



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 46 OF 2015

TATU CITY LIMITED.....1ST PLAINTIFF
KOFINAF COMPANY LIMITED.....2ND PLAINTIFF
NAHASHON NGIGE NYAGAH.....3RD PLAINTIFF
VIMALKUMAR BHIMJI DEPAR SHAH.....4TH PLAINTIFF

-VERSUS-

STEPHEN JENNINGS.....1ST DEFENDANT
FRANCES HOLLIDAY.....2ND DEFENDANT
HANS JOCHUM HORN.....3RD DEFENDANT
PIUS MBUGUA NGUGI.....4TH DEFENDANT
FRANK MOSIER.....5TH DEFENDANT
ANTHONY NJOROGE.....6TH DEFENDANT
CHRISTOPHER BARRON.....7TH DEFENDANT

R U L I N G

I N T R O D U C T I O N

1. On 6th February 2015, the Plaintiff/Applicant filed the suit herein simultaneously with a Notice of Motion of the same date under a Certificate of Urgency of even date seeking what were described as interim *ex-parte* urgent orders mentioned therein. The Duty Judge did not grant any orders but directed that the application be served on all the parties including the making of necessary applications for service out of the jurisdiction. The matter was then set for a mention on 27th February 2015.

2. On 23rd February 2015, a few days to the date of mention on 27th February 2015, the Plaintiffs filed an

Amended Notice of Motion with additional prayers. Prayer 1A seeking leave to be granted to continue this suit as a derivative action. Additional grounds 12 to 19 supported the urgency of the matter and the necessity for ex-parte urgent orders despite the matter being due for mention on 27th February 2015. In addition to the grounds which supported the Notice of Motion on 6th February 2015, the ex-parte application further urged the following grounds namely:-

“ . . .

12. The Notice of Motion herein dated 5th February, 2015 seeking to restrain the Defendants from taking decisions and actions pursuant to the 1st, 2nd and 3rd Defendants’ resolutions of 5th February, 2015 has been fixed for mention on 27th February, 2015.

13. The Defendants have, upon getting notice of the institution of this suit and the filing of the Notice of Motion, taken further steps, decisions and actions intended to prejudice the Plaintiffs and pre-empt the outcome of the suit and the Notice of Motion by calling meetings of the Board of Directors of the 1st Plaintiff and taking decisions and actions in pursuance of the challenged resolutions to the detriment of the Plaintiffs.

14. The Defendants having proceeded to hold an invalid meeting on 12th February, 2015 are likely to implement unilaterally reached resolutions some of which, including the agenda item on Emergency Debt Committee will have adverse/irreparable/irreversible damage to the 1st, 2nd, 3rd, and 4th Plaintiffs if conveyed to third parties or in the likely event that the Defendants instructed the offshore loan Facility Agent, Renaissance Partners Investment Limited which is a company under the control of the 1st, 2nd, 3rd, and 5th Defendants to make an enforcement on the loan thereby unilaterally nullifying the 2nd Plaintiff’s Board decision of 28th January, 2015 to engage PricewaterhouseCoopers, Certified Public Accountants to carry out an independent in-depth audit review of the loan account.

15. There is need to continue this suit as a derivative action, to prevent any attempts by the 1st, 2nd, 3rd and 5th Defendants to interfere with the shareholding of Cedar IV Limited and CedarSoc Limited, through their manipulation of the loan status by way of equity conversion as threatened by the 1st Defendant in the meeting of the 2nd Plaintiff’s Board of Directors held on 28th January, 2015 and claim a majority shareholding in the 1st and 2nd Plaintiffs respectively, with a view of ratifying the illegal actions of the Defendants and defeat the claim herein.

16. The Defendants’ actions are and will be of so much substantial irreparable injury that cannot be compensated in damages or otherwise, for the reason that the principals behind the actions, the 1st, 2nd, 3rd, 5th and 7th Defendants are all foreigners who may not be within easy reach of the Honourable Court’s jurisdiction when needed to account for the damage caused by their decisions and actions to the Plaintiffs and third parties interested in and affected by the 1st Plaintiff’s Tatu City development project and the extensive 2nd Plaintiff’s coffee growing and processing business which brought the said 1st and 3rd Defendants and at a later stage the 2nd and 5th Defendants on one hand and the 1st, 2nd, 4th Plaintiffs and I on the other hand to partner together.

17. Such an eventuality will render the 4th Plaintiff and I vulnerable, culpable and personally liable to criminal and civil claims for the reason that we are the only local and resident directors of the 1st and 2nd Plaintiffs who will be held to account to the respective market regulators for the irreparable damage the 1st, 2nd, 3rd, 5th and 7th Defendants would have caused by their actions on 1st Plaintiff’s Tatu City development project and the 2nd Plaintiff’s agricultural and coffee processing business.

18. The Defendants’ actions do not adhere to the overriding objective to facilitate the just,

expeditious, proportionate and affordable resolution of the dispute herein and need be restrained pending the determination of the dispute raised in this suit.

19. The Defendants' actions warrant a reconsideration of the request for an interim order of injunction pending the mention scheduled for 27th February, 2015 to prevent the ends of justice from being defeated by the Defendants."

3. The court after hearing the *ex-parte* Applicant's counsel Mr. Nelson Havi in chambers, allowed orders as follows:-

1. That the application dated 23rd February 2015 be and is hereby certified as urgent, and heard ex-parte.

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

3. That the 1st to 3rd Defendants whether by themselves, agents, servants or otherwise howsoever be and are hereby restrained from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 1st and 2nd Plaintiff's without the consent and concurrence of the 3rd and 4th Plaintiffs, pending the hearing of this application inter-partes.

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

5. That the said interim orders shall be in place upto and including 3rd March 2015 when the application will be heard inter-partes.

