question posed by Court

34. In the cause of the hearing of the Application, the Court asked Counsel to address it on the implication if any, of the leave granted to the 4th Plaintiff to continue the suit as a Derivative Action to the matter. This was granted in the ruling by Justice Ogola on 6th March 2015. Paragraph 43 of that decision is of importance:-

“43. In the Application before the Court, the Plaintiffs did not seek any leave to commence the suit by way of Derivative Action when they first came to court 6th February 2015. The prayer for leave is only pursuant to the Amended Notice of Motions filed in Court on 23rd February 2015 where there is a prayer to continue this suit as a Derivative Action. In the light of the conflicting case law in this matter, I would adopt a position that seeks to keep the parties in court rather than that which seeks to chase them away from the seat of justice, even after they have expressed a need for help. In my view, when a party is required by law to seek leave before commencing a Derivative or any other suit, and for whatever reason the party does not seek such leave, but nonetheless commences the suit, rules of justice would allow such a party to come back to court, and for good reasons to be recorded, urge the Court for the leave to continue with the action as a Derivative suit or other suit. That is what the Plaintiffs have done in the said Amended Notice of Motion. I have considered that prayer, and if it is still helpful, I allow it”.

35. Counsel Havi submitted that even the 1st Defendant was alive to the fact that any claim in so far it concerns the two Corporations could only be espoused as Derivative Action. And this is a Derivative Action where Tatu and Kofinaf are necessary parties. That the intention of the 1st to 6th Defendants is to defeat the Court's Decision of 6th March 2015 and to terminate the litigation. The Court was asked not to allow the 1st to 6th Defendants to use their acclaimed position to terminate an action against them.

36. S.C Ahmednasir maintained that the corporate structure of the Company could not change because of the existence of a Derivative Action. Counsel argued that the structure was intact and the Board of Directors were in control of the management and affairs of the two companies.

37. On his reading of the Decision, Counsel thought that the suit was omnibus in nature. In it were distinct and separate causes of action. The first was an action by Tatu and Kofinaf in their own right. In respect to that action only the Board of Directors of the two Companies could determine its fate and legal representation. Then there was a Derivative Action. That action could be pursued by the 4th Plaintiff who was granted leave to continue the action as a Derivative Action. There was also a cause of action by the 3rd Plaintiff as a Director and yet another cause of action by the 4th Plaintiff as a Director and Shareholder.

38. Having drawn that distinction Counsel submitted that neither the 3rd nor the 4th Plaintiffs or both acting together could assume the authority of the Board of Directors of the two companies to direct or control the cause of action that belonged to the two companies in their own rights.

Determination

39. Having heard the arguments by Counsel and read authorities referred to it, and giving regard to the nature of the dispute before Court, the Court takes the view that the application before it can be determined on two clear issues;

- Whether the grant of permission given to the 4th Plaintiff on 6th March 2015 to continue this suit as a Derivative Action defeats any attempt by the Board of Directors of the Companies to control and direct this litigation.
- Whether the Decision of the Court of Appeal in Civil Application No. Nai 244 of 2015 (*supra*) binds this Court as to who should represent Tatu and Kofinaf in these proceedings.

40. At the outset of the proceedings no leave was sought to commence the suit as a Derivative Action. Instead, through an Amended Notice of Motion filed on 29th February 2015, the 3rd and 4th Plaintiffs sought to continue this suit as a Derivative claim. In paragraph 43 of the Ruling of 6th March 2015, Justice Ogola granted the said permission to the 4th Plaintiff only. In doing so the learned Judge observed that the 4th Plaintiff is a shareholder of Tatu and Kofinaf and could institute a Derivative Action. The grant of leave had some legal implications.

41. The nature of a Derivative Action was explained in masterly language by lord Denning LJ Wallersteiner vs. Moir (No.2) Moir vs. Wallersleiner and others (No.2):[1975] 1 All ER 849

“It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v. Harbottle*. The rule is easy enough to apply when the company is defrauded by insiders or minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs- by directors who hold a majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorize proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress. In *Foss v. Harbottle Wigram* V-C saw the problem and suggested a solution. He thought that the company could sue ‘in the name of someone whom the law has appointed to be its representative’. A suit could be brought-

‘by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled’.

