



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 259 OF 2015**

**BETWEEN**

**TATU CITY LIMITED.....1<sup>ST</sup> APPELLANT**  
**KOFINAF COMPANY LIMITED.....2<sup>ND</sup> APPELLANT**  
**NAHASHON NGIGE NYAGAH.....3<sup>RD</sup> APPELLANT**  
**VIMAL KUMAR BHIMJI DEPAR SHAH.....4<sup>TH</sup> APPELLANT**

**AND**

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

*(An appeal from the Ruling and Order of the High Court of Kenya*

*at Nairobi (E. K. O. Ogola, J) dated 28<sup>th</sup> April, 2015*

*in*

*Civil Case No. 46 of 2015*

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**JUDGMENT OF THE COURT**

1. The Tatu City project was a grand and noble investment idea. But it is now mired in the ignominy of Boardroom and Shareholder wars, mostly fought in court rooms and the airwaves. The matter before us is just one other battle front that can only lead to a temporary ceasefire as the main battle awaits the parties before the High Court. It is an interlocutory appeal against orders issued by the High Court (**Ogola, J.**) on 28<sup>th</sup> April, 2015 in respect of two applications filed by the appellants before us. The first application was dated 5<sup>th</sup> February, 2015 (amended on 23<sup>rd</sup> February, 2015); the other was dated 19<sup>th</sup> March, 2015.

2. Surrounding the dispute is an intricate web of relationships between the parties stretching from Kiambu through Cyprus to Mauritius, but the kernel of it, similarly intricate, is an offshore loan transaction which appears to defy clarity. We may give a brief background to the appeal as gleaned from the record.

3. The 1<sup>st</sup> appellant (**Tatu**) and the 2<sup>nd</sup> appellant (**Kofinaf**) are public limited liability companies registered in Kenya. Their main object is the construction and development of a modern city in Kiambu County popularly known as Tatu City. The 3<sup>rd</sup> appellant (**Nyagah**) is the Chairman of the Board of Directors (**BOD**) of the two companies while 4<sup>th</sup> appellant (**Vimal**), 1<sup>st</sup> respondent (**Jennings**), 2<sup>nd</sup> respondent (**Holliday**), and 3<sup>rd</sup> respondent (**Horn**) are all members of the BOD. Save for Vimal who holds one share, none of the other directors holds any shares in the two companies. The majority shareholder of Tatu is **Cedar IV Limited**, a company registered in Mauritius, whose shareholders are **SCF Holdings II Limited** (500,001 shares) and **Manhattan Coffee Investment Holdings** (459,999 shares). The majority shareholder in Kofinaf is **CedarSoc Limited**, another company registered in Mauritius, whose shareholders are **SCF Holdings II Limited** (450,000 shares) and **Manhattan Coffee Investment Holdings** (550,000 shares). The interests of the foreign owned companies in the project are represented by Jennings, Holliday and Horn, while Nyaga and Vimal represent the interest of the so called local partners.

6. Through a company known as Renaissance Partners Investment Limited, (**Renaissance**), a company associated with Jennings and Horn, a loan of USD 62.5 million was secured to finance the project and was approved by Kofinaf BOD on 11<sup>th</sup> March, 2010. The term of the loan was 365 days from the date of drawdown and it was repayable at 33% per annum; that is a USD 20.5 million premium on it every year. On 7<sup>th</sup> May, 2010, the BOD resolved to sell some land owned by Kofinaf to raise USD 62.5 million for repayment of the loan. According to the local partners, 8 out of the identified properties were sold for USD 75.3 million and the proceeds of sale were utilized towards the repayment of the loan. There should therefore have been an overpayment in excess of USD 13.5 million but there was no clear explanation from the foreign partners, who had exclusive knowledge and control of the status of repayment of the loan, as to what became of the loan and the credit balance. Instead, the locals say, further demands were made for repayment of the loan.

5. Matters came to a head on 28<sup>th</sup> January, 2015 when the foreign partners outvoted the local partners in Kofinaf BOD and passed a resolution to sell one more property for USD 48 million in part payment of the loan which allegedly stood at USD 94 million as at that date. Nyaga and Vimal protested and called for professional auditing of the loan by M/s Price Waterhouse Coopers (**PWC**). The die was cast.

6. About one week later, 5<sup>th</sup> February, 2015, Jennings, Holliday and Horn, outside any BOD meeting, resolved to unilaterally remove Nyaga as chairman of the BOD and replaced him with a new chairman they appointed in the person of the 4<sup>th</sup> respondent (**Ngugi**) who also became a Director of Tatu and Kofinaf. Nyaga was further removed as a signatory of the bank accounts of the companies and was replaced by the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents - (**Mosier**), (**Njoroge**) and (**Barron**), respectively. Some senior employees of the companies were also removed. That is when Nyaga and Vimal moved to court in the name of the two companies, and on their own behalf, alleging breach of fiduciary duty and fraud on the part of the three other Directors and seeking to have the changes declared null and void and reversed. A raft of 16 reliefs were sought inclusive of permanent injunctions but the parties have to await the full hearing of that suit to determine the fate of those prayers.