6. That the matter shall be heard by lady Justice Farah Amin.

7. That there will be no need for a mention of this matter on 27th February 2015.

8. That costs shall be in the cause.

4. On 26th February 2015, the Respondents, unhappy with the above *ex-parte* orders issued on 23rd February 2015 to the Applicants, filed the current application (**The Notice of Motion before the court**) dated 26th February 2015 supported by a Certificate of Urgency of even date seeking orders for the immediate discharge of the said interim orders issued on 23rd February 2015 to the Plaintiff. The

application seeks the following orders:-

- 1. For reasons to be recorded this application be certified as urgent and be heard ex parte in the first instance for purposes of prayer 2 below.**
- 2. The interim orders of injunction granted ex parte on 23rd February 2015 be discharged or set aside.**
- 3. The Plaint in so far as it is brought on behalf of the 1st and 2nd Plaintiffs be struck out.**
- 4. The costs of this application and of the suit be borne by the 3rd and 4th Plaintiffs.**

5. After hearing Mr. Ochieng Oduol for the *ex-parte* Applicant this court directed that the application be served upon the Plaintiffs/Respondents for *inter-partes* hearing the following day being 27th February 2015. On that day, parties appeared, and made oral submissions on the current application, hence this Ruling.

THE PLAINTIFFS' CASE AND SUBMISSIONS

6. The Plaintiffs case pursuant to which the said *ex-parte* orders were granted is supported by the affidavit of **Nahashon Ngige Nyaga**, the 3rd Plaintiff herein. The affidavit is dated 5th February 2015 and filed in court on 6th February 2015. Mr. Nyagah depones thereto that he is a Director and Chairman of Board of Directors of the 1st and 2nd Plaintiffs and is authorised to swear the said affidavit on behalf of the 1st, 2nd and 4th Plaintiffs.

7. Mr. Nyaga stated that the 1st Plaintiff is the registered owner of property Land Reference Number 28867/1 measuring about 996.6 hectares on which a project by the name Tatu City is to be undertaken. The project is being undertaken as a venture of investors represented on the Board of Directors of the 1st Plaintiff by the 3rd and 4th Plaintiffs on one hand and the 1st to 3rd Defendants on the other hand. The 3rd Plaintiff has been the Chairman of the Board of Directors of the 1st Plaintiff since the commencement of the project. The 2nd Plaintiff is the registered owner of properties Land Reference Numbers 117, 11294, 11285, 113/1, 113/2, 7386, 7192, 111/1 and 110/2 on which is undertaken coffee farming and processing. The activities of the 2nd Plaintiff are undertaken as venture of investors represented on the Board of Directors of the 2nd Plaintiff by the 3rd and 4th Plaintiffs on one hand and the 1st to 3rd Defendants on the other hand. The 3rd Plaintiff has been the Chairman of the Board of Directors of the 2nd Plaintiff since the year 2010.

8. At an offshore level, the partners through a special purpose vehicle, Cedarsoc Limited, jointly secured a loan for the purchase of the 2nd Plaintiff. The loan was secured by a charge over the shares and properties of the 1st Plaintiff through the agency of Renaissance Partners Investment Limited, a company under the control of the 1st, 2nd, 3rd and 5th Defendants.

9. The deponent avers that several properties of the 2nd Plaintiff have been sold and the proceeds thereof allegedly utilised towards the repayment of the loan. He further avers that the 1st, 2nd, 3rd and 5th Defendants have total control over the details of repayment of the loan and have despite requests from the Plaintiffs refused and or failed to account for the amount repaid.

10. It is the Plaintiffs' case that the 1st Defendant was in breach of his fiduciary duties as a director of the Plaintiff Companies, and continued to misrepresent the status of the loan and make demands on the same to justify further sale of the properties of the 2nd Plaintiff. It is also the Plaintiffs' case that the 1st, 2nd and 3rd Defendants have purported to appoint the 4th and 5th Defendants as directors of the 1st Plaintiff. They have revoked the appointment of the 3rd Plaintiff as the Chairman of the Board of Directors of the 1st Plaintiff, and appointed the 4th Defendant as the Chairman of the Board of Directors of the 1st

Plaintiff. The said Defendants have terminated the employment of the 1st Plaintiffs' Chief Executive Officer, Lucas Akunga Omariba and appointed Anthony Njoroge as acting Chief Executive Officer of the 1st Plaintiff. They have terminated the employment of John Ngahu and Elizabeth Ndichu as employees of the 1st Plaintiff, removed 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. Further, the said Defendants have purported to appoint the 4th and 5th Defendants as directors of the 2nd Plaintiff, revoked the appointment of the 3rd Plaintiff as the Chairman of the Board of Directors of the 2nd Plaintiff and appointed the 4th Defendant as the Chairman of the Board of Directors of the 2nd Plaintiff.

11. It is the Plaintiff's contention that the 1st, 2nd and 3rd Defendants' actions aforesaid are intended to give them exclusive control over the affairs of the 1st and 2nd Plaintiffs in order that they may continue pilfering the capital and income of the Plaintiffs whilst asset stripping the Plaintiffs. It is further the Plaintiff's contention that there is real danger that the 1st, 2nd and 3rd Defendants' actions will leave the Plaintiffs exposed because the properties of the 1st and 2nd Plaintiffs would have been sold, the proceeds therefore siphoned out of the Country and beyond reach. This is because the said 1st, 2nd and 3rd Defendants are not Kenyan Nationals and cannot be readily available to account should the project stall or fail. Upon the foregoing basis the Plaintiffs secured the said interim orders now the subject matter of this application and Ruling.