42. Although instigated and mounted by the minority Shareholders, a Derivative claim must be a cause of action vested in the Company and brought for the benefit of the Company. The relief sought is on behalf of the Company. Locally, Derivative Actions now have statutory salutation in Part XI of the Companies Act, 2015. That accepted, what form is a Derivative Action to take.

43. In the same Decision, Lord Denning had the following to say;

“To avoid that circuitry, Lord Hatherley LC held that the minority shareholders themselves could bring an action in their own names (but in truth on behalf of the company) against the wrongdoing directors for the damage done by them to the company, provided always that it was impossible to get the company itself to sue them. He ordered the fraudulent directors in that case to repay the sums to the company, be it noted, with interest. His decision was emphatically approved by this court in ‘*Menir v Hoopers*’ Telegraph works and *Mason v Harris*. The form of the action is always ‘AB (a minority shareholder) on behalf of himself and all other shareholders of the company against the wrongdoing directors and the company. That form of action was said by Lord Davey to be a ‘mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress’; see *Burland v Earle*. Stripped of mere procedure, the principle is that, where the wrongdoers themselves control the company, an action can be brought on behalf of the company by the minority shareholders, on the footing that they are its representatives, to obtain redress on its behalf. I am glad to find this principle well stated by Professor Gower in his book on companies in words which I would gratefully adopt:

‘where such an action is allowed the member is not really suing on its own behalf nor on behalf of the members generally, but on behalf of the company itself. Although... he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs. The Plaintiff shareholder is not acting as a representative of the

other shareholders but as a representative of the company... in the United States...this type of action has been given the distinctive name of a "derivative action," recognising that its true nature is that the individual member sues on behalf of the company to enforce right derived from it".

The Complaint takes the form of "Minority shareholder (suing on behalf of himself and other shareholders of the company) vs. the wrongdoing Directors and The Company".

44. It has been suggested elsewhere that its title could be akin to the title in Judicial Review applications. Whatever the form, what is of paramount significance is that the action is one which must vest in the company and brought for its benefit and the title to the Pleadings must be depicted vividly so that, it would appear to be so at a glance. However since it is commenced by way of complaint the form must not veer too far from the convention.

45. Lord Denning's discussion also demonstrates that the Company is named as a Defendant. That common law position has found Statutory approval in the United Kingdom (see **Gower and Davies 'Principles of Modern Company' 8th Edition**). The rationale for making the Company a Defendant is explained thus;

"The reason for this oddity seems to be that anyone can make another person a Defendant to a claim but making a person a claimant requires that persons consent".(Gower & Davies) (supra)

That said, the real or true Defendants are the Directors or other persons alleged to be transgressing against the Company. The Company would be a nominal Defendant. A Defendant by name only!

46. The extent of participation and activity of this nominal Defendant in the proceedings is a subject of divided opinion. One view is that the Company can be as active as any other Defendant. However, in **Shen v. Miller [2012] 2012 WL 6619025**, it was held that,

"In essence, the Corporation that is the subject of the derivative claim is generally a nominal party only, 'Because the claims asserted and the relief sought in [the derivative] complaint would, if proven, advance rather than threaten the interest of the nominal Defendant, the nominal Defendant must remain neutral in the action '[citation]' (part....Supra, 167 cal.App.4th at p.1007).

The holding was that as a nominal Defendant, the company must remain neutral or passive in the proceedings.

47. Although each case must be considered in its own unique circumstances, the Court prefers to side with the opinion that generally, the Company should remain neutral (passive) as the real protagonists square it out. This is because should the Derivative Action succeed then it will benefit the Company and there should be no motivation by the Company to resist it. An apposite analogy of the nature of a Derivative Action is that the Plaintiff Shareholder substantively acts as a *guardian ad litem* for the Corporation (see a **Shen(supra)**). There should be no reason for the beneficiary to fight the Guardian.

48. That said an exception to the Company's neutrality could be, where, for instance the Company is challenging the suitability of an action to be commenced or continued as a Derivative claim. But once the Court resolves the challenge in favour of the Plaintiff, then there may be no reason why the Company should continue to play an active role.

