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

1. On 22nd April 2015, the 3rd Defendant herein, **Hans Jochum Horn**, who had all along in this matter been represented by the firm of **Tripleoklaw Advocates** who also represented the rest of the Defendants, filed a Notice of Change of Advocates appointing **M/s Mbugua, Atudo & Macharia Advocates** to act for him. The following day being the 23rd of April 2015, the said advocate for the 3rd Defendant filed the application under consideration, being Notice of Motion dated 23rd April 2015 seeking to secure the following surviving orders.

1. Spent

2. The Honourable Court be pleased to order that the terms of reference for the conduct of an independent in depth audit of the 2nd Plaintiffs' offshore loan account be limited in scope to the terms set out in the resolution of the Board of Directors following the meeting held on 28th January 2015 which was to determine the total offshore loan amounts secured by CedarSoc Limited (a

Mauritian entity) and guaranteed by the 2nd Plaintiff from inception to date and the reconciliation on the repayments thereon.

3. The Honourable Court be pleased to order that Ernst & Young, KPMG or any other international, independent firm be appointed as the auditor for the 2nd Plaintiff's loan account;

4. Alternatively, that the Honourable Court be pleased to order that the guarantor, through its Board of Directors be at liberty to appoint an independent auditor for the 2nd Plaintiff's loan account;

2. The application is premised on the orders of this court of 6th March 2015, especially orders 3 and 4 thereof, which are in the following terms:-

(3) That pending the receipt of the Price Waterhouse Coopers report mentioned at prayer (4) below, the bank accounts of the Plaintiff Companies shall be operated as resolved by those Companies on 5th February 2015, and despite Order (1) and (2) 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 are forthwith lifted.

(4) That Price Waterhouse 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;

3. The Applicant's case is that while the Defendants are keen to comply with the above orders of the court, the 3rd and 4th Plaintiffs, and PriceWaterHouseCoopers are attempting to expand the scope of the said audit in clear breach of the said order. Further, the Applicant alleges that a dispute has since arisen regarding the scope of the audit that PriceWaterHouseCoopers is expected to conduct leading to the impasse and or deadlock, and that it has become necessary for this court to direct that the audit be limited to the terms of reference for the audit previously ordered by this court on the 6th March 2015. The Applicant now also doubts the capacity of PriceWaterHouseCoopers to conduct an independent audit due to alleged conflict of interest that cannot be mitigated under the circumstances. The application therefore seeks this court's order on specific terms of reference for the said audit.

4. The application is supported by affidavit of the 3rd Defendant/Applicant herein sworn on 22nd April 2015. The application is also supported by the other Defendants through the oral submissions of the their Counsel Mr. Ochieng Oduol. However, those other Defendants have not filed any response to the application by way of affidavits.

5. The Plaintiffs opposed the application through a replying affidavit sworn on their behalf by Nahashon Nginge Nyagah on 6th May 2015 and filed in court the following day.

THE APPLICANT'S CASE

6. The Applicant in his supporting affidavit, and in the submissions of his Counsel Messrs Macharia and Ochieng Oduol summarized the Applicants' case. The Applicant noted that the order regarding the in depth audit, as determined by this Court, was informed by a decision made by the 1st and 2nd Plaintiffs' Board of Directors on 28th January 2015 at which the directors resolved as follows;

a. ***to appoint an independent audit firm, ideally an international one given the nature of the audit and domicile of the subject matter, to carry out a comprehensive and detailed audit of the Companies loans account and the reconciliation on the loan repayment thereon;***
b. ***That Messrs. Pricewaterhousecoopers (PWC), Certified Public Accountants be and are hereby appointed to carry out the required independent audit of the said loan account.***
c. ***That the objective of the audit exercise was to determine the total loan amounts secured by the***

Companies from inception to date and the reconciliation on the repayments thereon.

d. ***That the Chairman and Mr. Robert Reid be and are hereby authorized to discuss and agree with PWC on the Terms of Reference (TORs) and fees charged by PWC.***
e. ***That thereafter PWC to proceed and start the audit process with immediate effect.***
f. ***That the Chairman and Mr. Robert Reid to provide required documentations to PWC for the required audit.***

5. The Defendants now dispute aspects of the said minutes which they alleged were drawn at the direction of the 3rd and 4th Plaintiffs but nevertheless concurred with the orders made by this Court on 6th March 2015 regarding the conduct of the audit, the salient parameters which the Defendants understand to be as follows;

i. ***The audit is to be undertaken by Pricewaterhousecoopers or any other agreed entity. As stated above, the said auditors should be a reputable international firm since the loan account is domiciled offshore.***
ii. ***The Auditors are to be appointed by the appropriate organs of the 1st and 2nd Plaintiffs. The appropriate organs of the two companies are either the board of directors or shareholders at a general meeting.***
iii. ***The said auditors were to be appointed forthwith.***
iv. ***The audit was to be an "in depth audit" limited to the objective of determining the total loan amounts secured by the company from inception to 28th January 2015 and the reconciliation on the repayments thereon.***
v. ***The findings of the auditors were to be reported to the court by 20th April 2015, now past or within such reasonable period of time as shall be adequate to perform that audit.***

6. In view of the sensitive nature of the audit and the importance attached to the findings of the audit by the parties to this suit and indeed this Court, the Applicant's case is that it was incumbent upon the parties to demonstrate utmost good faith in proceeding with all aspects of the audit exercise including the choice of auditors, scope of the terms of reference, general facilitation of the auditor's work and disclosing all material facts.

