IN THE COURT OF APPEAL

AT NAIROBI

Civil Appeal 72 of 2008

BETWEEN

LTI KISII SAFARI INNS LTD

DR. CHARLES GEKONDE OTARA

DR. MRS CHRISTA MARRIANNE OTARA ..... APPELLANTS

AND

DEUTSCHE INVESTITIONS-UND ENWICKLUNGSGELLSCHAFT ('DEG')
LTI HOTEL BETWEILGUNGS-UND INVESTITIONSGESELLSCHAFT MBH

COOPERS & LYBRAND TRUST CORPORATION KEITH LAW GRANT SINCLAIR

PRATUL HEMRAJ SHAH ..... RESPONDENTS

(An appeal from the judgment and decree of the High Court of Kenya at Kisumu (Mwera, J) dated 26th October, 2007

in

H.C.C.C. NO. 83 OF 2006)

****

JUDGMENT OF GITHINJI, J.A.

[1] This is an appeal from the judgment and decree of the superior court (Mwera, J) dismissing the appellants' suit against the respondents with costs.

[2] The dismissed suit was filed on 20th June, 1997, seeking various reliefs. I will advert to the pleadings and reliefs later after outlining, as I now do, the various transactions entered into by parties and the events which cumulatively precipitated this litigation.

[3] The second appellant (***Dr Otara***) is a medical practitioner trained in Germany. He is married to the third appellant (***Dr (Mrs) Otara***) who is also a medical practitioner. Dr. (Mrs) Otara is a German by birth and a Kenyan by naturalization. At the material time they both operated a thriving private hospital at Kisii. Between 1983 and 1984, the second and third appellants (Otaras) started construction of a 182 - bedrooms - Four- Star beach hotel on four properties of approximately 25 acres owned by Otaras, namely

L.R. Nos. Kwale/Diani Beach Block 810, 868, 869 and 870. The hotel was being constructed by Kisii Safari Inns Limited, a company in which the Otaras were the sole shareholders (company). After completing about three - quarters of the hotel project at a cost of about KShs.105,625,000/=, they ran short of funds, after which they approached the first respondent - ***DEUTSCHE INVESTITIONS-UND ENWICKLUNGSGELLSCHAFT*** **(DEG)**,in short, to finance the project. DEG was at the material time a financial institution (bank), wholly owned by the German Government with its Head Office in Germany. Its function was to finance private projects initiated by corporations in developing countries. It is now owned by KFW, a wholly owned government institution. At the material time it was financing some hotels at Diani Beach eg. Robinson Baobab and Leisure Lodge.

[4] Dr Otara also approached the second respondent - ***LTI HOTEL BETWEILGUNGS-UND INVESTITIONSGESELLSCHAFT MBH*****, (LTI)** in short, to manage the hotel which was under construction and which was named **Kaskazi Beach Hotel.** LTI is a German company which is a wholly owned subsidiary of LTU Group based in Germany. It manages hotels all over the world and was at the material time, managing some hotels at Diani Beach. It was also running related businesses such as tour operators, and charter and scheduled flights. At the material time, it was managing over 15 hotels in other parts of the world. It also owned and managed 8 Nile cruise ships. hotels in Cuba and Sri Lanka.

[5] By a letter dated 20th December, 1990, DEG referring to previous conversations, agreed in principle to co-finance the project upto a maximum of Deutsche marks (DM) 5,000,000 "*subject to the entering into a legally binding contract on terms and conditions satisfactory to DEG*."

[6] Earlier on 22nd July, 1990, Dr Otara had written to Wolfgang Hedderich of LTI partly as follows:

"I would like, therefore, to appoint LTI as management company for the hotel and I am ready to sign this management contract. The hotel is under construction and will take another five to six months to complete. I would appreciate if you would revise and develop the concept of the project and assure the project management and Technical Assistance during the final constructing phase including the hotel pre-opening according to your proposed development contract on cost basis."

[7] After further negotiations a tripartite Co-operation Agreement was ultimately executed on 27th June, 1991 by Dr Otara and Dr Mrs Otara on the first part, LTI of the second part and DEG of the third part which prescribed the reconfiguration and financing of the project and the rights and obligations of the three respective parties.