49. The significance of this discussion on the nature of a Derivative Action becomes apparent presently.

50. In granting Shah (the 4th Defendant) leave to continue the suit as a Derivative Action, the Court did at least two things. First, it was an approval that the 4th Plaintiff could continue the action on behalf of Tatu and Kofinaf. Second, it affirmed that the 4th Plaintiff could control and drive the Derivative Action. Indeed one of the Grounds for which the Derivative Action was sought was that some of the Defendants could use their strength as Shareholders to defeat the claim (See Ground 15 to the Application for leave)

51. It was therefore well conceded by Senior Counsel Ahmednasir that in so far as the Derivative Action was concerned, the 4th Plaintiff had a right to Counsel of his choice. It was a concession, in my view, that in so far as the Derivative Action was for the benefit of Tatu and Kofinaf, the 4th Plaintiff was the only person who had a say on to who could act in that action.

52. Senior Counsel however argued that there was another component of the action that belonged to Tatu and Kofinaf in their own right as legal entities. Counsel referred to paragraph 38 of the Ruling of Judge Ogola to support that argument in which the Judge observed:-

"It was submitted by Mr. Ochieng Oduol that the 1st Plaintiff's Company cannot bring up a Derivative action, and that on that ground 1st and 2nd Plaintiffs cannot be Plaintiffs in this matter. That submission may be correct especially when it is stated that the said companies have brought a Derivative Action. However, it has not been said that the said companies have come to court on that ground. Those companies are in court on their own right. They own properties and assets, and have liabilities which they may need to protect. It has been alleged that funds belonging to those companies are being siphoned out of the country illegally by the Defendants, and that the 2nd Plaintiffs' assets in land are being plundered. The Plaintiffs' companies have the right to come to court to protect or defend their perceived rights. In fact, for the issues raised before court, the said Plaintiffs would be necessary parties for the proper and efficient determination of all issues before court".

Reading that passage, it may not be easy to disagree with the interpretation given by Counsel to that holding.

53. And although that may be so, this Court prefers to think that the true and practical effect of the Order granting the 4th Plaintiff leave to

continue as the Derivative suit was to convert the action commenced by Tatu and Kofinaf into a Derivative claim. In the least, the claim of Tatu and Kofinaf merged with the Derivative action and at most was subsumed into the Derivative Action. And my view could be borne out by the discussion of the nature of Derivative Actions in the preceding paragraphs of this decision. In that event the 4th Plaintiff's position on choice of Counsel would be unassailable and should prevail.

54. But let me for a moment, accept that the interpretation made by Senior Counsel Ahmednassir is the correct one. That leads to a peculiarity in these proceedings, not attributable to the interpretation by Counsel, but to the manner in which the action was commenced and has been continued. In the same cause and contained in one Plaintiff would be an action by Tatu and Kofinaf in their own name and right, sitting side by side with a Derivative Action brought by a minority Shareholder for the benefit of the Company.

55. Counsel made that argument as a foundation to his submission that for the action that is owned by the Tatu and Kofinaf in their own right, the Companies Board of Directors had an exclusive right to appoint Advocates to act on their behalf and they settled on the firm of Ahmed Nassir Abdikar & Co. Advocates.

56. What then would be the practical consequence of permitting the two distinct actions to be conducted by Advocates with conflicting instructions?

57. For an answer, one needs to look at the Amended Plaintiff dated 19th March 2015. Basically, it is alleged that the 1st to 3rd Defendants have acted in breach of their fiduciary duties of Tatu and Kofinaf and have committed acts of fraud. Paragraph 18 provides the particulars of Breach of Fiduciary Duty and fraud as follows:-

a. On the 1st day of June, 2012, the 3rd Defendant acting on his own and on behalf of the 1st and 2nd Defendants, without authority of the Board of Directors of the 1st Plaintiff, unilaterally executed a Master Intra-Group Loan Agreement committing the 1st Plaintiff into further loan agreements and repay the same;

b. On the 1st day of June, 2012, the 3rd Defendant acting on his own and on behalf of the 1st and 2nd Defendants, without authority of the Board of Directors of the 1st Plaintiff, unilaterally executed a Master Intra-Group Loan Agreement committing the 2nd Plaintiff into further loan agreements and repay the same;

c. On the 14th day of September, 2012, the 1st and 3rd Defendants appropriated United States Dollars Two Million, Two Hundred and Fifteen Thousand (US\$. 2,215,000.000) to their personal use or use by third parties associated with them;