THE DEFENDANT'S CASE AND SUBMISSIONS

12. The Defendants disputed the Plaintiffs' case for the said orders through the current application which is supported by affidavit of **Mr. Stephen Armstrong Jennings** dated and filed in court on **26th February 2015**. Mr. Jennings depones that he is authorised by the 2nd to 7th Defendants to make the said affidavit. The highlight of the Defendant's case is that the Amended Notice of Motion dated 23rd February 2015 is an abuse of the process of Court. The *ex parte* orders of injunction granted on 23rd February 2015 were obtained on the basis of a gross misrepresentation of facts, material non-disclosure and suppression of material facts. The deponent further states that the *ex parte* orders of injunction have been obtained on the basis of malice, contrived and clearly intended to cripple the 1st and 2nd Plaintiffs' business in which the 1st, 2nd and 3rd Defendants have substantial interest.

13. It is the deponents assertion that the orders sought and obtained are an improper use of the court process. No undertaking as to damages has been offered by the Plaintiffs or imposed by the Court. It is further his assertion that the 1st and 2nd Plaintiffs are not competent parties to this suit. In the alternative, the 3rd and 4th Plaintiffs have no authority to bring this suit on behalf of the 1st and 2nd Plaintiffs. He also avers that the suit, in so far as it purports to have been brought to protect the 1st and 2nd Plaintiffs, is a derivative action for which leave was neither sought nor obtained before the suit was filed and the suit in so far as it relates to the 1st and 2nd Plaintiffs is accordingly a nullity. It is the deponents position that the belated application for leave to carry on the suit as a derivate action is incompetent.

14. It is the Defendants' case that the orders sought and obtained have the effect of amending the 1st and 2nd Plaintiffs' Articles of Association. The deponent avers that the application in so far as it relates to the employment of Lucas Akunga Omariba, John Ngahu and Elizabeth Ndichu is incompetent in view of the express provisions of Article 162(2)(a) as read with Article 165(5)(b) of the **Constitution of Kenya 2010** and the order of 23rd February 2015 is a nullity to this extent. In any event, Lucas Akunga Omariba, John Ngahu and Elizabeth Ndichu are not parties to this suit.

HEARING OF THE APPLICATION

15. Counsel for the parties also made oral submission before the court. Mr. Havi for the Plaintiff submitted that at an offshore level, the partners through a special purpose vehicle, Cedarsoc Limited, jointly secured a loan for the purchase of the 2nd Plaintiff. The loan was secured by a charge over the

shares and properties of the 1st Plaintiff through the agency of Renaissance Partners Investment Limited, a company under the control of the 1st, 2nd, 3rd and 5th Defendants. The security documents are exhibited at pages 70 to 110 of the List and Bundle of Documents.

16. He further submitted that several properties of the 2nd Plaintiff had been sold and the proceeds thereof allegedly utilised towards the repayment of the loan. It was also his submission that the 1st, 2nd, 3rd and 5th Defendants have total control over the details of repayment of the loan and have despite requests from the Plaintiffs refused and or failed to account for the amount repaid.

17. Counsel submitted that a Business Plan prepared by the 1st Defendant on the 29th day of May, 2014 indicated that there existed no loan to a third party. Therefore, the entire land sale process was intended to increase the 1st, 2nd, 3rd and 5th Defendants control over the 1st and 2nd Plaintiffs' assets and to undermine the Plaintiffs. The Plan is exhibited at pages 111 to 165 of the List and Bundle of Documents. He further submitted that the 1st Defendant has in breach of his fiduciary duties as a director of the Plaintiffs continued to misrepresent the status of the loan and make demands on the same to justify further sale of the properties of the 2nd Plaintiff. The correspondences and documents in that regard are exhibited at pages 166 to 174 of the List and Bundle of Documents.

18. It was also submitted by counsel that the 1st, 2nd and 3rd Defendants have in further breach of their fiduciary duties as directors of the 1st Plaintiff purported to donate to the 7th Defendant a power of attorney giving him draconian powers to unilaterally deal with the assets and affairs of the 1st Plaintiff. The power of attorney is exhibited at pages 175 to 177 of the List and Bundle of Documents.

19. Counsel went ahead to submit that a meeting of the Board of Directors of the 1st and 2nd Plaintiffs was held on the 28th day of January, 2015. In the said meeting, during the presentation of the 1st Plaintiff's Chief Executive Officer's report, it was noted that there was interference by the 1st, 2nd and 3rd Defendants in the management of the 1st Plaintiff. The meeting became disorderly, unruly and aborted on account of the 1st Defendant's attempt to take unilateral control of the deliberations and resolutions of the Board of Directors. A reconvened meeting of the Board of Directors of the 1st Plaintiff was held on the 5th day of February, 2015 to transact the unfinished business of the meeting of 28th day of January, 2015. The 1st Defendant again, disrupted the proceedings seeking to introduce a new agenda to elect a new Chairman of the Board of Directors, an issue that could not lawfully be deliberated at the reconvened meeting. The meeting ended prematurely without any resolutions. The notices calling for the meetings are exhibited at pages 178 to 180 of the List and Bundle of Documents. A few minutes thereafter, the 1st, 2nd and 3rd Defendants emailed the 3rd and 4th Plaintiffs resolutions to sign. The resolutions are exhibited at pages 181 to 187 of the List and Bundle of Documents.

20. The resolution in respect of the 1st Plaintiff purported to appoint the 4th and 5th Defendants as directors of the 1st Plaintiff, revoke the appointment of the 3rd Plaintiff as the Chairman of the Board of Directors of the 1st Plaintiff, appoint the 4th Defendant as the Chairman of the Board of Directors of the 1st Plaintiff, terminate the employment of the 1st Plaintiff's Chief Executive Officer, Lucas Akunga Omariba, appoint Anthony Njoroge as acting Chief Executive Officer of the 1st Plaintiff, terminate the employment of John Ngahu and Elizabeth Ndichu as employees of the 1st Plaintiff, remove Lucas Akunga Omariba, John Ngahu and the 3rd Plaintiff as signatories to the 1st Plaintiff bank accounts and replace them with the 6th and 7th Defendants.