7. To that end on 9th March 2015, three days after this Court delivered its ruling, Tripleolaw Advocates wrote to Pricewaterhousecoopers Limited on behalf of the Defendants informing the auditors about the court ruling and indicated that Mr. Reid would be in contact with them in due course to agree on the terms of engagement, and that Mr. Reid did in fact meet with representatives of PWC for the aforesaid purpose. However on 10th April 2010, PWC wrote to Mr. Reid and the 3rd Plaintiff stating that they would not engage in any communication with the advocates representing any of the parties, and they would only communicate with Mr. Reid and the 3rd Plaintiff in their capacity as the appointed representatives of the parties in dispute. PWC also stated that it was clear to them that the parties could not agree on the interpretation of the term "in-depth review", but that the onus was on the parties to discuss and agree on the terms of reference to be included in the auditor's letter of engagement. PWC would only agree to perform the services based on terms of reference agreed upon by both parties in dispute. PWC then prepared what they understood the scope of the indepth audit to be. (***see annextures "HJH 1 – 3" of the Applicant's supporting affidavit***).

8. The Applicant's case is that in the aforementioned document setting out the scope of the in-depth audit, the auditors rely on statements made by the 3rd and 4th Plaintiffs in the course of the meeting held on 28th January 2015 although the said statements were not infact captured in the resolutions passed by the board of directors including a statement that **"the auditors should confirm the actual lenders and makeup of the loan from inception."** The Applicant's case is that the identity of the lenders has never been in dispute.

9. The Applicant's case is that subsequent attempts to reach agreement on the auditor's terms of reference have not been successful as the 3rd and 4th Plaintiffs have sought to unlawfully and irregularly expand the scope of the in-depth audit to include issues that exceed the mandate prescribed by this Court. For

example, the auditors, at the prodding of the 3rd and 4th Plaintiffs, perceive the scope of their audit to include carrying out "*background checks on the financiers' ownership structure*" whereas the board of directors at its meeting held on 28th January 2015 clearly stated that the scope of the audit would be as follows;

"The objective of this audit exercise was to determine the total loan amounts secured by the company from inception to date and the reconciliation on the repayments thereof."

(***The true copies of emails exchanged between the parties regarding the auditor's terms of reference is marked "HJH-4"***).

10. In the circumstances, the Applicant alleges that the parties are at a dead-lock and the audit cannot proceed without the intervention of this Court directing the parties to limit the scope of the audit to the terms set out in the resolution of the Board of Directors following the meeting held on 28th January 2015; that the auditor's fees be paid by the 1st Plaintiff; strictly limiting the period within which the audit should be carried out; and directing the Board of Directors to determine, by majority vote, any issue that arises in the course of the audit and which requires the input of the companies.

11. The Applicant's case is that the parties ought to undertake the audit exercise in a spirit of utmost good faith and assist the court and the auditors by providing all material facts necessary to resolve matters in a just and expeditious manner.

12. The application's second limb is that the Applicant has established that the 4th Plaintiff, who is the alter ego of a local enterprise known as BIDCO, failed to disclose to the court and to the Defendants that PricewaterhouseCoopers are, and have been, for a significant period, the external auditors of BIDCO. BIDCO is one of the largest manufacturers of fast moving consumer goods in Kenya and its account with PWC would, in the Applicant's view, be one of the most important business relationships maintained by PWC. PWC were also auditors for the Central Bank of Kenya during the tenure of the 3rd Plaintiff as Governor. This too was an important relationship for PWC.

13. Under the circumstances, the ongoing and previous relationships between the 3rd and 4th Plaintiffs, on the one hand and PWC, on the other hand does raise credible and serious concerns of a conflict of interest and/or perception of bias that cannot be mitigated given the divergent positions taken by the parties to this suit. Further, the Applicant's case is that 1st and 2nd Plaintiffs' Board of Directors in their resolution calling for in depth audit contemplated ***"an independent audit"*** which cannot under the aforesaid circumstances, be undertaken by PWC.

14. The Applicant case is that the PWC is irretrievably conflicted to do an independent audit and he now proposes the appointment of KPMG or Ernst & Young, who are the current 1st and 2nd Plaintiffs' auditors.

THE RESPONDENTS' CASE

15. The Respondents oppose the application, and have faulted the correctness of statements deponed to in Mr. Horn's affidavit. The Respondents' case is that the appointment of PWC to carry out an audit of the loan account was a decision of the 2nd Plaintiff, made in terms of the unanimous resolution of the 2nd Plaintiff's Board of Directors in the meeting held on 28th January, 2015; according to the Respondents, those resolutions are self interpreting and clear. The Order made by the Court on 6th March, 2015 only reiterated the 2nd Plaintiff's decision and limited the time within which the audit report should be submitted to the Court to 45 days or within such reasonable period of time as shall be adequate to perform the audit. Further, the Respondents' case is that the 3rd Defendant/Applicant can only depone for himself and not on behalf of the rest of the Defendants who are not applicants in the current application on the claimed dispute on the minutes exhibited as "**HJH1**" and the interpretation of the Order made on 6th March, 2015; The minutes exhibited as "**HJH1**" were not drawn at the directions of the 3rd and 4th

Plaintiffs as alleged, but were drawn by the 2nd Plaintiff's former Company Secretary, Mr. John L.G. Maonga who circulated the drafts in respect thereof for comments by all the directors of the 2nd Plaintiff before forwarding a final copy thereof to the directors of the 2nd Plaintiff, who signed the same willingly.