7. Meanwhile, the motion (as amended on 23<sup>rd</sup> February, 2015) referred to earlier was filed together with

the plaintiff seeking the following temporary relief:-

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

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

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

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

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

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

8. Some of those orders were granted *ex parte* but before the *inter partes* hearing of the application, the respondents filed their own application seeking to have the *ex parte* orders set aside. After hearing both sides on the application for setting aside the *ex parte* orders, the trial court made the following orders:-

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

*application dated 6<sup>th</sup> February, 2015 inter-partes.*

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

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

*(d) The Price Water House 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.*

9. The Court explained the rationale for those orders, thus:-

*"...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 a stake in the company which will be erased by the bad publicity of litigation..... 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."*

10. The truce was not to be. Soon after, Nyaga and Vimal made further allegations that Jennings, Holliday and Horn had stopped the intended audit by PWC on 12<sup>th</sup> March, 2015 on the pretext that PWC had not been lawfully instructed. They alleged the three had made attempts to alter the minutes of the resolution of Kofinaf BOD regarding the loan; they intended to limit the scope of the audit, review the Articles of Association and exclude Nyaga from participation in the affairs of the companies as chairman. These attempts were resisted, hence the amendment of the plaint on 19<sup>th</sup> March, 2015 and the filing of the second motion seeking the following temporary orders:-

*"1. This Application be certified as urgent and heard exparte.*

*2. The Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from effecting any changes in the memorandum and articles of association of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and the shareholding and directorship of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, pending the hearing and determination of this application and/or this suit.*

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

4. *The Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from effecting any payments on account of the alleged loan, from the accounts of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs or from any monies of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs wheresoever held, pending the filing in Court of the report on the in-depth audit of the loan, resolved by the 2<sup>nd</sup> Plaintiff on the 28<sup>th</sup> day of January, 2015, to be undertaken by Price WaterHouse Coopers Certified Public Accountants (Kenya), pending the hearing and determination of this application and/or this suit.*

5. *The Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from dealing, advertising, charging, selling, mortgaging, transferring in any manner whatsoever properties held by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs wheresoever, pending the filing in Court of the report on the in-depth audit of the loan resolved by the 2<sup>nd</sup> Plaintiff on the 28<sup>th</sup> day of January, 2015, to be undertaken by Price WaterHouse Coopers Certified Public Accountants (Kenya), pending the hearing and determination of this application and/or this suit.*

6. *The 1<sup>st</sup> to 3<sup>rd</sup> Defendants be directed to account to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs for the sum of United States Dollars thirteen Million Five Hundred and Forty thousand and Three (US\$ 13,540,003.00) in respect of which the loan is overpaid referred to paragraph 17 of the Amended Plaintiff, pending the hearing and determination of this suit.*

7. *The 1<sup>st</sup> to 3<sup>rd</sup> Defendants be directed to deposit in Court, the sum of United States Dollars Thirteen Million Five Hundred and Forty Thousand and Three (US\$ 13,540,003.00) in respect of which the loan is overpaid as security for their appearance in this matter.*

8. *The audit by Price WaterHouse Coopers Certified Public Accountants (Kenya) directed to be undertaken in terms of the order of 6<sup>th</sup> March, 2015, be undertaken by the said Price WaterHouse Coopers Certified Public Accountants (Kenya) as resolved in the minutes of the Board of Directors Meeting of the 2<sup>nd</sup> Plaintiff held on 28<sup>th</sup> January, 2015 as finalized by John L. G. Maonga and signed by the 3<sup>rd</sup> Plaintiff”.*

11. The court was of the view that it had substantially dealt with the first application in the Ruling made on 6<sup>th</sup> March, 2015, and that the only pending issues therein were **prayers (a)** (*Resolutions made on the 5<sup>th</sup> day of February, 2015 by Jennings, Holliday and Horn*); and **(b)** (*Nyaga and Vimal remaining in their various positions obtaining before 5<sup>th</sup> February, 2015*) which were granted for a period pending the *inter partes* hearing; **prayers (c)** (*the bank accounts being operated as resolved by those Companies on 5<sup>th</sup> February, 2015*); and **(d)** (*PWC being appointed by the appropriate organs of the Companies to carry out the audit*), were granted pending the tabling of the PWC Report, which was yet to take place. The second application was heard afresh in full.

12. The case of the two companies, and the cases of Nyaga and Vimal, as summarized by the trial court was that the actions of Jennings, Holliday and Horn were intended to give them exclusive control over the affairs of Tatu and Kofinaf in order that they may continue pilfering the capital and income of the companies whilst asset-stripping them. According to them, there was real danger that their actions will leave the companies exposed because the company properties would have been sold, the proceeds siphoned out of the country and beyond reach because the three respondents are not Kenyan nationals and cannot be readily available to account should the project stall or fail. The appellants were apprehensive that the respondents will, unless restrained by a court order, continue with their unlawful actions and the companies will suffer irreparable loss and damage to their businesses.

13. Jennings, Holliday and Horn refuted all the allegations of impropriety or fraud and gave a full history of the investment and how the loan has ballooned out of control after Winding Up proceedings, which took some time to resolve, were instituted against the companies by a third party. They asserted that there was no intention to exaggerate the debt which has to be repaid for commercial survival of the companies; that the court had made findings on 6<sup>th</sup> March, 2015 that the debt was genuine and repayment was a priority; that they had no intention of interfering with Nyaga's position as the chairman in both companies

since there was a court order; that they have no interest in frustrating or otherwise interfering with the PWC audit and their only interest was to ensure that the audit is undertaken in a clear and transparent manner with the full knowledge and authority of the BOD; that the prayer for an account was mischievous and in any event, it was already the subject of the audit to be undertaken by PWC; and that there was nothing sinister about the proposed amendments to the Articles of Association of the Companies, the intention being to strengthen the governance structures of the Companies and to enable them to operate more efficiently.