21. The resolution in respect of the 2nd Plaintiff purported to appoint the 4th and 5th Defendants as directors of the 2nd Plaintiff, revoke 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.

22. Mr. Havi submitted that the matters set out in the two resolutions had not been the subject matter of any meeting of the shareholders or of the Board of Directors of the 1st and 2nd Plaintiffs. They were unlawful and *ultra vires* the Memorandum and Articles of Association of the said 1st and 2nd Plaintiffs. He submitted that the 1st, 2nd and 3rd Defendants' actions aforesaid are intended to give them exclusive control over the affairs of the 1st and 2nd Plaintiffs in order that they may continue pilfering the capital and income of the Plaintiffs whilst asset stripping the Plaintiffs. Counsel submitted that there is real danger that the 1st, 2nd and 3rd Defendants' actions will leave the Plaintiffs exposed because the properties of the 1st and 2nd Plaintiffs would have been sold, the proceeds therefore siphoned out of the Country and beyond reach because the said 1st, 2nd and 3rd Defendants are not Kenyan Nationals and cannot be readily available to account should the project stall or fail. The 1st Plaintiff's bank accounts are exhibited at pages 188 to 195 of the List and Bundle of Documents. Counsel submitted that in view of the matters stated hereinabove, the Plaintiffs are reasonably apprehensive that the Defendant will, unless restrained by an order of this Court continue with their unlawful actions and the Plaintiffs will suffer irreparable loss and damage to their businesses.

23. Mr. Ochieng Oduol for the Defendants submitted that the 3rd and 4th Plaintiffs do not have the requisite authority of the 1st and 2nd Plaintiffs to commence and continue this suit. No notice has been given of any meeting on 5th February 2015 or any other date at which the directors of the 1st and 2nd Plaintiffs were to deliberate on the question of whether or not to bring this suit in the name of the Companies and the purported verifying affidavits, resolutions and written authority exhibited as part of the Plaint are defective and invalid. Mr. Ochieng Oduol submitted that the Defendants have been involved with the Tatu City Project from inception through an entity known as Renaissance Partners Investments Limited ("**Renaissance**") which directly provided or sourced through third parties the funding for the purchase of the Companies (which hold the land). Mr. Ochieng submitted on preliminary issues, stating that the firm of Havi & Company Advocates acted in bad faith when they came to court *ex-parte* and yet they already had the notice that Mr. Ochieng's firm had been instructed in this matter.

24. Furthermore, the Defendant's Advocates filed a Notice of Appointment on 20th February 2015 and served the same on the firm of Havi & Company on the same day. Accordingly, when the Plaintiffs purported to attend before Mr. Justice E Ogola on 23rd February 2015 on the amended application, it could no longer be said that there was no representation on behalf of the Defendants and it was incumbent upon the Plaintiffs' Advocates to draw the Judge's attention to the fact that the Defendants were now represented. It is therefore the Defendant's case that approaching the Court *ex parte* was mischievous, intended to steal a march on the Defendants and was an abuse of the Court process.

25. Mr. Ochieng Oduol submitted that it is a prerequisite to the grant of an order of injunction such as that obtained by the Plaintiffs to require that an undertaking as to damages be given. No such undertaking as to damages has been proffered by the Plaintiffs and neither has any been imposed by the Court. As a result it is the Defendant's case that they are exposed to monumental damages, which will be the obvious result of the consequential delay in undertaking the Tatu City project as well as the reputational damage that the project will no doubt suffer as a result of the adverse publicity. Further, the Defendants are also exposed to substantial costs in having to defend this suit.

26. The counsel submitted that in so far as the 3rd and 4th Plaintiffs purport to bring this suit for the protection of the 1st and 2nd Plaintiffs, this suit is a derivative action for which leave was required before the suit could be commenced. In prayer number 1A of the Amended Notice of Motion dated 23rd February 2015, the Plaintiffs have sought leave to continue this suit as a derivative action. The Defendant's position is that such leave cannot be granted after the commencement of the suit and must be sought and obtained before the suit is commenced. It is therefore, the Defendants' position that the suit is incompetent and a nullity in so far as it is brought on behalf of the 1st and 2nd Plaintiffs without leave of the Court and the orders granted on 23rd February 2015 cannot be sustained.

27. As regards the orders granted in respect of the termination of employment of Lucas Akunga Omariba, John Ngahu and Elizabeth Ndichu, the counsel submitted that the same have been granted without

jurisdiction. This is to the extent that Article 162 (2) (a) as read with Article 165(5)(b) of the **Constitution of Kenya 2010** vests the jurisdiction to deal with matters relating to employment specifically in the Employment and Labor Relations Court and the Commercial Division of the High Court cannot purport to grant Orders restraining the termination of the employment of these individuals. It is therefore the Defendants' position that the Orders touching on these individuals were improperly sought and obtained and must be set aside or discharged.

28. The counsel submitted that the 3rd and 4th Plaintiffs have completely misrepresented the deliberations at the meeting on 12th February 2015. According to him, at no time did the meeting discuss any issues relating to the matters raised in this suit save to agree that it would be necessary to instruct Counsel to represent the interests of the Companies.

29. It is also the Defendant's case that there has been significant material non-disclosure and suppression of material facts by the 3rd and 4th Plaintiffs in presenting the application for injunction. At paragraph 14 of the grounds upon which the application is premised, the Plaintiffs allege that the Defendants intend to nullify the 2nd Plaintiff's board decision of 28th January 2015 to engage PriceWaterhouseCoopers (**PWC**) to carry out an independent, in depth audit and review of the loan account. Counsel submitted that nothing could be further from the truth. According to the Defendants the 3rd Plaintiff has failed to disclose that as far back as September 2014, the Defendants were already taking steps to ensure that all 'principals' were properly appraised of the status of the off shore loan. A Mr. Robert Reid allegedly made contact with the 3rd Plaintiff with a view to agreeing on the modalities for engaging PWC to ascertain the status of the loan. It is therefore the Defendants' position that for the Plaintiffs to file this suit five (5) days later alleging that the Defendants were intent on misrepresenting the status of the offshore loan is a deliberate untruth. The counsel submitted that as late as 20th February 2015, the 3rd Plaintiff contacted PWC to undertake the audit and the Defendants had absolutely no objection to the audit being undertaken save for the fact that the Plaintiffs had made the loan account the subject of this suit and it was only proper that the audit be undertaken taking cognizance of the existence of the suit.