d. On 7th day of November, 2012 the 1st and 3rd Defendants requisitioned United States Dollars Five Million Eight Hundred (US\$. 5,800,000.00) on behalf of the 1st Plaintiff, remitted United States Dollars Three Hundred (US\$.3000,000.00) and appropriated United States Dollars Five Million, Five Hundred Thousand (US\$.5,500,000.00) to their personal use of use by third parties associated with them;

e. 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 United States Dollars Eighty Three Million, Nine Hundred and Forty Six Thousand, Six Hundred and Seventy-Seven (US\$.83,946,677.00) when no such amount or any part thereof was outstanding.

f. Refusing to give an account of how the sum of United States Dollars Eighty Three Million, Nine Hundred and Forty Six Thousand, Six Hundred and Seventy –Seven (US\$.83,946,677.00) was arrived at and to give the 3rd and 4th Plaintiffs the supporting documents, evidence and date in respect thereof;

g. 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 United States Dollars Six Million Three Hundred and Thirty-Nine Thousand , Three Hundred and Twenty (US\$.6,339,320.00) when there was no such default; and,

h. On the 28th day of January, 2015, the 1st to 3rd Defendant misrepresented to the 2nd Plaintiff that there was an outstanding liability on the loan in the sum of United States Dollars Ninety-Four Million (US\$.94,000,000.00) and committed the 2nd Plaintiff to a further sale of property for a sum of United States Dollars Forty-Eight Million (US\$.48,000,000.00) towards the alleged liability.

And the 1st and 2nd Plaintiffs claim an account of and/or special damages against the 1st to 3rd Defendants in the sum of United States Dollars Thirteen Million Five Hundred and Forty Thousand and Three (US\$. 13,5640,003.00) arising out of the breaches particularized herein above”.

58. It is also alleged that the 1st, 2nd and 3rd Defendants have purported to concede to the 2nd Defendant a Power of Attorney to unilaterally deal with the assets and affairs of the 1st Plaintiff.

59. Another complaint is that in a meeting of 5th February 2015, the 1st, 2nd and 3rd Defendants purported to appoint the 4th and 5th Defendants as Directors of Tatu and to appoint the 4th Defendant as Chairman of the Board in place of the 3rd Plaintiff. A similar complaint is made in respect to the Members of the Board of Kofinaf.

60. Introduced by the amendment to the Plaintiff are matters said to have happened subsequent to the filing of the suit. That inspite of the

Court Order made on 6th March 2015 that an audit of the loan be undertaken, the Defendant have frustrated efforts to commence the audit and have taken unlawful actions to exclude the 3rd and 4th Plaintiff from the management of Tatu and Kofinaf. Particulars are set out in paragraph 25A as follows;

- a. The Defendants have asked PwC not to go on with the audit on the claim that there is dispute on instructions to it on the same;
- b. The 2nd Defendant attempted to coerce the 2nd Plaintiff's former Company Secretary, John L.G Maonga to falsify minutes of the Board of Directors Meeting of the 1st Plaintiff;
- c. The Defendants have falsified an extract from MIN 12/2015 (e) referred to in paragraph 20 herein above to reduce the scope of the audit and purported to remove the 3rd Plaintiff from list of persons to liaise with with PwC on the audit;
- d. The Defendants have procured their appointed Company Secretary for the 1st and 2nd Plaintiffs, Cornelius Kigera to alter and falsify the minutes of the Board Meeting of the 2nd Plaintiff held on the 28th day of January, 2015 and vary the contents thereof in so far as they relate to MIN 12/2015 (e) referred to tin paragraph 20 herein above which meeting he did not attend and whose minutes had been finalized by the preceding Company Secretary, John L.G. Maonga;
- e. 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 one of the persons designated to liaise with PwC in the 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".