16. The Respondent case is that the court by its order of 6th may 2015 had already identified PWC as the auditor, which was a mere affirmation of what had already been done by the 2nd Plaintiff on 28th January, 2015 and the reference in the Order to "(***or another agreed entity) which the parties had initially agreed"*** could only refer to PWC.

17. The Respondents stated that the Defendants have frustrated the said audit. However, the parties representatives met with PWC on 10th March 2015 pursuant to the directive of the Board of the 2nd Plaintiff and discussed and agreed on the scope of the audit. (***The draft minutes of the meeting are exhibited marked as "NNN2"*****)**. Amongst the items discussed and agreed upon was the fact that further communication between PWC and the 2nd Plaintiff would be made by Mr. Robert Reid and Mr. Nyagah on behalf of the 2nd Plaintiff and not from Advocates. This agreement was to remedy the attempts made in the letter dated 9th March, 2015 from Tripleolaw Advocates to direct PWC on how to progress with the audit. On 12th March, 2015, Mr. Nyagah forwarded a formal instruction letter on the audit to PWC. (***The letter is exhibited herewith and marked as "NNN3"*****)**. On the same day PWC acknowledged receipt of the instructions and indicated that they would prepare draft TORs and terms of engagement for the parties' approval. (***The email in that regard is exhibited and marked as "NNN4"*****)**. However, the efforts to commence audit were allegedly frustrated by the Defendants whose actions led the Plaintiffs to file application dated 19th March, 2015, which sought amongst others, an order that:-

"The audit by PricewatehouseCoopers Certified Public Accountants (Kenya) directed to be undertaken in terms of the order of 6th March, 2015, be undertaken by the said PricewatehouseCoopers Certified Public Accountants (Kenya) as resolved in the minutes of the Board of Directors meeting of the 2nd Plaintiff held on 28th January, 2015 as finalised by John. L. G. Maonga and signed by the 3rd Plaintiff."

18. In his Affidavit in response to the application aforesaid, the 1st Defendant, Mr. Stephen Armstrong Jennings who stated that he had authority to represent all the Defendants conceded to the request aforesaid in terms of paragraph 9 of his Affidavit in the following terms:-

"To demonstrate our commitment to undertake the audit we are prepared to proceed on the basis of the Resolution of 28th January, 2015 as set out in paragraph 20 of the Amended Plaint dated 19th March, 2015."

The Respondents' case is that when the application came up for hearing on 27th March, 2015, the Defendants conceded to prayer 8 in respect thereof as set out above. Subsequent to the concession, Mr. Robert Reid wrote to PWC on 29th March, 2015, requesting that the audit proceeds. (***See exhibit marked as "NNN6"***) which is an email to the effect. The Respondents responded on 31st March, 2015, clarifying several misrepresentations in Mr. Robert Reid's email aforesaid. (***See Exhibit "NNN7" being the copy of the email***). A letter dated 10th April, 2015 from Tripleoklaw Advocates written in alleged contravention of the agreement reached on 10th March, 2015, prompted the email dated 10th April, 2015 from PricewaterhouseCoopers (PwC) referred to in paragraph 9 of the Affidavit of Mr. Horn and exhibited as "**HJH3**". (***See annexture "NNN8" which is a copy of the letter from Tripleoklaw Advocates***). The said letter, according to the Respondents, is condescending, belittling and abusive of PWC. It could only have been written with the intention to annoy PWC in order that they do not go on with the audit. It was, in the Respondents' view, written in clear disregard of the agreement that Advocates of the parties should not engage PWC on the audit.

19. Referring to the attempts to establish the identity of the lenders, the Respondents maintain that the identity of the actual lenders and the makeup of the loan from inception is a key issue to be examined in

the audit, a fact underscored in the minutes of the 2nd Plaintiff's Board of Directors meeting of 28th January, 2015. In the Respondent's view, the audit to be undertaken is an in-depth audit and not limited to a loan account reconciliation as intended by Mr. Horn in prayer 2 of the current application. In any case, the Respondents aver, an in-depth audit cannot be limited in scope as Mr. Horn would want the Court to direct. The Order of 6th March, 2015 already directed compliance with the resolution made by the 2nd Plaintiff on 28th January, 2015, and the Respondents have not sought to expand the scope of the audit beyond the said resolution, or beyond the Order of 6th March, 2015. The Respondents avered that the alleged dead-lock in the progression of the audit has been created by the Defendants who, for their own reasons, do not want the audit to be undertaken in the manner agreed or at all. The Respondent's case is that the concession made in Court on 27th March, 2015 on who should undertake the audit and how the same should be undertaken is binding upon Mr. Horn and all the Defendants for that matter. The resolution by the 2nd Plaintiff made on 28th January, 2015 and the TOR so far framed by PWC are sufficient to enable the audit directed in terms of the Order of 6th March 2015. In the view of the Respondents, the attempt to refer the issue of audit to the 2nd Plaintiff's Board of Directors for re-consideration is intended to enable the Defendants, who have a majority in the Board, to control the audit process.