30. It is the Defendant's case that the 3rd and 4th Plaintiffs have always been aware that it was part of the strategy agreed by the shareholders of the 1st and 2nd Plaintiffs that certain assets of the 2nd Plaintiff would be sold in order to pay off the loan. The 3rd and 4th Plaintiffs have been at board meetings at which this resolution was reached and have consented to this strategy. The minutes of the meeting of the board of directors of the 2nd Plaintiff held on 7th May 2010 is particularly instructive and a true copy of the minutes is annexed at pages 17 to 19 of the exhibit.

31. It is further the Defendants' case that as a matter of fact, the 4th Plaintiff is on record as having offered to market some of the properties while he was on a business trip to the United States. It is therefore the Defendants' position that it is most dishonest of the Plaintiffs to now allege that the sale of the properties constitutes stripping the Companies' assets.

32. The Defendants' case is that the Orders issued on 23rd February 2015 have had the effect of freezing the 1st and 2nd Plaintiffs' bank accounts without regard to the fact that the said Plaintiffs have various obligations which have to be met especially towards the end of month which include the payment of salaries and bonuses to staff, payment of utilities, including water and electricity, payment to contractors for infrastructure works being undertaken and repayments of the outstanding loan account which needs to be serviced in default of which interest will accrue or the lenders will activate action arising from such default. According to the Defendants, what the 3rd and 4th Plaintiffs have failed to disclose is that it is the entities controlled by the 1st, 2nd and 3rd Defendants which invariably always put up the money to finance the operations of the 1st and 2nd Plaintiffs. The 3rd and 4th Plaintiffs have themselves not invested a single shilling in the Tatu City project and therefore have nothing to lose should the project collapse.

33. In his further submissions, Mr. Ochieng Oduol denied that the 3rd and 4th Plaintiffs have been removed from being directors of the 1st and 2nd Plaintiffs. They continue to be directors. According to the

Defendants in terms of Articles 109 and 111 respectively of the Articles of Association of the 1st and 2nd Plaintiffs respectively, a Chairman is appointed for each meeting of the board and the effect of the prayers sought by the 3rd and 4th Plaintiffs and the orders granted is to amend the Articles of Association of the Companies.

34. Counsel submitted that the Defendants have no intention of siphoning out any money or otherwise acting in any way to the detriment of the Plaintiff Companies. On the contrary, they have raised more than USD 70 million (approximately Kshs. 6.3 billion) and the suggestion that the Defendants are foreigners who intend to strip the Companies and siphon away the monies cannot even begin to be validated in light of everything they have done to keep the project alive since 2007.

35. The counsel submitted that the present lawsuit has the effect of suppressing investor appetite for the Tatu City project. Further that it will dilute shareholder value and ultimately threatens to destroy what the Defendants have worked painstakingly to build in the face of numerous obstacles over the last 7 and a half years and is greatly injurious not only to the Defendants but also to each of the Plaintiffs as well. Mr. Ochieng Oduol submitted that the suit is intended to achieve an ulterior objective, is incompetent, is without proper legal and factual basis and the Orders issued on 23rd February 2015 should be discharged or set aside. Further that the suit as framed on behalf of the 1st and 2nd Plaintiffs should be struck out.

ANALYSIS

36. I have carefully considered the application before the court, the opposing affidavits and the submissions of the parties. It seems to me that the following are the issues for consideration in order to dispose off this application.

i. Whether the suit by the 1st and 2nd Plaintiffs is bad in law and irregular and should be struck out for lack of authority.

ii. Whether the suit by the 3rd Plaintiff should be struck out for being filed as a derivative suit yet the 3rd Plaintiff is not a shareholder.

iii. Whether the 4th Plaintiff's suit should be struck out for lack of leave of court to commence a derivative suit.

iv. Whether the 1st Plaintiff has invested a lot of money in the project which needs to be protected, and whether this suit has given bad publicity to the 1st and 2nd Plaintiffs.

v. Whether the Plaintiffs had accepted and acquiesced by ratification of Board resolutions of some of the actions of the Defendants.

vi. Whether the Defendants are siphoning money belonging to the 1st and 2nd Plaintiffs out of the country.

vii. What is in the best interest of the 1st and 2nd Plaintiff Companies and how can the court protect this.

37. On the issue number one, did the 1st and 2nd Plaintiffs being corporations, obtain their various board authorisation to commence this suit? Mr. Ochieng Oduol for the Defendants submitted that no such authorisation was obtained and therefore, the 1st and 2nd Plaintiffs action has no *locus standi* and must be struck out. Mr. Havi denied the allegations and submitted that there was proper authorisation. He cited order 4 Rule (1) (4) of the Civil Procedure Rules. The Order deals with particulars to be contained in a Plaint, and states that:-

4(1) (4) "Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so."

38. Mr. Havi then submitted that the only authority required is a written authority under seal, and that these were availed in the supporting affidavit. Indeed, there are written authorities by the 1st and 2nd Plaintiffs signed under seal of those companies in the presence of two directors. Mr. Havi submitted that this was sufficient authority and that in any event Article 107 of the 1st Plaintiff Company's Articles of Association and its equivalent for the 2nd Plaintiff requires only two directors to provide such an authority, and Article 118 of 1st Plaintiff require a seal to be fixed in the presence of two directors and that this requirement was complied with. Article 107 of Articles of Association for the 1st Plaintiff, which is of similar import with Articles 107 – 109 of the 2nd Plaintiffs' Articles of Association states as follows:-

Article 107: "The quorum necessary for the transaction of the business of the Directors may be fixed by the Directors, and unless so fixed shall be two directors present or deemed present . . ."