[8] The Co-operation Agreement provided among other things that the estimated cost of the project was KShs.270,000,000/-, that DEG would grant a loan of upto 5,000,000 DM, approximately KShs.80,000,000/- (at the exchange rate of KShs.16 to 1 DM), that shortfall would be financed by other financiers; that the share capital of the company would be increased from KShs.10,000,000/- to KShs.105, 000,000/- divided into 5,250,000 ordinary shares of nominal value of KShs.20 each; that Dr Otara would transfer the titles of the properties on which the hotel was being constructed to the company, that as a consideration for the transfer of the land which was valued KShs.30,000,000/- and the partly completed hotel valued at KShs.45,000,000/- (total KShs.75,000,000/-) the company would allot to Otaras 3,750,000 shares of KShs.20/- each to be credited as fully paid up; that LTI would subscribe for shares worth KShs.30,000,000/- on various conditions; that ultimately the share capital of Otaras would be KShs.75,000,000/- equivalent to 71.4% of the shareholding while LTI's shareholding would be KShs.30,000,000/- equivalent to 28.6%; that the Memorandum and Articles of Association of the company would be amended in accordance with requirements of LTI and DEG and the Otaras would give LTI a revocable option to manage the hotel for a further five years on the formal expiry of the Management Agreement (specified as ten years). By Article 5.5 of Co-operation Agreement, the Otaras covenanted with LTI that they would purchase all shares held by the company strictly in accordance with provisions of the Articles of Association relating to the transfer of shares on the occurrence of the three events, namely, if the Management Agreement is terminated for any reason; if an extended Management Agreement is not executed or cannot be performed, or, is terminated for any reason and, lastly, if LTI is prohibited for any reason from holding shares in the company or if any authorization is withdrawn for it to hold such shares. The Agreement further provided that the Board of Directors of the company should

have three directors to be nominated by shareholders – two (2) appointed by Otaras and one (1) appointed by LTI.

[9] A Management Agreement was executed by 24th April, 1991, between the company and LTI which was to manage the hotel at an agreed fee for a period of ten years which period would automatically be renewed for a further five years.

The Management Agreement contained a partial invalidity clause 5.3 thus:

"Should any of the provisions of this Agreement be void for any reason whatsoever, the validity of the remaining provisions shall thereby not be affected. In such case, the partners shall replace the ineffective provisions by a legally effective one which in its consequences shall approximate the ineffective provisions as closely as possible."

[10] By a formal Loan Agreement dated 16th June, 1991, between the company and DEG the latter agreed to lend DM 5,000,000 on various conditions repayable, after three years grace period, semi-annually by instalments of DM 417,000 from 30th October, 1994 to 30th October, 1999 and the last instalment of DM 415,000 by 30th April, 2000. The loan was payable with interest at rates specified therein.

[11] The conditions precedent attached to the loan included the requirement that the share capital of 105,000,000 should be subscribed for and paid up; that the specified properties on which the hotel is built shall have been transferred to the company; that Barclays Bank and Development Finance Company of Kenya (DFCK) shall have committed to grant loans of KShs.55,000,000/- and KShs.30,000,000/- respectively to the company; that all necessary approvals including approvals by Central Bank shall have been granted; that Co-operation Agreement, Management Agreement and the Technical Assistance and Pre-opening contract; shall have been executed; that securities shall have been created; that the Memorandum and Articles of Association of the company were satisfactory to DEG and that DEG shall have obtained a legal opinion on various matters. The DEG loan was to be secured by mortgage of specified properties which was to rank in *pari passu* with mortgages and floating changes in favour of Barclays Bank and DFCK. The Loan Agreement contained a partial invalidity clause – 16 (3) in the same terms as clause 5.3 of the Management Agreement.

[12] DEG ultimately instructed the firm of Kaplan & Stratton Advocates in connection with obtaining all necessary Exchange Control approvals appropriate for the loan to be advanced and for various securities to be provided to DEG pursuant to the Loan Agreement and in drafting the Debenture Trust Deed. Kaplan & Stratton also acted for LTI in connection with the transaction in which LTI were to become a shareholder in and manager of the company. Mr P. J Hime, a partner in Kaplan & Stratton specifically handled the transaction.

[13] On application by Kaplan & Stratton to the CBK for various approvals, CBK granted approval under the Exchange Control Act for issuance of 1,500,000 ordinary shares by the company to LTI; for the execution of Management and Technical Assistance and Pre-opening Agreements but limited their duration to five years from the date of opening the hotel reviewable and renewable if need be; permission under Exchange Control Act for the company to receive DM 5 million from DEG and also to receive DM 500,000 bridging finance from each of two entities in Germany; for receipt of KShs.30,000,000 by the company from LTI. CBK also issued a Certificate of Approved Enterprise dated 29th April, 1991, under the Foreign Investments Protection Act to LTI verifying that the capital of KShs.30,000,000/- has been recognized by the issuance of 1,500,000 shares of KShs.20/- each. The Certificate was issued subject, *inter alia,* to submission of documentation from CBK evidencing receipt of the share subscription funds in the country "*in an approved manner*."