14. After considering the record, the submissions of counsel and framing the issues for determination, the trial court made the following orders:-

***(a) The unilateral resolutions made by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants on 5<sup>th</sup> February, 2015 are prima facie unlawful.***

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

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

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

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

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

15. Those are the orders that aggrieved the two companies, Nyaga and Vimal hence the appeal before us, premised on five grounds which may be summarized:-

***The learned Judge erred in law in:-***

***(i) holding that the Appellants' Notice of Motion amended on 23<sup>rd</sup> February, 2015, had been determined on 6<sup>th</sup> March, 2015, all that remained concerning it were 2 items and in failing to consider and determine the said Motion in its entirety.***

*(ii) making conclusive and final findings of fact, in holding that he could not inquire into the make-up of the offshore entities or the parties' respective contribution to the capital of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants when the contribution to the share capital was a matter in issue, relevant to the claim of majority shareholding in the 1<sup>st</sup> and 2<sup>nd</sup> Appellants by the 1<sup>st</sup> Respondent.*

*(iii) failing to consider whether the Appellants would suffer irreparable injury, or the balance of convenience tilted in favour of the grant of an injunction to restrain the implementation of the decisions made by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents on 5<sup>th</sup> March, 2015 (sic), having found the entire resolutions in respect thereof prima facie, unlawful.*

*(iv) holding that the grant of an injunction to restrain the implementation of the decisions made by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents on 5<sup>th</sup> February, 2015 would paralyze the business of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, when the said Applicants had prior thereto, operated effectively without the 4<sup>th</sup> to 7<sup>th</sup> Respondents.*

*(v) failing to restrain the continued sale of the 1<sup>st</sup> and 2<sup>nd</sup> Appellant's properties, to raise funds towards the repayment of a loan whose audit the Respondents had frustrated pending the filing in Court of the report on the in-depth audit of the loan accounts of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.*

Jennings, Holliday and Horn were also aggrieved by the orders and filed a cross appeal on ten grounds which may be summarized too, thus:-

***The learned Judge erred in:***

*(a) acting without jurisdiction in making a declaratory order in an interlocutory application that the resolutions made by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were prima facie unlawful.*

*(b) wrongly interpreting articles 109 and 111 of the 1<sup>st</sup> and 2<sup>nd</sup> Appellant companies' Articles of Association on the election of a chairman of the board and in granting the application for injunction by the 3<sup>rd</sup> Appellant.*

*(c) wrongly interpreting the principle enunciated in the case of Musa Misango vs Eria Musigire & Others [1966] EA 390 which was inapplicable to the circumstances of the case and in particular the application for injunction by the 3<sup>rd</sup> Appellant.*

*(d) holding and determining that the 3<sup>rd</sup> and 4<sup>th</sup> Appellants shall resume their positions in the 1<sup>st</sup> and 2<sup>nd</sup> Appellant companies obtaining before 5<sup>th</sup> February, 2015 pending the hearing and the final determination of the suit in the High Court.*

*(e) holding and determining that the 3<sup>rd</sup> Appellant be consulted in all financial transactions involving the 1<sup>st</sup> and 2<sup>nd</sup> Appellant companies.*

*(f) acting in excess of his jurisdiction in interfering with the internal management of the 3<sup>rd</sup> and 4<sup>th</sup> Appellant companies and in determining that the 4<sup>th</sup> Respondent shall not assume chairmanship of the boards of the 1<sup>st</sup> and 2<sup>nd</sup> Appellant companies.*

*(g) holding and determining that the 1<sup>st</sup> and 2<sup>nd</sup> Appellant companies shall not effect any loan repayments by the 1<sup>st</sup> and 2<sup>nd</sup> Appellant companies for the duration of the intended audit and pending the filing of the audit report in court and further direction from the High Court.*

*(h) holding and determining that the respondents or their agents however described are restrained from effecting any changes in the memorandum and articles of association of the 1<sup>st</sup>*

**and 2<sup>nd</sup> Appellant companies and the shareholding and directorship of the 1<sup>st</sup> and 2<sup>nd</sup> Appellant companies pending the hearing and determination of the suit in the High Court.**

**(i) granting interlocutory injunctive orders in a defective suit having granted the 3<sup>rd</sup> and 4<sup>th</sup> Appellants leave to continue the suit as a derivative suit and without the necessary amendments to the pleadings having been effected.**

**(j) the decision of the learned Judge was against the weight of the evidence tendered and the principles of law applicable to the case.**

17. Before us, **Justice (Rtd) Richard Otieno Kwach** and **Mr. Nelson Havi** instructed by M/s Havi & Company Advocates represented all the appellants; learned counsel **Mr. Issa Mansur**, instructed by M/s Issa & Company Advocates represented Jennings, Holliday, Ngugi, Mosier and Barron; while Horn was represented by **M/s MMA Advocates** who did not attend the hearing session despite being served; and Njoroge was represented by **M/s Mbugua Atudo & Macharia Advocates** who also did not attend court despite service.