Mr. Havi submitted that under Order 4 Rule 1 subrule 4 all that was required was a written authority under seal, and no investigations as to whether a notice was given to other directors was necessary. Mr. Havi cited the case of **A.S. Sheik Transporters & another – Vs – Barclays Bank (k) Limited & Others, HCCC NO. 335 of 2011** in which the court held the view that under Order 4 Rule 1 sub rule 4 what is required was an authorisation under the seal, and that the validity of the purported authorisation would be a subject of another enquiry all together. Mr. Havi father submitted that if the court is in doubt, the prudent thing would be to refer the issue to the annual or special shareholder meeting of the said Plaintiff Companies for ratification. In my view, compliance with Order 4 (1) (4) would be sufficient where there is no controversy or dispute as to how a corporation files a suit. In the matter before the court, and looking at the pleadings, there is evidence that there are two warring groups, both claiming to be *bonafide* Board members of the said Companies. The "**Board**" represented by the Defendants claim to have held a meeting on 5th February 2015 where the 3rd Plaintiff was removed as the Chairman of the Plaintiff Companies. On the other hand, the second "Board" represented by the 3rd and 4th Plaintiffs claim that theirs is the genuine Board whose resolution should be adopted by this court. In this claim, chance and happenstance appears to support their claim. They have the letter heads of the Plaintiff's companies. They also have the seal of the said companies. Seals and letter heads are the seat of authority of any corporation. The fact that in their possession the 3rd and 4th Plaintiffs have the relevant company seals and letter heads does one very important thing to their case. They establish a *prima facie* case that they are the legitimate officials of the said companies. It is important to note that no changes in the Boards of both Plaintiff Companies have been effected at the Registrar of Companies, and that as at now, the 3rd Plaintiff remains the Chairman of the Board of the Companies. The result is that the Defendants control of the Plaintiff's Companies, and the Plaintiff's claim of having the same, is a seriously contested issue which must abide a further inquiry, at the full trial of the matter. To assert that the 1st and 2nd Plaintiff's Boards did not authorise the suit, while there exists, on the face of the record, what appears to be proper authorisation, would be improper at this stage. It is further noted that both Plaintiff Companies annexed Resolutions dated 5th February 2015 in which they resolved to take an appropriate legal action, and appointed the firm of Messers Havi & Company Advocates for that purpose. It is on these grounds that pending an inquiry as to how those purported authorities were obtained, the 1st and 2nd Plaintiffs are legitimate parties herein and cannot be struck off from the suit.

39. 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 the 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 the court, the said Plaintiffs would be necessary parties for the proper and efficient determination of all issues before the court.

40. The second issue is whether the suit by the 3rd Plaintiff should be struck out for being filed as a derivative action yet the 3rd Plaintiff is not a shareholder. It is the law that a derivative action is a remedy

available to shareholders who are able to bring themselves within the exceptions set out in the case of **Foss – Vs – Harbottle**, being a minority shareholder, or part of that minority shareholding who would not marshal strength to prevail upon the Board of the Company to authorise the filing of a suit on their behalf. This action is not open to non shareholders in a company. A perusal of form CR12 at page 33 of the Plaintiff's application shows the directors and shareholders of the 1st Plaintiff Company. Mr. Nahashon Ngige Nyagah, the 3rd Plaintiff herein, is listed as a Director with Nil Shares. That position obtained as at 22nd December 2014. Having no share qualification, it would appear that the 3rd Plaintiff cannot commence a derivative action. However, it is important to note that the 3rd Plaintiff is the Chairman of the Board of the Plaintiff Companies. He is the fulcrum upon which those companies operate or revolve. Besides, the 3rd Plaintiff has alleged injuries occasioned to him, or which will be occasioned to him as an individual. The 3rd Plaintiff has alleged in his claim that he has been unprocedurally sacked from the chairmanship of the Plaintiff Companies. If this allegation is correct, the 3rd Plaintiff will suffer injuries which are very individual and personal. Such a wrong against the 3rd Plaintiff would be an individual wrong, or a wrong that has been done to an individual. In a strikingly similar case in Uganda, being **Musa Misanga - Vs- Erai Musigire & others [1966] 1EA 390 (HCU)** the court, faced with almost similar circumstances had this to say:-

“This is a motion which raises some point of great importance. The first question is whether a director who is improperly and without cause excluded by his brothers from the board from which they claim the right to exclude him, is entitled to an order restraining his brothers from so excluding him. In this case a man is necessarily a shareholder in order to be a director and as a director he is entitled to fees and remuneration for his services and it might be a question whether he would be entitled to the fees if he has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of the legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meeting of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect him individually, as a shareholder, as well as his liability as a director and it has been sometimes held that even a director who does not attend board meeting is bound to know what is done in his absence. It appears to me that the injury or wrong done to him by preventing him from attending board meetings by force, he has a right to sue. He has what is commonly called a right of action, and these decisions which say that, where a wrong is done to the company by the exclusion of a director from the board meetings, the company may sue, and must sue for that wrong, do not apply to the case of wrong done to an individual.”

41. I have also considered the prayers made in the suit by the Plaintiff. Some of those prayers are directly for the benefit of the 3rd Plaintiff in so far as he alleges to have been unlawfully and unprocedurally removed from the Chairmanship of the said boards of Directors. I am therefore satisfied that this suit is maintainable in law by the 3rd Plaintiff in his own right, or that this court has the jurisdiction to entertain it as an action brought for injury to the 3rd Plaintiff personally by his co-directors and other members of the Plaintiff Companies.