[14] Subsequently on 11th September, 1991, CBK wrote to Barclays Bank, Nkrumah Road, Mombasa, regarding receipt of share subscription funds thus:

"Exchange Control has noted that Kisii Safari Inns Ltd has received KShs.30,000,00 (shillings thirty million), being shares subscription funds in respect of the 1,500,000 ordinary shares of KShs.20/- each issued to LTI of Germany from external sources in an approved manner."

[15] Meanwhile, by a special resolution passed on 20th April, 1991, the company changed its name from Kisii Safari Inns Ltd to LTI Kisii Safari Inns Ltd and a Certificate of Change of Name was given on 3rd May, 1991, to that effect. By two further resolutions passed on 20th May, 1991, the share capital of the company was increased to KShs.105,000,000 and the Articles of Association drastically altered.

[16] The loans by the three lenders were to be secured by a Debenture Trust Deed which is a single deed under which several debentures are given, a legal charge over title numbers Kwale/Diani Beach Block/ 810, 868, 869 and 870, registered in the name of the company. The lenders appointed ***Coopers & Lybrand Trust Corporation*** (3rd respondent), (Coopers & Lybrand Trust) to be trustees for the lenders under the Debenture Trust Deed. The Debenture Trust Deed and legal charge were prepared by Kaplan & Stratton on the instructions of Coopers & Lybrand Trust, and both were executed by the company and Coopers & Lybrand Trust on 25th July, 1991. Thereafter, the Debenture Trust Deed and the charge issued by the company to Coopers & Lybrand Trust were registered under the Companies Act and respective Certificate of Registration of a Mortgage were given on 2nd August, 1991.

[17] Clause 9 (1) of the Debenture Trust Deed provided that the security could become enforceable upon the happening of the specified events of default.

Clause11.01 which relates to appointment of Receiver provides:

"*At any time after the security shall have become enforceable, the Trustee may in its discretion, and shall, upon the request of the holders by an Extra Ordinary Resolution, in writing under the hand of one of its officers or attorneys or under its common seal, appoint any person or persons (with power to act jointly or severally), whether an officer of the Trustee or not, to be a Receiver of the company and of all or any part of the property and assets of the company forming part of the charged assets upon such terms as to remuneration or otherwise as the trustees shall think fit and may in like manner from time to time remove any Receiver so appointed and appoint another in his place.*"

By clause 11.04, a "Receiver" includes *inter alia*, "receivers and managers" and by clause 11.02, a Receiver is an agent of the company and the company alone is liable for its acts and defaults.

[18] After the conditions of the Loan Agreement were fulfilled by the company, the lenders released the funds and the construction of the hotel was completed. The 193 rooms - Four - Star tourist hotel opened for business on 15th December, 1991, under the management of LTI.

[19] By a letter dated 24th March, 1994, $2^{1}/_{4}$ years after the hotel had opened, DEG notified the company that it was in arrears of loan repayments in the sum of DM 579,176 which would increase to DM 883,587 by 30th April, 1994, and demanded payment of all outstanding amounts on or before 30th April, 1994. By a further letter dated 3rd May, 1994, DEG notified the company that since it had defaulted in the payments, it would invoke its rights under the Debenture Trust Deed. Thereafter, the prescribed machinery under the Debenture Trust Deed for appointment of a Receiver were set in motion culminating in the appointment of the 4th and 5th respondents on 7th July 1994 by Coopers & Lybrand Trust as Receivers and Managers of the company.

PLEADINGS:

[20] The Amended plaint which was described by the Trial Judge "*as more or less like a story telling exercise complete with very long paragraphs all couched in near perfect arose*", has 16 paragraphs and seeks 11 declarations and other reliefs.

In paragraph 11, the appellants aver that it was a term of contract that LTI would pay for the 1,500,000 shares in foreign currency – that is, Deutsche Marks; that the CBK gave permission to LTI to acquire the shares on condition that LTI would remit to Kenya DMs whose equivalent was KShs.30 million; that in breach of obligations and in contravention of ***Exchange Control Act***, LTI paid for them in Kenya currency; that the allocation of the shares was in contravention of ***Section 50 A of the Companies Act*** as prior consent of the Treasury was not obtained, and, that for those two reasons, LTI never became a shareholder. The appellants sought a declaration that the allocation of 1,500,000 shares was in contravention of ***Section 50 A of the Companies Act*** and null and void.