18. In their written submissions which Justice Kwach and Mr. Havi highlighted orally, the appellants referred to an intention by the firm of **M/s Ahmednasir, Abdikadir & Company Advocates** to have the appeal withdrawn on the pretext that they were acting for the Tatu and Kofinaf. That issue was another of the sideshows that have bedeviled the dispute between the parties, but it was overtaken by events after the High Court made a decision on it. We were informed by **Mr. Busaidy**, Advocate holding brief for Mr. Ahmednasir, and recorded it before the hearing of this appeal, that the firm of M/s Ahmednasir, Abdikadir & Company Advocates was no longer representing the two companies. We need not therefore deal with the issue any further.

19. According to the appellants, the gist of the appeal is that despite the trial court having found that the resolutions made on 5<sup>th</sup> February, 2015 were *prima facie* unlawful, and directing that Nyaga remains a Director in the two companies, the court erroneously declined to:

*(i) restrain Ngugi, Mosier, Njoroge and Barron from assuming office as Directors of the two companies,*

*(ii) restrain the removal of Nyaga as a mandatory signatory of the companies' bank accounts,*

*(iii) restrain the respondents from selling the properties of the companies,*

*(iv) restrain the respondents from running the affairs and operating the bank accounts of the two companies to the exclusion of Nyaga and Vimal.*

20. It is further complained that despite the court ordering an in-depth forensic audit of the companies' loans by PWC within a time limit, nothing had happened as PWC pulled out citing frustration and lack of co-operation from the respondents. The appellants want the *status quo* existing before the filing of the suit on 5<sup>th</sup> February, 2015 to be maintained until the hearing of the suit.

21. The appellants further contend in their submissions that the trial court made erroneous and final findings that the foreign investors had controlling shareholding in the two companies which justified their unilateral actions. In their view, it was that finding that led to the decision not to restrain the respondents from selling the properties of the companies, controlling the bank accounts and appointing officers of the companies. The case of ***Rockland Kenya Ltd vs Elliot White Miller [1994] eKLR*** was relied on for the proposition that it was not the function of the court to resolve conflicts of evidence on affidavits as to facts when considering an application for injunction. They further observed that the trial court did not consider, as it should have, the issues of irreparable damage and balance of convenience before declining to grant the reliefs sought. In their view, there was a wrong committed that required a remedy by way of an injunction but the refusal to stop the unlawful resolutions gave the respondents undue advantage

resulting in the paralysis of the companies. It also exposed the companies' properties to unlawful sale since, on the facts, there was no outstanding loan repayment but an overpaid loan, it was submitted.

22. Several cases were relied on in support of those submissions, including:

**Pulbrook vs Richmond Consolidated Mining Co., (1878), 9, Ch, D 610, 615 (CA)** where the majority of Directors were restrained from excluding one director from management of the company's affairs; **Achili vs Tovell (1972) 2 Ch 243** for the principle that a proven wrong need to be remedied with injunction, and the injured party should not be compelled to take damages; **Despina Pontikos [1975] E. A 38** for the proposition that inability to comply with an injunction is not a ground to refuse an injunction where a case has been demonstrated; and **East African Safari Air Limited vs Anthony Ambaka Kegode & Another [2011] eKLR** where the court preserved the assets and accounts of a company pending determination of management disputes between directors.

23. In response to those submissions, and in urging the cross appeal, Mr. Mansur filed written submissions and orally highlighted them. Counsel urged us to interfere with the exercise of the trial court's discretion in accordance with the principles set out in **Mbogo vs Shah [1968] EA 93** because there were misdirections committed by that court. The first transgression was the failure to follow the dictates of **Order 40 Rule 1** of the **Civil Procedure Rules (CPR)** that injunctive relief be based on facts proved by affidavit or otherwise. The court in this case, in his view, merely relied on issues raised in pleadings but not proved.

The second was to ignore the guidelines set in the cases of **Giella vs Cassman Brown & Co Ltd [1973] EA 358** and **Nguruman Limited vs Jan Bonde Nielson & 2 Others [2014] eKLR**.

24. According to counsel, there was every justification in law for the trial court to hold that it could not enquire into the make-up of the offshore entities or contribution to the share capital of Tatu and Kofinaf since the certificate issued by the Registrar of Companies is the final authority in determining share qualifications of shareholders. **Section 119** of the **Companies Act** and the case of **Vadag Establishment vs Yashvin Numised Ag & Others (Civil Appeal No. 83 of 2001)** were correctly relied on. In any event, counsel observed, that issue had been determined in earlier proceedings before **Musinga, J.** (as he then was) in **Winding Up Petitions Nos. 29 and 30 of 2010**.

25. However, as regards the resolutions of 5<sup>th</sup> February, 2015 which included the removal of Nyaga as Director, counsel submitted that the trial court did not consider whether the appellants had a *prima facie* case on the election of Chairman in accordance with the Companies' Articles of Association; whether Nyaga could not be compensated in damages for his removal as Director; and whether the balance of convenience tilted in his favour. Counsel further submitted that the court granted summary orders, with no factual basis and without jurisdiction, as they were made outside the provisions of the Companies' Articles of Association. These were orders relating to alteration of the Articles of Association, removal and replacement of directors and repayment of loans. They were all to do with the internal management of the companies and the court had no jurisdiction to interfere. The cases of **Murri vs Murri & Another [1999] 1 EA 212** and **Martin Njuguna Kuria & 12 Others vs Nuclear Investments & 7 Others [2014] eKLR** were relied on for that submission.