42. The third issue is whether the 4th Plaintiff's suit should be struck out for lack of leave of court to commence a derivative suit. Before I address this issue, it is to be noted that the 4th Plaintiff is a shareholder and has the right to bring a derivative action. However, considering the court's finding in regard to the 3rd Plaintiff whose position, not being a shareholder, was even more perilous, the 4th Plaintiff's right to maintain this suit is not in doubt. However, this court needs to comment on the issue of leave to commence a derivative suit. Conflicting authorities have been cited by both parties in support of their positions as to whether leave should be applied for before the commencement of the suit or if the same may also be available after the suit has commenced. All these authorities are from the High Court. That this is a very grey area was brought home by Justice Musinga **IN THE MATTER OF CMC HOLDINGS LIMITED, MISC. CIVIL CASE NO. 273 OF 2012**, when he said:-

“I think time has come to enact a new Companies Act which will, inter-a-lia, shed light on the grey areas of company law practice, including derivative claims . . .”

The situation above has been brought by conflicting decisions, from the High Court, some of foreign jurisdictions, including decisions in **Dadani – Vs – Manji & 3 Others**, in while Justice Mwera concluded that:-

“the proper way to lay a derivative action is to begin with filing the suit, then following it with an application to be served along with the Plaint, followed by the court hearing and determining whether the Plaintiff should continue with the action.”

43. In the application before the court, the Plaintiffs did not seek any leave to commence the suit by way of a 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.

44. Before I go into the next issues, I wish to add that despite my findings in issues numbers one, two and there, this court also recognises that the parties before the court are members of the same organisation; they are running the same business, and it is in the interest of that business and its continuity that a decision should be made. I would therefore be very reluctant, although that is not the position here, to issue orders based purely on technicalities since that will not help the parties to advance the interest of the Plaintiff Companies.

45. Now to the remaining issues number four, five, six and seven. It has been alleged that the individuals comprising the Defendants have invested in the two Plaintiff Companies almost 100% and that the 3rd and 4th Plaintiffs have not made any investment in the suit projects. It is because of this allegation that it is further alleged that the 3rd and 4th Plaintiffs have little interest in the Plaintiff Companies and that they are ready to derail and delay or even destroy the Plaintiff Companies. A perusal of CR 12 dated 22nd December 2014 shows that the 3rd Plaintiff has no shares in the 1st Plaintiff Company, while the 4th Plaintiff has only one share out of 1,575,000 shares of 1 shilling each. The majority shareholder is Cedar IV Limited care of Appelby Management (Mauritius) which owns 1,574,993 out of the said 1,575,000 shares. The other shareholders own 6 shares among themselves. From the above analysis, it is clear that the shareholders who are not part of the Plaintiffs control more than 99% of the interest in the Tatu City Limited, and they are by that fact entitled to direct the operations and the future of the said Plaintiff Company. On this issue Mr. **Stephen Arstron Jennings**, the 1st Defendant has explained in his supporting affidavit to this application that he has been involved with the Tatu City Project from inception through an entity know as Renanissance Partners Investments Limited, which directly provided or source the funding for the project. The company was able to overcome the negative effects of a suit filed in 2010 by another minority shareholder seeking to wind up the company, and Mr. Jennings was able to raise additional funding which raised the profile of the company to attract additional investors. So this particular suit alarms him as it seeks to wipe out the gains achieved over the last 18 months. Mr. Jennings said the suit is a bad publicity for the company and it will derail the company from achieving its objectives. Mr. Jennings further stated that the changes taking placed at the 1st Plaintiff Company have been in the pipeline for a considerable period of time, and those decisions were taken with the participation of the 3rd and 4th Plaintiffs. He gives the example to engage PriceWaterHouse Coopers (PWC) to carry out an independent in depth audit and review of the loan account, and that indeed on 20th February 2015 the 3rd Plaintiff contacted PWC to undertake the in depth audit of the loan account. This was a decision which was made in September 2014 which required that all principals were properly appraised of the status of the off shore loan. The Defendants were therefore shocked that the Plaintiffs' suit herein alleges intent to misrepresent the status of the off shire loan by the Defendants, and that this is a misdirection to the court. Mr. Jennings stated that the 3rd and 4th Plaintiffs have always been aware that it was part of the strategy agreed by the shareholders of the 1st and 2nd Plaintiffs that certain assets of the