20. On the allegation that PWC is irretrievably conflicted to conduct the said audit, the Respondents stated that the choice of PWC to audit the loan was made by the 1st Defendant as evidenced by the minutes of the 2nd Plaintiff's Board of Directors meeting held on 28th January, 2015. At the time of the making of the decision for the appointment of PWC to audit the loan, the 3rd Plaintiff herein, Mr. Nyagah could not remember that the said auditors had acted for Central Bank of Kenya some 13 years ago. Mr. Nyagah denied having any current or past relationship with PWC, its partners or officers. In fact Mr. Nyagah stated that for the time that he served as Governor of Central Bank of Kenya for the year ended 2001, the bank's auditors were Ernst & Young and KPMG Peat Marwick and for the year ended 2002, the auditors were Ernst & Young and PWC. (***See annexture "NNN9"***). However, Mr. Nyagah stated that he did not participate in the appointment of the auditors for Central Bank of Kenya or deal directly with them in the conduct of their work. He cannot remember dealing with any single officer from PWC during that time. The accounts were only brought to him for signature after verification by the Chief Financial Officer. Mr. Nyagah questioned at what time Mr. Horn became aware that PWC were auditors of Central Bank of Kenya during Mr. Nyagah's tenure, and how this fact would have impacted the 2nd Plaintiff's decision to appoint PWC to audit the loan. Mr. Nyagah further stated that if Mr. Horn's claim that PWC are conflicted on account of having acted for Central Bank of Kenya were to be taken seriously, then both Ernst & Young and KPMG Peat Warwick proposed by Mr. Horn would also be conflicted as they acted for Central Bank of Kenya during his tenure as Governor. Finally Mr. Nyagha stated that Mr. Horn was a Senior Executive of Ernst & Young for a long period of time and that Mr. Nyagha does not understand why Mr. Horn would want the said auditors to undertake the audit where PWC cannot. (***See annexture "NNN10" which are Mr. Horn's curriculum vitae obtained from the internet and minutes of 21st September, 2012 in which Ernst & Young were appointed auditors***).

21. Mr. Nyagah deponed in his affidavit that there is no ongoing personal relationship nor has there been any past relationship between PWC and himself, and that Mr. Horn has not demonstrated what conflict of interest and/or bias exists to warrant the replacement of PWC as appointed auditors.

22. It is the Respondents' case that PWC is a large international audit firm whose claimed past or present association with Mr. Nyagah cannot be said to be a ground to replace them from undertaking an audit which they were duly appointed to do by the 2nd Plaintiff's Board of Directors, and that the said PWC have not shown any bias or favouritism to any party but have acted most professionally. The allegation of conflict of interest is meant merely to enable the Applicants to appoint an auditor whom they would manipulate and control. The Respondents urged the court to dismiss the application which according to them is not made in good faith.

23. I have considered the application and opposition to it, and the submissions of the parties. In my view, the issues for determination by this court are as follows:-

i. ***Whether a determination of the auditor the subject matter of this application is an issue which had been settled, or whether the court can still intervene.***
ii. ***Whether PriceWaterHouseCoopers are in the circumstances of this case conflicted, and lacks the capacity to independently carry out the said in-depth audit.***
iii. ***What are the terms of reference for the auditor.***

AUDITOR

24. To address the first issue, it is necessary to go into the history of the matter before the court, and the preceding applications which have produced the two Rulings now before the court dated 6th March 2014, and 28th April 2014. It is important to note from the outset that the appointment of PWC to carry out the in-depth audit to the said loan account was not a decision of this court. Rather, this court sought to put into effect the intention of the parities, in a decision made by the parties themselves in September 2014 at a time when the disputants were in a better relationship with each other, and exercised good will towards each other. Indeed, in the replying affidavit of Mr. Stephen Armstrong Jennings dated and filed in court on 26th February 2015, the Defendants supported without any reservations the appointment of PriceWaterHouseCoopers and in the said replying affidavit it is Mr. Jennings who questioned the apparent reluctance of the 3rd and 4th Plaintiffs to proceed with the PriceWaterHouseCoopers as proposed. Therefore, when this court made orders (c) and (d) in the Ruling of 6th March 2015, this court was merely affirming the decision of the parties themselves.

25. It is important to note and to consider that the decision to appoint PriceWaterHouseCoopers was a decisions of the Board of Directors of the Plaintiff's Companies, pursuant to rules and regulations contained in their Memorandum and Articles of Association, and rules pertaining to meetings, operations and decision making capacities of corporations. Such a decision carries a good deal of weight, and it is the way of internal management of corporations. It is a kind of decision that a court will be quite reluctant to interfere with, unless for very good reasons advanced for interference. In this particular instance, the application, although nominally supported by other Defendants, is essentially the 3rd Defendant's application. It is arguable to say that the application does not enjoy absolute support from other Defendants probably because the other Defendants understand better the import of a corporation making decisions through its authorized organs. Again, the Applicant has not demonstrated why he found it absolutely necessary to disengage from the earlier decisions of the board, to bring this application for the specific prayer, except that he believes that PriceWaterHouseCoopers is conflicted and cannot independently carry out the audit envisaged herein.