26. Indeed, counsel asserted, the orders suspending repayment of loans and for consultation of Nyaga in all financial transactions, were mandatory in nature but were not grantable because, firstly, the lender was not given an opportunity to be heard, and secondly, on the authority of **Diamod Trust Bank (K) Ltd vs Jaswinder Singh Enterprises [1999] 2 EA 72**, and **Kenya Breweries vs Okeyo [2002] 1 EA 101**, the case was not unusually strong and there were no special circumstances to warrant the grant of such relief.

27. As regards the declaration made by the trial court that the resolutions made on 5<sup>th</sup> February, 2015 were *prima facie* unlawful, counsel submitted that such declaration could not be made without full interrogation of the evidence and was therefore made without jurisdiction. The cases of **Joseph Mzungu Nyoka vs Vros Produce Limited & 525 Others [2015] eKLR** and **Vivo Energy Kenya Limited vs Maloba**

**Petrol Station Limited & 3 Others [2015] eKLR** were relied on for those submissions.

28. Finally, it was submitted that the injunctive orders were granted in a suit that was a nullity as were the ensuing orders. That was so because Nyaga and Vimal were allowed, in the Ruling of the court made on 6<sup>th</sup> March, 2015, to proceed with the suit as derivative action in which event the plaint should have been amended to enjoin the two companies as defendants but there was no amendment made.

**Halsbury's Laws of England 4<sup>th</sup> Edition para 767** was relied on for the proposition that:

***"..in all such cases the company must be made a defendant",***

and **Macfoy vs United Africa Ltd [1961] All E. R 1169** stating that void action is in law an automatic nullity requiring no court order to set it aside. Mr. Mansur urged us to dismiss the appeal and grant the cross appeal.

29. In a brief rejoinder, Mr. Havi pointed out that the ruling on derivative action was in a different ruling of the court which was not challenged and the cross appeal in this matter cannot be supplanted to challenge that ruling. He further pointed out that evidence of the loan and the repayment thereof was before the trial court (though not before this Court) and therefore, there was sufficient basis for suspension of further loan repayments. Counsel urged us to revisit the entire application and make fresh orders for maintenance of the status quo in view of the changed circumstances of the audit by PWC having stalled. He distinguished the **Nguruman case (supra)** on the basis that the claim in this case was based on law and not equity and it was not necessary to consider whether there was a *prima facie* case before granting the injunctive relief.

30. As stated earlier, counsel for the other parties filed no written submissions and made no oral submissions in the appeal. Only one Mr. Macharia, learned counsel, said he supported Mr. Mansur.

31. We have anxiously considered the record of the appeal and cross appeal, the submissions of counsel and the authorities cited before us. Both the appeal and cross appeal call for our interference with the discretion of the trial court in granting the orders it did. It is common ground that such discretion cannot be interfered with lightly by an appellate court unless it is shown that the discretion was clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. Those principles were stated in the ageless case of **Mbogo & Another vs Shah [1968] EA 93**. In the subsequent case of **United India Insurance Co Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] KLR 898** Madan, JA stated thus:

***"The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

32. Mr. Mansur also raised an issue of jurisdiction asserting that the application before the court was invalid on account of the derivative suit being a nullity. We must deal with that issue forthwith because jurisdiction is everything. The application which was before the court (the motion amended on 23<sup>rd</sup> February, 2015) is the one that sought an order for pursuing the suit on behalf of the two companies as a derivative one. It is the same application that is the subject matter of this appeal and cross appeal. The order for derivative action was not given until 6<sup>th</sup> March, 2015 and has not been challenged. So was the finding that Nyaga and Vimal had their personal rights to pursue in the suit. Pleadings can always be amended for the proper and full adjudication of the issues. For those reasons we find, with respect, that the proposition that the proceedings before the trial court were based on a nullity and that the orders issued were also nullities, is misplaced. We reject the submissions of counsel.

33. Did the trial court in this matter exercise its discretion judiciously?

As stated earlier, the very core of the dispute is whether or not an offshore loan admittedly given to the two companies was repaid in full or not. Both parties were in agreement that the loan be subjected to professional auditing and a time table was set for that process. It seems to us, as it did to the trial court, that if that process was hastened and finalized, then the appeal and cross appeal would have been rendered unnecessary. But, again as observed, several sideshows appear to have detracted the parties from that desired goal, hence the pursuit of the appeal and cross appeal. Indeed, several months after the impugned ruling, the parties were still arguing whether PWC should carry out the audit and the High Court, in a ruling made on 28<sup>th</sup> June, 2015 reiterated its earlier orders that:

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

***c. Price Water House Coopers 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 1<sup>st</sup> Plaintiff.***

***e. This order shall be served upon Price Waterhouse Coopers (PWC) who shall commence the said audit immediately upon such service.***

***f. The cost of this application shall be paid by the 3<sup>rd</sup> Defendant.***

***g. The matter will be mentioned on 28<sup>th</sup> July, 2015 to receive the said audit report. "***

None of the learned counsel made any mention of those orders or the application made but it is reported as **Tatu City Limited & 3 Others vs Stephen Jennings & 6 Others** in [2015] eKLR. Whether or not there was an appeal was also undisclosed.