61. The prayers sought are:-

- a. The Resolution made by the 1st, 2nd and 3rd Defendants on the 5th day of February, 2015 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, Lucan Akunga Omariba, appoint Anthony Njoroge as acting 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's bank accounts and replace them with the 6th and 7th Defendants be declared null and void *ab initio* and cancelled.
- b. The Resolution made by the 1st, 2nd and 3rd Defendants on the 5th day of February 2015 purporting to appoint the 4th and 5th Defendants as Directors of the 2nd Plaintiff, revoking 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 be declared null and void *ab initio* and cancelled.
- c. A permanent Injunction be issued restraining the 1st to 3rd Defendants whether by themselves, agents, servants or otherwise howsoever from acting upon the resolutions made on the 5th day of February, 2015 by the 1st to 3rd Defendants in respect of the Plaintiffs as more particular se out in a. and b. herein above.
- d. A permanent Injunction be issued restraining the 1st to 3rd Defendants whether by themselves, agents, servants or otherwise howsoever form taking and making decisions, giving instructions, writing and signing letters, notice, forms, deeds, minute, 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.
- e. A permanent Injunction restraining the 4th to 7th Defendants whether by themselves, agents, servants or otherwise howsoever form 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.
- f. A permanent Injunction be issued restraining the 4th to 7th Defendants whether by themselves, agents, servants or otherwise howsoever form accessing and operating account numbers 1000143867 and 1000180072 operated by the 1st Plaintiff at The Mall, Westland Branch of NIC Bank Limited and 1002095738 1002095676 operated by the 1st Plaintiff at the Village Market Branch of NIC Bank Limited, and account numbers 0100003674295 and 0100003674309 operated by the 1st Plaintiff with CFC Stanbic Bank Limited.
- g. A permanent injunction be issued restraining the Defendants whether by themselves, agents, servants or otherwise howsoever 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 and the shareholding and directorship of the 1st and 2nd Plaintiffs.
- h. A permanent injunction be issued restraining the Defendants whether by themselves, agents servants or otherwise howsoever 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 offshore loan facility and land sales as set out in the notice calling for a meeting of the Board of Directors Meeting of the 1st and 2nd Plaintiffs on 24th March, 2015.

i. A permanent injunction be issued restraining the Defendants whether by themselves, agents servants or otherwise howsoever from effecting any payments on account of the alleged loan, from the account 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 Price water house Coopers Certified Public Accountants (Kenya).

j. A permanent injunction be issued restraining the Defendants whether by themselves, agents, servants or otherwise howsoever from dealing, advertising, charging, selling, mortgaging, transferring in any manner whatsoever properties held by the 1st and 2nd Plaintiffs wheresover, 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 water house Coopers Certified Public Accountants (Kenya).

k. The 1st to 3rd Defendants be directed to account to the 1st and 2nd Plaintiffs for the sum of United States Dollars Seventy Five Million, Three Hundred and Twenty-Five Thousand, One Hundred and Twenty-Eight (US\$. 75,325,128.00) in respect of the properties sold and referred to in paragraph 16 of the Amended Plaint.

l. 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.

m. The 1st to 3rd Defendants be directed to pay to the 1st and 2nd Plaintiffs the sum of United States Dollars Thirteen Million Five Hundred and Forty Thousand and Three (US\$. 13,540,003.00) or any part thereof ascertained after the in-depth audit of the loan resolved by the 2nd Plaintiff on the 28th day of January, 2015 to be undertaken by Price water house Coopers Certified Public Accountants (Kenya)

n. 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.

o. The Defendants be ordered to pay the Plaintiffs costs of this suit together with interest thereon at Court rates from the date of filing of suit until payment in full.

62. This Court has set out the contents of the Plaint in some detail to demonstrate that it is intractable, nigh impossible, to segregate or separate the claims by the Corporation in their own right and those belonging to the Derivative Action. And this should not be surprising because by its very nature a Derivative claim must be a cause of action which is vested or inheres in the Company. Secondly, and critical, the real protagonist, are the 3rd and 4th Plaintiffs against the Defendants.

63. It is beyond conjecture that the instructions to the firm of Ahmednasir Abdikadir & Co. are at odds with that of Havi & Co. Advocates. After filing the impugned Notice of Change of Advocates, the firm of Ahmednasir Abdikadir & Co. on 22nd October 2016 filed a Notice of withdrawal of the suit by the 1st and 2nd Plaintiffs. That Notice of withdrawal is testimony to the nature of instructions given to Counsel.