26. In my view, and this is the law, an order of the court can be challenged either through a review, or through an appellate process. Through order (d) of the Ruling of this court on 6th March 2015 the court had already appointed PWC (or another agreed entity) to carry out the said audit. The parties having failed to agree, PWC became the auditor by dint of that order. The order has not been appealed, and this court has not been asked to review it. I have no reason to interfere with it.

CONFLICT OF INTEREST

27. The second issue is whether the said PriceWaterHouseCoopers is in the circumstances of this case so conflicted that it cannot independently carry out the envisaged audit. Mr. Macharia submitted that the following facts are common ground between the parties and/or beyond contest:

i. ***PricewaterhouseCoopers are presently the external auditors of Bidco Africa, a leading business conglomerate involved in the manufacture of edible oil, detergents, soaps, margarine and baking powder with its headquarters in Kenya.***

ii. ***The 4th Defendant is a shareholder, director and the Chief Executive Officer of Bidco Africa.***

iii. ***The aforesaid facts were uniquely within the knowledge of the 4th Defendant at the 2nd Plaintiff's meeting held on 28th January 2015.***

iv. ***Article 93 of the 2nd Plaintiff's Articles of Association states as follows:***

" A director may contract with and be interested in any way , whether directly or indirectly , in any actual or proposed contract or arrangement with the company, either as vendor, purchaser or otherwise , and shall not be liable to account for any profit made by him by reason of any such contract or arrangement , provided that the nature of the interest of the director in such contract or arrangement is declared at the meeting of the Board at which the question is first taken into consideration if his interest then exists or, in any other case, at the next meeting of the Board held after he became interested and it shall be the duty of the Director so to declare his interest. "

The Articles are annexed at pages 280 to 311 of the Plaintiffs Further Supplementary List and Bundle of documents filed in court on 25th March 2015.

v. ***The 4th Defendant did not disclose the material facts referred to at paragraphs (i) and (ii) above at the board meeting held on 28th January 2015 at which the decision to appoint PWC as the auditors was made or to this honourable court when the parties argued the applications that culminated in the ruling delivered on 6th March 2015***

vi. ***PricewaterhouseCoopers was also one of the external auditors at Central Bank Kenya during the tenure of 3rd Plaintiff. The 3rd Plaintiff was one of the two bank officials who signed the statement of directors responsibilities on the financial statements on behalf of the bank.***

vii. ***The two parties both agree that the audit is critically important in unlocking the underlying issue in dispute, namely in what manner and who is to govern the company which is presently valued at close to US $ 1 Billion. The parties agree that the report to be prepared after the audit is concluded must, like ceasars wife, be un-impeachable and above reproach or suspicion.***

Article 50(1) of the Constitution of Kenya states that:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

28. Mr. Macharia submitted that a court mandated or directed audit is an extension of the judicial proceedings. Indeed at the board meeting held on 28th January 2015, the directors clearly emphasized the need for, and contemplated the appointment of "an independent" auditor. The in-depth audit must therefore be carried out by an audit firm that meets the standards set out in Article 50 of the constitution within the peculiar circumstances of this case. Mr. Machari cited the **Black's Law Dictionary,** and very many local and international authroties to support his submissions on conflict of interest. Most of those authorities were based on conflict involving a Judges "*sitting in their own causes*". The authorities were easily distinguishable, and were not very helpful for this particular case.

29. Citing the case of **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002, Mr. Macharia submitted that the 3rd and 4th Plaintiff's had a duty to declare material information that was peculiarly within their knowledge and should not be now heard to throw this burden to the defendants as they have attempted to do in their respective replying affidavits. Counsel submitted** that in the context of the importance of the in-depth audit and the very considerable interest of not only the parties to this suit but indeed the national economy in the Tatu City project, PricewaterhouseCoopers fails the independence and perceived bias/conflict of interest to be expected of them as auditors.

30. On his part, Mr. Havi for the Respondents submitted that the allegations of conflict of interests against PWC are baseless and are meant to frustrate the audit. Counsel submitted that, firstly, the current application and claim of conflict of interest must be understood to emanate from the 3rd Defendant alone.

The rest of the directors of the 2nd Plaintiff whom are recognized by the Plaintiffs as having made the decision appointing PricewaterhouseCoopers on 28th January, 2015, have not made a similar complaint. The application should not be understood to relate to them, or the Board of Directors of the 2nd Plaintiff for that matter. The other Defendants who are directors of the 2nd Plaintiff have not given the 3rd Defendant written authority in terms of Order 1 rule 13 (1) & (2) of the Civil Procedure Rules, 2010, to plead for them. The said Order and Rules provide as follows:-

"Where there are more Plaintiffs than one, any one more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding.

The authority shall be in writing signed by the party giving it and shall be filed in the case."