34. Be that as it may, the two applications that lay before the trial court for determination sought interlocutory injunctions, essentially under **Order 40 Rules 1, 2, 4, 8 and 9** of the CPR although **sections 1, 1A, 1B 3, 3A, 63 (c) & (e)** of the CPA were thrown in for good measure. As such, the guiding principles for consideration of the applications were well set out in the *locus classicus* case of **Giella vs Cassman Brown (supra)** and restated by this Court in **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others C. A. No. 77 of 2012** as follows:

***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***

***(a) establish his case only at a prima facie level,***

***(b) demonstrate irreparable injury if a temporary injunction is not granted, and***

***(c) alley any doubts as to (b) by showing that the balance of convenience is in his favour.***

***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will***

***suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."***

35. The first port of call is therefore to find out whether the applicant has established a *prima facie* case with a probability of success. What amounts to a *prima facie* case was examined in the case of ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others*** (2003) KLR 125 at pages 137 and 138 where Bosire, JA. stated as follows:

***"..It is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."***

36. This Court, in the ***Nguruman*** case (*supra*) further expounded on the same issue thus:-

***"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

37. We have examined the impugned ruling which runs into 54 pages but there is no allusion to the guiding authorities cited above or the applicable principles for grant of the temporary injunctions sought by the appellants. To that extent the criticism leveled against the trial court by both Mr. Havi and Mansur that there was no sequential consideration of the principles has some basis. It is always prudent for a court of law to state with clarity the principles of law upon which its decision is based. Does the omission to expressly state the guiding principles and authorities mean the trial court was totally oblivious of these principles? We do not think so, in the circumstances of this case.

38. It is clear from the record that the court framed several issues and examined them in detail, all in an attempt to satisfy itself that a *prima facie* case had been established; hence the first order issued on the basis of those findings that:

***"The unilateral resolutions made by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants on 5<sup>th</sup> February, 2015 are prima facie unlawful."***

On the basis of that finding, the rest of the orders reproduced in paragraph 14 of this judgment were made.

39. The further criticism in the appeal and the cross appeal that in making the finding on *prima facie* case, the trial court tended to delve deep into factual issues that will fall for determination at the main hearing are not wholly unfounded. If the analysis and the findings amounted to a final resolution of factual matters at an interlocutory stage, it would, of course, amount to a fatal misdirection. See ***Agip (K) Ltd vs Vora*** [2000] 2 E A 285, the ***Rockland Kenya Ltd*** case (*supra*) and the ***Vivo Energy*** case (*supra*). In our

assessment, however, the analysis fell short of resolution of those issues and leaves factual assertions from both sides for testing in cross examination at the hearing of the main suit.

40. On the various issues complained about in the appeal and cross appeal, the trial court framed and then answered them in a manner that we may summarize:-

- ***On whether the court could enquire into the make-up of the offshore entities or contribution to the capitals of Tatu and Kofinaf –***

The court, correctly in our view, declined the invitation to delve into the shareholding as it was beyond the scope of the application before it. It chose instead, at that stage, to rely on the records available at the Registry of Companies on the status of the two companies. We are in agreement with the submissions of Mr. Mansur on that issue.

- ***On the removal of Nyaga as Chairman of the Board of Directors of Tatu and Kofinaf -***

On the basis of undisputed material before it, the court found that a regular BOD meeting was concluded on 28<sup>th</sup> January, 2015 and there was no evidence of a reconvened BOD meeting on 5<sup>th</sup> February, 2015 which could pass BOD resolutions pursuant to **Articles 109** and **111** of the Articles of Association. It reasoned thus:

***"A notice reconvening the meeting for 5<sup>th</sup> February, 2015 was issued on 29<sup>th</sup> January, 2015. The notice is at page 179 of the Plaintiffs' Bundle of Documents dated 5<sup>th</sup> February, 2015. The agenda for the meeting did not include the election of chairman or appointment of the 4<sup>th</sup> Defendant as a director. It did not include any of the matters contained in the 2 resolutions made on 5<sup>th</sup> February, 2015. The reconvened meeting was chaotic and aborted without any resolution. This fact is deponed to in the affidavit of the 3<sup>rd</sup> Plaintiff sworn on 5<sup>th</sup> February, 2015. The deposition is not traversed. It follows therefore, that there was no decision by the directors of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on 5<sup>th</sup> February, 2015 for the election of chairman for the board of directors of the 2 companies."***

- ***On removal of Nyaga as a signatory to the bank accounts -***

The court found that removal was not preceded with a notice, deliberations and decisions reached upon after carrying a vote, and therefore a case had been demonstrated for protection.