2nd Plaintiff would be sold in order to pay off the loan. The 3rd and 4th Plaintiffs have been at board meetings at which this resolution was reached and have consented to this strategy. The minutes of the meeting of the board of directors of the 2nd Plaintiff held on 7th May 2010 is particularly instructive. A true copy of the minutes was annexed at pages 17 to 19 of the Defendant's exhibit. Mr. Jennings further stated that as a matter of fact, the 4th Plaintiff offered to market some of these properties while he was on a business trip to the United States. Mr. Jennings found it dishonest of the 3rd and 4th Plaintiffs to now allege that the sale of the properties constitutes stripping the Companies' assets. This court has seen marked as pages 20 to 22 true copies of emails exchanged evidencing this; in addition, the marketing material for the purpose of interested potential investors in the land is produced at pages 23 to 26 of the exhibit. A determination of the fourth issues in my view reveals that the 3rd and 4th Plaintiffs have always been aware of the strategies put in place by the Tatu city to raise funds for the company objectives. It is also true that they have all along been aware of the off shore loan account and the purpose for which it was established. The off shore loan account cannot all over sudden be used to siphon money abroad on the basis of paying loans. As the Chairman of the Board of Directors the 3rd Plaintiff was always apprised of the said loan account and its status. The parties had already made a decisions to engage PWC to do an independent indepth audit of the said account. It was prudent to wait the outcome of that audit, but it is probably understandable that after the alleged Boardroom coup, no such audit was going to take place any time soon. That notwithstanding, the blanket order to freeze the 1st and 2nd Plaintiffs' accounts was very draconian, especially since those accounts are multipurpose and are used to pay general expenses for running the companies, paying salaries, levies, recurrent expenses, and even the said loan. On the issue of financial sourcing, it is clear that entities controlled by the 1st, 2nd and 3rd Defendants are the ones which have put up the money to finance the operations of the 1st and 2nd Plaintiffs. The 3rd and 4th Plaintiffs have not responded to the allegations that they have themselves not invested a single shilling in the Tatu City Project, and therefore they have nothing to lose should the project collapse. In my view, considering the investments the 1st, 2nd and 3rd Defendants have put in the project, there is no evidence that they intend to siphon out any money or otherwise to act in any way to the detriment of the Plaintiff Companies. The 3rd and 4th Plaintiffs have not responded to the submission by the 1st Defendant that he has single handled raised more than USD 70 million (approximately 6.3 billion) to set up the projects since 2007. If that allegation is correct, and I have no reason to doubt it, then the 1st Defendant's overwhelming control and say in the company cannot be restrained except under exceptional circumstances. In my view, the 1st Defendant has done a lot to the Plaintiffs Companies through personal effort which cannot be interpreted to mean he has ill intention for the Plaintiff Companies. The present suit many have the unintended effect of suppressing investor appetite for the Tatu City Project and/or dilute its share value and ultimately destroy what all the parties to the suit have painstakingly build in the face of numerous obstacles since its inception in 2007. It is my finding that the 3rd and 4th Plaintiffs have always been aware of the strategy of raising funds to build the projects comprised in Tatu City, and that strategy involved securing funds off shore, through a loan. Those loans must be repaid as per the agreements securing them. Again, to the extent that the 3rd and 4th Plaintiffs are aware of the financial input into the Tatu City Project by the entities associated with the 1st, 2nd and 3rd Defendants, it is illogical for the Plaintiffs to imply that the Defendants are not patriotic towards the Plaintiff Companies and are siphoning money out of the country through the said off shore loan repayment or are selling assets belonging to the 2nd Plaintiff. I also find that, pursuant to the foregoing the 3rd and 4th Plaintiffs had accepted and acquiesced and/or ratified through Board resolutions some of the activities of the Defendants for instance, the said acquisition of off shore loan or the proposed engagement of PWC. Finally upon reading Articles 109 and 111 respectively of the Articles of Association of the 1st and 2nd Plaintiffs, a Chairman is appointed for each meeting of the Board and their period is determined at that meeting. On the face of it, it would appear that every meeting of the Board would most probably be held under a different chairman. In this regard, it seems to me that this court cannot at this stage make a finding on whether or not the alleged sacking of the 3rd Plaintiff as Chairman of the board was a lawful action or not, or that the sacking of the 4th Plaintiff as director was correct. Having considered the history of the suit and application before the court, it is my view that the stakeholders in the Tatu City Limited have no option but to work together to realise the objectives for the two Plaintiff Companies. Both parties have stake in the company which will be erased by the bad publicity of litigation. Boardroom wars should be restricted to the said boardroom. Tatu City had given Kenyans, and the world, a hope in living in a modern city. The public looked forward to the realisation of that dream. Despite their financial muscle, the 1st, 2nd and 3rd Defendants should also be magnanimous,

and assure their local partners that their stake in the Plaintiff Companies are secured. In this regard, the orders of this court will be such as to protect the interest of the Plaintiff Companies.

46. Although the application before the court is one for the setting aside of the interim orders granted on 23rd February 2015, the application basically amounts to a response to the Plaintiff's application and it is difficult to determine the same in isolation without at the same time considering the Plaintiffs prayers in their application. After this Ruling the parties will be at liberty to proceed with the hearing of the Plaintiff's application for a consideration of the prayers thereof which may remain outstanding after this Ruling.

47. The orders which I grant herein are for two purposes. The first purpose is to create a truce and restore the operations of the Company to create an environment in which the alleged financial mismanagement and the circumstances surrounding the off shore loan can be investigated with all the warring parties on board. The second purpose is to give the Plaintiff Companies freedom to transact their businesses without restrictive orders on the Company accounts for the limited period mentioned hereunder.

48. Pursuant to the foregoing paragraphs of this Ruling, and after careful consideration of the prayers sought in both applications before the court, this court is pleased to make orders as follows:-

a. The Resolutions made on the 5th day of February 2015 by the 1st to 3rd Defendants in respect of the 1st and 2nd Plaintiff Companies shall take effect as intended except that those Resolutions shall be suspended in so far as they relate to or affect the 3rd and 4th Plaintiffs in any way except as provided under prayer (c) below, pending the hearing of the Plaintiff's application dated 6th February 2015 inter-partes.

b. Until the hearing and determination of the said application as stated in (a) above, the 3rd and 4th Plaintiffs shall remain in their various positions obtaining before 5th February 2015.

c. Pending the receipt of the PriceWaterHouse Report mentioned at prayer (d) below, the bank accounts of the Plaintiff Companies shall be operated as resolved by those Companies on 5th February 2015, and despite Order (a) and (b) herein above, the 3rd and 4th Plaintiffs shall not in any way interfere with the operations of the said accounts. Accordingly, the freezing orders on those accounts issued on 23rd February 2015 are forthwith lifted.

d. The PriceWaterHouse Coopers (or another agreed entity) which the parties had initially agreed on to conduct independent in depth audit of the said offshore loan account shall forthwith be appointed by the appropriate organs of the Plaintiff Companies to carry out the said audit, and to report its findings to this court within 45 (forty five) days, or within such reasonable period of time as shall be adequate to perform that audit.

e. Each party shall be responsible for their costs in this application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 6TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Havi for the Plaintiffs

Mr. Abidha for the Defendants

Teresia – Court Clerk