31. Counsel cited the decision by the **Court of Appeal in Chalicha F C S Ltd –vs- Odhiambo & 9 others (1987) eKLR 182**, where the Court stated that:-

"This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the plaintiff's witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 rule 8 or rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The appearance and defence of defendants (respondents) 1, 2 5 and 7 were prepared and filed by an advocate and if the defences were on the basis of representative action, then the advocate should have stated so. The trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. Judgment should have been entered against defendants 3 to 10. Trial should have proceeded as against defendants one and two. In the light of the findings that the plaintiffs had purchased the farm and taken possession of it, then judgment should have been entered for the plaintiff against defendants 1 and 2. After the trial, the trial judge should have granted the prayers as prayed by the plaintiff. George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice."

In the circumstances, Mr. havi submitted that the 3rd Defendant as a lone director of the 2nd Plaintiff cannot seek to dictate and/or vary the unanimous decision of other directors, duly made on 28th January, 2015. The entire application should be refused on this ground alone.

32. I agree with this position. However, it is important to interrogate further the issue of conflict of interest of the proposed auditor since its very important. The complaint of conflict of interest against the 3rd Plaintiff is framed at paragraph 14 (iii) of the 3rd Defendant's Affidavit in the following terms:-

"Pricewaterhousecoopers were also auditors of the Central Bank of Kenya during the tenure of the 3rd Plaintiff as Governor. This too was an important relationship for PricewaterhouseCoopers."

Mr. Havi submitted, and I agree with him, that this statement is made by the 3rd Defendant without any evidence to back it up. At paragraph 10 of his Affidavit, the 3rd Plaintiff has answered fully the claim of conflict of interest targeted at him. He has shown that PricewaterhouseCoopers cannot be conflicted because it was not his auditor, but that of Central Bank of Kenya. He has no personal relationship with the auditor or any individual working there and that in any event, Ernst & Young and KPMG, who the 3rd

Defendant seeks to replace PricewaterhouseCoopers with, acted for Central Bank of Kenya Limited at the very same time in issue, 13 years ago. Unlike the 3rd Defendant's bare claims, the 3rd Plaintiff's testimony on this issue is supported by the accounts of Central Bank of Kenya for the period in issue, which are exhibited at pages 42 to 48 of the exhibits to the 3rd Plaintiff's Affidavit.

33. The accusation against the 4th Plaintiff is at paragraph 14 i) and ii) of the 3rd Defendant's Affidavit. The 4th Plaintiff is claimed to be the alter ego of BIDCO, a big account for the auditor and that he failed to disclose to the Court and to the Defendants that the auditor is the external auditor of BIDCO. Again, Mr. Havi submitted that this is a bare statement without any supporting evidence.

34. On his part, the 4th Plaintiff has to the satisfaction of this court, indicated how he is an entity separate from BIDCO Oil Refineries Limited. He has shown that the said company has in its panel, all the prominent auditors including all those suggested to replace PricewaterhouseCoopers. There was nothing to disclose about the said auditor because there is no relationship between it and the 4th Plaintiff as an individual. Besides, the 3rd Defendant has not claimed or demonstrated how the relationship between BIDCO Oil Refineries Limited and the auditor has impaired or is likely to impair the auditor's independence in the audit exercise. If PWC is conflicted on account of association with BIDCO Oil Refineries Limited, then all the other suggested auditors, who have been shown are in current association with the company associated with the 4th Plaintiff, would be conflicted. The result is that there would be no "*independent auditor*" to undertake the audit. That is the absurdity intended in the current application.

35. But more importantly, and this is the position of this court, the matters of Central Bank of Kenya and BIDCO Oil Refineries Limited cannot be supplanted on the 3rd and 4th Plaintiffs. The two sit on the Board of Directors of the 2nd Plaintiff in their own individual capacity and for their own personal interests. Those interests have not been claimed or demonstrated to relate to Central Bank of Kenya and BIDCO Oil Refineries Limited in any way whatsoever. Fraud, the principal ground for lifting the veil of incorporation has not been alleged on the matter of the alleged conflict of interest by the auditor. The 3rd and 4th Plaintiffs should not, in the circumstances of this case, be prejudiced on account of their past and/or current association with entities that have previously retained or currently retain the auditor as their auditor. In **Bachoo Patel t/s K.G. Patel Shop Limited –vs- Stanley George Wamutira (2010) eKLR,** the Court reiterated that a director of a limited liability company is a separate entity from the company and the latter's liabilities cannot be imposed on him. This is what the court said:-

"In his judgment the learned magistrate went on to hold that "….Having admitted that the company was his, it matters not that he is Bachoo patel or Matatlal Patel and having admitted that his company had dealings with the plaintiff I find that the defendant had contract with the plaintiff and he owes 34,410/=…." Again this is a gross misdirection in law by the learned magistrate. It appears to me that the learned magistrate had thrown through the window the basic principles of company law as elucidated and enunciated in the leading case of Solomon V Solomon and Co. ltd (1987) A.C and Lee V Lee's Air Farming Ltd (1960) 3 ALL E.R. 420. It is trite law that a limited liability company is a legal entity separate from the directors. It can sue and be sued in its name. Accordingly it cannot be said that merely the appellant was a director of the company, he can be held personally for the liabilities of the company. The company's separate legal entity and or personality is not clouded and cannot be transferred to its director. The appellant cannot thus assume the debts and or responsibilities of a limited company."