- ***On appointment of Ngugi as Chairman of Tatu and Kofinaf -***

The court found the appointment as suspect on the basis of the preliminary finding that there were no elections held in accordance with the Articles of Association of the two companies on 5<sup>th</sup> February, 2015. It reasoned as follows:

***"The Defendants have not given any evidence that the 4<sup>th</sup> Defendant is a director of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. There is no Form 203 A filed in that regard. The 4<sup>th</sup> Defendant was not one of the directors from whom a chairman could be elected or chosen. His assumption to office of chairman of the board of directors of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs is therefore, prima facie, ultra vires and unlawful."***

- ***On the appointment of Ngugi, Mosier, Njoroge and Barron as Directors of Tatu and Kofinaf -***

The court reasoned as follows:

***"The 4<sup>th</sup> to 7<sup>th</sup> Defendants assumed office as officers of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on the basis of the unilateral resolutions made by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants on 5<sup>th</sup> February, 2015. It has been***

*demonstrated how those resolutions did not accord with the requirements as to the calling and holding of meetings of the board of directors and decision making process of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. The Plaint and Amended Plaint has sought to declare the entire resolutions as null and void. A prima facie case to restrain the 4<sup>th</sup> to 7<sup>th</sup> Defendants from holding themselves out as officers of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff has been demonstrated."*

- *On amendments to the Memorandum & Articles of Association -*

The court found there was no objection to the order sought, stating:

*"The third issue concerned a proposed meeting meant to make changes in the memorandum and articles of association and shareholding and directorship of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. The Defendants did not object to the grant of the order on this issue in terms of prayer 2 of the Second Application pending the conclusion of the audit by PwC."*

- *On stay of further loans repayment and further land sales.*

The court reasoned:

*"The proposed audit by PwC is intended to verify the Plaintiffs' claim that the loan is repaid in full and that there is no need for further land sales and payments to the lender. The Plaintiffs position is that the resolution of 7<sup>th</sup> May, 2010 by the board of directors of the 2<sup>nd</sup> Plaintiff was exhaustive of the amount to be raised from land sales towards the repayment of the loan. The Plaintiffs have provided a detailed list of properties sold and the amount of US\$ 75,325,128.00 realised and utilized towards the repayment of the loan. Other than the resolution of 7<sup>th</sup> May, 2010, there has been no other unanimous resolution for further land sales and repayment of the loan. The dispute on the issue culminated in the two resolutions of 28<sup>th</sup> January, 2015. The resolution to audit the loan was unanimous. The resolution to continue land sales was by the foreign partners alone. It was strongly objected to by the local partners.....The Plaintiffs' position has been that the lender has not made any formal demand of any outstanding loan to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs or sought to realize the various securities given in respect thereof. They are concerned by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants insistence on repayment from their position as directors of the 1<sup>st</sup> to 2<sup>nd</sup> Plaintiffs. The Plaintiffs are of the view that the audit of the loan be completed first, to establish if there is any outstanding liability before any further land sales and payments can be made to the lender. The Plaintiffs submitted that the request is not unreasonable, bearing in mind the fact that the audit is to be completed within 45 days as directed by the Court on 6<sup>th</sup> March, 2015."*

- *On suspension of loan repayment -*

*"..the issue of the said loans having been paid, or even being overpaid is seriously disputed, and with good reasons. It is instructive, however, that the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs have not denied that the loans were given. If that is still correct, then it follows that the said loans must be repaid to the extent provided for in the various contractual documents securing the same. The fact that there has been no demand by the lenders does not mean that the borrowers are not in default. The prayer to stop the repayment of the loans can only be considered seriously by this court where there is a corresponding undertaking by the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs to bear the loss which may arise from failure to repay the said loans. Without such undertaking, the consequences of failure to repay the loans would be visited against the Plaintiffs companies, which in itself would be against the interests of those companies. A prolonged period to abstain from repaying the loan would therefore not be allowed. I am however cognisant that this prayer is only for the duration pending the tabling of the said PWC Report. Initially this was 45 days from 6<sup>th</sup> March 2015, a time which has already lapsed without the report being tabled and there is no evidence that the same may happen anytime soon. So that the parties may see the sense to carry out the*

*said audit sooner, rather than later, I am inclined to order that the repayment of the said loans be suspended until the PWC or equivalent report is tabled or filed in this court for further directions."*

- *On Dealings in land -*

*"..these companies deal in land. They sell and acquire land, and stopping them from doing that business would amount to serious interference with their business. It is also possible that, because that is their business, there could be ongoing transactions at various stages of completion which a restraining order could severely compromise, and affect negatively to the detriment of the Plaintiff companies contracts involving third parties. While it is possible, at least for a limited period, to restrain the repayment of the loans because one would be dealing with known lenders which even this court now knows, a blanket order restraining all transactions on properties of the said companies would be seriously punitive and should not be entertained, even for a moment. Any misgivings and apprehensions by the applicants are saved by the fact that such transactions take long, are public in nature and cannot be hidden. In whatever stages those transactions could be, they would be authorized and supervised by the legitimate organs of the 1st and 2nd Plaintiff companies, in which the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs sit. Accordingly, prayer 5 of the Second application is denied.*

- *On the request for accounts and security -*

*"It must also be borne in mind that the Companies are going concerns with operating expenses which must be on a regular basis. The proposed audit will help to confirm these figures. In addition to the loan of US\$62,500,000.00 the Companies continued to require further facilities as evidenced for example by the Further Debenture dated 13<sup>th</sup> September, 2010 to secure loan facilities of an additional US\$ 5,375,000.00. This Further Debenture appears at pages 206-234 of the Plaintiff's Further Supplementary Bundle of Documents. The allegation that the loan has been fully repaid is therefore without factual foundation and the alleged reconstruction undertaken by the Plaintiffs appears to be erroneous. The truth is that the loan, which was originally for 365 days has been outstanding for close to 5 years now. Mr. Jennings was surprised by the allegations at paragraph 32 of the Supplementary Affidavit because the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs have been aware of the Master Inter-Group Loan Agreement executed between the Companies and Cedar IV Limited and CedarSoc Limited respectively. These Agreements have been in existence since 1<sup>st</sup> June, 2012 and are for the benefit of the Companies because they allow the Companies to borrow from their respective majority shareholders on a revolving basis and therefore reduce the Companies' reliance on borrowings from commercial lenders who would otherwise require security. There is no proof that these Agreements have been abused in any way or have been used as vehicles for fraud and the allegations of breach of trust and fraud are unfounded. I am not satisfied that the order for accounts, or that for security, are merited or justified, and the same are denied."*