64. Even if this Court was to accept the argument that, through the Resolution of 16th September 2015, Tatu and Kofinaf lawfully appointed Ahmednassir Abdikadir & Co. Advocates to act on its behalf in place of Havi & Company Advocates, the unique circumstances of this case inhibits an endorsement of that appointment. This is because, as demonstrated above, it is impossible to segregate the action by the Corporation in their own right and that of the Derivative action. Secondly, it is the Directors and Shareholders who are the real protagonist herein and not Tatu and Kofinaf, so that if this were to be a typical derivative action, Tatu and Kofinaf would be neutral parties. If the action of the corporation herein were to be directed at cross purposes with that of the 4th Plaintiff, then the Derivative action would be imperiled and the very reason why leave was granted to the 4th Plaintiff to continue the action as a derivative action would be defeated. And it must be said that leave was granted by Court in the face of a challenge by the Defendants. Surely, once the challenge was surmounted, ought not the real protagonists to the suit be allowed to rumble in Court or as, often suggested by Ogola J. seek a less acrimonious resolution.

65. Yet, this Court cannot reach a Decision that disregards or conflicts with a binding Decision or order of the Court of Appeal.

66. From the Ruling of the Court of Appeal of 11th December 2015 in Civil Application No. Nai 244 of 2015 the following emerge. Unhappy with the Ruling and Order of Ogola J. of 28th April, 2015 herein, the Plaintiffs preferred an Appeal to the Court of Appeal. In the meantime the Plaintiffs moved the Court for an Order of Injunction pending the determination of the intended Appeal. The Application, by way of Notice of Motion, was filed by the firm of Havi & company Advocates on behalf of all the four Plaintiffs.

67. On 1st October 2015, the firm of Ahmednasir Abdikadir & Co. Advocates filed a Notice of Change of Advocates replacing Havi & co. Advocates in the representation of the 1st and 3rd Plaintiffs (then the Applicants). An informal Application was made on behalf of these two Applicants to withdraw the Motion on their behalf. It was premised on the argument that Havi & Co. Advocate did not have authority of the Companies to file the Application. Given the Resolutions of the Board of Directors of 16th September 2015 discussed herein above, Havi & Co. Advocates resisted that Informal Application.

68. After hearing argument, the Court of Appeal Ruled;

“In conclusion, the notice of motion was brought on behalf of the two Companies by the firm of advocates which had no instructions as from 16th September, 2015 to represent the two Companies. The Notice of Motion is in reality brought by the 3rd and 4th Applicants on behalf of the two Companies who are among the directors, who appointed the 1st and 2nd Applicants’ current advocates by a Resolution of the Board of Directors passed on 16th September 2015. Thus the Notice of Motion is brought in contravention of the resolution of the Boards of the two Companies”.

Is this, as submitted by Respondents, a decision that binds this Court in respect to the question before it?

69. In my estimation the critical issue here is not the efficacy of the Resolution of 16th September 2015 but whether or not in the circumstances of this case the firm of Ahmednasir Abdikadir & co. Advocates should be allowed to come on record for Tatu and Kofinaf. The circumstances are that there is a Derivative Action on behalf of the two Companies and the two companies are all but nominal parties herein. And that given the inseparable nature of the claims in the Derivative action and the claim that may belong to the companies in their own right it is neither desirable nor feasible that the claims should be litigated at cross purposes. In my view to decline to endorse the appointment of Ahmednasir Abdikadir & Co. Advocates does not diminish or disregard the force of the holding by the Court of Appeal that from 16th September 2015, the said firm had instructions to represent the companies. All that this Court is saying is that the said firm cannot be permitted to enter these proceedings if the intention of that entry is to torpedo a Derivative Action which has been permitted by Court.

70. As is now apparent this Court is for allowing the Application. But on costs, I take the view that in the peculiar circumstances of the case Tatu and Kofinaf correctly felt that they were entitled to appoint Counsel of their choice. There is no reason therefore why Senior Counsel Ahmednasir & Co. or his firm should bear the costs of the Application.

71. In the upshot, I allow the Application dated 29th September, 2015 but with no Order as to costs.

Dated, Signed and Delivered in Court at Nairobi this 11th Day of November, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Havi & Osudwa & Kidera for Plaintiffs

Busaidy for 1st and 2nd Plaintiffs

Oloo for Macharia for 3rd Defendants

Busaidy for Issa for 1st, 2nd, 4th, 5th and 7th Defendants

Alex - Court clerk