36. Allegations of conflict of interest must be supported with evidence in order to disqualify the person accused in that regard. Mere suspicion and unfounded fears cannot suffice. It was so held in **Nancy Makhoha Bazara –vs- Judicial Service Commission & 9 others (2012) eKLR**, when the Court held that:-

"During the hearing of the petition, we rejected the submissions to the effect that the Attorney General is the legal adviser to the Commission. In any case there is no evidence before us to suggest that the Commission solicited and he provided legal advice in any matter or steps concerning the incident that

occurred on 31st December 2011 involving the Petitioner herein. In this case the Attorney-General was not even a member of the subcommittee. Fortified by the decision in Van Rooyen's Case (ibid) we find that the presence of the Attorney General in the Commission does not constitute a conflict of interest nor compromise the independence and impartiality of the Commission. It is contended that the Attorney General handled the matter in a very malicious manner to the extent of encroaching on the DPP's Constitutional mandate to achieve ulterior motives only to him. The petitioner is also apprehensive of the Attorney General's impartiality and fairness in the incident. It is also contended that the Attorney General gave a hurried advice to the President to suspend the Petitioner and form a Tribunal. We have thoroughly and meticulously gone through all the documents and the materials before us and we do not find any evidence to support the allegations made against the Hon. Attorney General. There is no evidence that the Attorney General acted in a particular manner whether maliciously or otherwise in order to achieve ulterior motives. We therefore find the allegations and apprehensions against the Attorney General in the way he conducted himself as utterly misplaced and without merit."

37. In the end, I find that the 3rd Defendant has not proved his claim of conflict of interest on the part of the auditor. The in-depth audit was intended to be independent of the influence, interruption or control of any of the parties. It cannot lie in the mouth of the 3rd Defendant, to propose a preferred choice of auditor, without sufficient proof of conflict of interest on the unanimously appointed auditor. The Defendants and the 3rd Defendant in particular, have nothing to fear in the in-depth audit, if their actions are faultless.

TERMS OF REFERENCE FOR AUDIT

38. The third issue is to determine the terms of reference of the audit. Referring to the scope thereof, Mr. Macharia submitted that at the meeting held on 28th January 2015, which was chaired by the 3rd Plaintiff, the board of directors expressly limited the scope of the audit in the following terms: "***that the objective of this audit exercise was to (1) determine the total loan amounts secured by the company from inception to date and (2) the reconciliation on the payments thereon***."

Mr. Macharia submitted that the audit was limited to the two issues identified above. For unknown reasons and in a clear attempt to over-reach and extend the scope of the audit, PricewaterhouseCoopers, adopted the extensive terms set out at pages 24 and 25 of the application in what can only be termed as a fishing expedition that was not authorized or within the contemplation of the directors. Mr. Macharia observed that the terms proposed by PricewaterhouseCoopers and eagerly supported by the 3rd and 4th Plaintiffs' encroach on the jurisdiction of this court by, for example, proposing to identify "***violations of policies***" and "***ascertaining if such violations amount to irregularities***". Further, Mr. Macharia submitted, the terms proposed by PricewaterhouseCoopers clearly exceed the sort of audit authorized by the directors and this court in its Ruling on 6th March 2015 when the auditors, for inexplicable reasons, wander far away from the objectives clearly captured for them in the minutes of the meeting and launch into an adventure to "***ascertain the financiers ownership structure, to the extent possible.***" Counsel submitted that the proposed terms are intended to result in a ruling rather than an audit report and thus hamstring the jurisdiction of this court.

39. In response, Mr. Havi submitted that the decision to undertake an in-depth audit of the loan and to appoint PricewaterhouseCoopers (PwC) was an internal decision of the 2nd Plaintiff. There should be no intervention by the Court in that decision, save to ensure the speedy and just determination of the dispute in Court, whose filing was prompted by the board room coup conducted by the 1st to 3rd Defendants on 5th February, 2015, in an attempt to silence the 3rd and 4th Plaintiffs on their demands for true and correct accounts of the loan. Such an intervention by the Court was rightfully made on 6th March, 2015. The directive given by the Court has not been complied with in full, because of frustrations created by the Defendants. The intervention of this court is not merited.

40. Mr. Havi submitted that the 3rd Defendant's request to limit the scope of the in-depth audit in the manner sought in prayer 2 of his application is a request to the Court, to intervene in the internal decision

making process of the 2nd Plaintiff contrary to principles of company law. The minutes of the 2nd Plaintiff's Board of Directors' meeting of 28th January, 2015 and the resolutions therein capture what is required of the auditor in clear detail. The auditor has expressed its understanding of the instructions given, in his summary exhibited at pages 23 to 24 of the 3rd Defendant's Affidavit. The auditor should be facilitated by cooperation from the Defendants and the Plaintiffs in undertaking the in-depth audit.

41. In my view, to determine the scope for the terms of reference for the audit, it is again necessary to go back to the history of the Rulings herein. Prayer number 8 of the Plaintiff's application dated 19th March 2015 sought an order that:-

"The audit by PriceWaterHouseCoopers certified Public Accountants (Kenya) directed to be undertaken in terms of the Order of 6th March, 2015, be undertaken by the said PriceWaterHouseCoopers (Kenya) as resolved in the minutes of the Board of Directors meeting of the 2nd Plaintiff held on 28th January 2015 as finalized by John L. G. Maonga and signed by the 3rd Plaintiff."