41. The trial court indeed said more on the issues raised before it, but the summary above shows clearly that the court laid a basis for the conclusions reached on each issue. The court was entitled to take into consideration the matters it did because they were relevant. There were rights on both sides of the argument that were violated or threatened to be violated and the trial court identified these. It is doubtful, even in our own assessment, that any amount of damages can compensate such violations. The standard of proof required was only a balance of probability. There is no mistaking the running thread in the court's reasoning that its main interest was the survival of the companies within the law and in accordance with their Memorandum and Articles of Association as they awaited final determination of the suit. That is why, even after the finding that the actions of Jennings, Holliday and Horn were *prima facie* unlawful, the court declined to issue a mandatory injunction to eject the newly installed directors but went ahead to consider the balance of convenience as follows:

*"However, there is already a dispute in court between these two groups. In as much as this court*

*has established that the said resolutions may not have been merited pending the determination of this suit, the granting of this order will paralyse the operations of the said companies, and would give undue advantage to one group pending the hearing of this matter. It is to be noted that in matters like this the court will consider as paramount the interest of the company, and will avoid issuing an order which may paralyse the business of the company or render performance severely difficult. Therefore, pending the finalization of this matter in a full hearing, the status quo of the company as it is today shall be preserved, except that the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs shall forthwith resume their positions obtaining before 5<sup>th</sup> February, 2015. .... The 4<sup>th</sup> to 7<sup>th</sup> Defendants will therefore remain as directors pending the hearing of this suit except that the chairmanship of the boards of those companies shall revert to the 3<sup>rd</sup> Plaintiff, with the 4<sup>th</sup> Plaintiff remaining a director."*

42. In similar vein, the court stemmed the restructuring of the companies and preferred the maintenance of the *status quo*, stating:

*"However, there is need to maintain the structure of the companies until the hearing and determination of the suit. The intended alterations to the memorandum and articles of association appears to have been initiated by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants without consultation with the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs or the directive by the shareholders of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. A raft of changes is intended in the proposed amendments, including giving exclusive control powers to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants and limiting shareholders' rights. The Defendants have not demonstrated how these changes are beneficial to the two companies or necessary in view of the current management dispute between the foreign and local partners."*

43. Overall, whereas we think the learned Judge, on the basis of the material placed before him, exercised his discretion in a judicious manner in issuing the orders he did pending the filing of the audit report on the offshore loan and the hearing of the main suit, he erred in making the order for stoppage of the loan repayments instead of allowing them to continue. We respectfully say so for the following reasons which are discernible from the various excerpts of the learned Judge's ruling that we have quoted above;

*(a) Contrary to the plaintiffs' (appellants') assurances, the audit was not, has not and will not be completed within the limited period of 45 days which highly influenced the learned Judge's suspension of the repayments.*

*(b) The learned Judge himself found that the loans needed to be repaid and that a prolonged non-repayment of the same would be prejudicial to the companies. He seems to have taken comfort in the short 45 days anticipated for the audit, but it is now over 2 years later, which has only highlighted the prejudice he correctly sought to avoid.*

*(c) The learned Judge stated in his ruling that he would only consider stopping repayment if the Nyagah and Vimal undertook to bear the loss the companies would incur as a result. He, however, went ahead to stop or suspend repayment, yet no such undertakings were given. This amounted to an obvious contradiction in which failure to consider a relevant fact and also falling within the "clearly or plainly wrong" head under which we may interfere with his exercise of discretion consistent with a long line of authorities including Mbogo vs. Shah (supra) and the United India Insurance Co Ltd & 2 Others case (supra).*

*(d) Since the learned Judge found as a fact that the allegation of the loan having been fully repaid had no factual foundation it was plainly erroneous for him to stop its repayment and that error, too, invites and compels our interference.*

*(e) Having made findings that logically militated against suspension of the loan repayments including in some of the passages we have quoted herein; the learned Judge erred in ordering the suspension of repayment apparently as an incentive or a prod for the parties to quickly undertake the audit. This, we think, was an error of extraneous consideration because only proof*

*of full repayment could have justified a stoppage of further payment, which was not the case.*

44. The result of our findings above is that we dismiss the appeal in entirety.

45. We partly, allow the cross-appeal to the limited extent of setting aside the order stopping or suspending the repayment of the overseas loans by **Tatu** and **Kofinaf** and substituting it with an order that the two companies do continue making or effecting the said loan repayments.

46. We direct that the High Court do prioritize the hearing and determination of the pending suit on its merits in the interest of justice and to forestall further losses and prejudice being suffered by the parties herein.

47. Each party shall bear its own costs.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of September, 2017.**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**