I have looked at the proceedings leading to the Ruling delivered on that application on 28th April 2015. The Defendant did not challenge that prayer. At paragraphs 57 and 58 of the said Ruling, this court observed in regard to prayer number 8 as follows:-

"In prayer 8 of the Second Application, the applicants have asked that the said audit by PriceWaterHouseCoopers be undertaken by the said firm as directed by this court and as resolved in the minutes of the Board of Directors meeting of the 2nd Plaintiff held on 28th January 2015 as finalized by John L.G. Maonga and signed by the 3rd Plaintiff.

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

I have now considered the application dated 23rd April 2015, by the 3rd Defendant, being this application. The question which I ask myself is, is the 3rd Defendant acting in good faith in bringing this application and asking for such an order, when all the Defendants had all along been comfortable with the said prayer number 8? Although this court did not make any orders regarding the said prayer number 8, and this court has the duty to determine the current application on its own merits, this court is not satisfied that good reasons have been advanced to alter the position then adopted by all the Defendants on that issue prior to the delivery of the said Ruling. In any event I do not perceive that there is a serious difference on the issue by the parties. The Applicant merely seeks that the auditor adheres to the resolution under MIN 12/2015 (e) which stated that:-

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

It was resolved:-

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

vi. ***that the Chairman and Mr Robert Reid to provide required documentations to PwC for the required audit."***

42. The Plaintiffs are entitled to have the in-depth audit undertaken independently without interruption or control by the Defendants, in terms of the decision made by the 2nd Plaintiff on 28th January, 2015. In **Re Nationwide Electrical Industries Limited (2007) eKLR**, the Court directed that an audit be undertaken in terms of the request of the requisitioning shareholders, holding that:-

"The applicants herein are minority shareholders in the company and the evidence before me is that despite what the respondents aver, the applicants have right to know the status of the affairs of the company and their right to know have been thwarted by the oppressive majority shareholders…

A transparently managed and operated company has no cause to fear or worry over investigations."

43. That is the very same case here. The Defendants should have no cause to fear if their representations of the status of the loan are correct.

44. In conclusion this court reiterates the crucial importance of the proposed audit. The disputants herein are locked into a dispute which only the said audit may unravel. The crucial business of the 1st and 2nd Plaintiffs are at a standstill due to the dispute. It is therefore important that both sides to the dispute approach the said audit in good faith, so that the business of the two companies is not unduly compromised. I do not consider the choice of auditor as a win or a loss for either party. The audit issue was an interim measure in the resolution of the dispute, and must be dispensed with as soon as is possible. It should not be the new dispute. If this happens then there is possibility of a long drawned dispute which will no doubt dissipate the energy of the Plaintiff companies and disorient their business. The auditor appointed will, no doubt, understand the need to approach its work with professionalism and utmost neutrality. The Applicant's fears that PWC are seeking to expand the scope of the audit. This fear should not be there at all. The company had agreed on the character and scope of the audit to be undertaken by PWC. That audit needs to be complete and should cover all the issues relating to the financial affairs of the company, and in that regard it is logical that all the facts and figures be laid on the auditors table by all the parties to give full effect to the exercise. To do otherwise will render the audit an exercise in futility. After the proposed audit exercise is carried out, there should be no further need for another audit. Therefore, the representatives of the parties should be free to avail to the auditor all the information and materials required for the exercise, and they should be flexible enough with such informations and documents to enable the said audit achieve the fullest effect under the said Terms of Reference.

45. In previous Rulings herein, this court has emphasized the need for Tatu City owners to work together to realize the huge potential of their business which most Kenyans eagerly look forward to. This court therefore continues to urge the parties to this suit to work for the good of the company. To do that this audit exercised should be dispensed with in the earliest possible time.

46. In the upshot, this court makes the following orders:-

a. Except and to the extent provided hereunder, the Notice of Motion application herein by the 3rd Defendant dated 23rd April 2015 is dismissed.

b. Pricewaterhousecoopers (PWC), appointed auditors herein vide the Ruling of this court delivered on 6th March 2015 shall proceed to carry out the said audit as per b. the decision made by the Plaintiff's Board of Directors on 28th January 2015 and with the necessary flexibility agreed upon by the 3rd Plaintiff and Mr. Robert Reid pursuant to Clause (d) of the said decision made on 28th January 2015.

c. Pricewaterhousecoopers shall file their Report in this court within 45 days of the commencement of the audit.

d. The cost of the audit shall be paid by the 1st Plaintiff.

e. This order shall be served upon Pricewaterhousecoopers (PWC) who shall commence the said audit immediately upon such service.

f. The cost of this application shall be paid by the 3rd Defendant.

g. The matter will be mention on 28th July 2015 to receive the said audit report.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 12TH DAY OF JUNE 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Havi for the Plaintiffs

Mr. Macharia for the 3rd Defendant

Mr. Ochieng Oduol for the 1st, 2nd, 4th, 5th, 6th and 7th Defendants

Teresia – court clerk