[21] The appellants further pleaded in paragraph 11 that, shortly after LTI became a shareholder, it and DEG conspired to deprive Otaras of their ownership of shares in the company and also to deprive the company of its business by procuring the company, through economic duress/undue influence, (that is, by threatening to break the contract to finance the completion of the hotel and commencement of its operations) to:

(i) replace the existing Memorandum and Articles of Association and;

(ii) enter into a Loan Agreement with DEG.

The particulars of economic duress/undue influence pleaded were:

(a) failing to advise the appellants to obtain independent advise as regards borrowing, running tourist hotels and independent legal advise pertaining to alteration of the Memorandum and Articles of Association, the making of the loan agreement, the co-operation agreement and the debenture trust deed;

(b) departing from the agreement of March 31st 1991, between appellants, DEG and LTI;

(c) threatening to break agreement of March 31 1991, if the 1st appellant did not consent to the alteration of the memorandum and articles of association and to the terms of loan agreement, the co-operation agreement and the debenture trust deed;

(d) arranging for DEG's and LTI's advocates, M/s Kaplan & Stratton to act for appellants.

[22] By paragraph 12, the appellants averred that the Loan Agreement is void to the extent specified therein and that the void provisions are severable under article 16 (3) of the Loan Agreement. The appellants further averred that the Debenture Trust Deed is void to the extent specified therein; that the amended Memorandum and Articles of Association are *ultra vires* the Companies Act; that the provision in the Articles ousting the democratic principle is a unconscionable bargain for reasons stated therein and that the oppressive parts are severable under article 16 (3) of the Loan Agreement.

[23] In paragraph 14, the appellants averred that LTI between December 15, 1991 and July 6, 1994, when they were managing the hotel received and converted to its own use the company's revenue from tour operators; failed to supply to the company accounts for money banked in German accounts and neglected or refused to pay DEG thereby inducing insolvency of the company with a view to placing the company under receivership which receivership would enable DEG and LTI to take away the company's business.

[24] Lastly, the appellants pleaded in paragraph 15 that DEG arbitrarily, capriciously and unreasonably appointed Receivers and Managers; that any agreement on remuneration of the Receivers and Managers would be an unconscionable bargain and that the Receivers were only entitled to reasonable remuneration.

[25] In addition, to seeking declaratory judgment, the appellant also sought, *inter alia*, an order of injunction restraining DEG from placing the company's business under receivership; an order that the managers do supply restated accounts from December 15, 1991 and an order that Receivers and Managers do supply accounts; an order that the LTI accounts for monies retained over and above the amount agreed

and, lastly, general damages.

The defendants, DEG and LTI in particular, filed lengthy statements of defence through the firm of M/s Kaplan & Stratton Advocates answering to every allegation made in the plaint. It is not necessary at this stage to reproduce the contents of the respective defences.

[26] It is however important to mention that the appellants filed an application for injunction to restrain Kaplan & Stratton Advocates from continuing to act for the respondents on the ground having that acted for the appellants, DEG, LTI and Coopers & Lybrand Trust in the entire transaction, the appellants availed to them confidential information which they would use at the trial to the appellants detriment. That application was allowed by Mbaluto J on 16th February 2001.

THE TRIAL

[27] The appellants called four witnesses at the trial, namely, Dr Otara (PW 1); Barrack Onyango Amolo(PW 2); Hezron Kamau Waithaka (PW 3) and Gabriel Ayanga (PW 4). On the other hand, the respondents called three witnesses, namely, P J Hime (DW 1); Monika Erlinghagen (DW 2) and Hanfred Schardinger (DW 3). In addition, voluminous documentary evidence was produced at the trial by the respective parties.

FINDINGS OF HIGH COURT

[28] The trial judge ultimately made findings, *inter alia,* that necessary steps for LTI to hold shares in the company, were taken and that the law was not contravened; that the appellants did not place before the court factors which negatived the voluntary character to execute the instruments; that the respondents (DEG & LTI), had no duty to tell the appellants to seek independent legal or other advice in the transaction; that Kaplan & Stratton were not instructed by the appellants and drew the impugned documents on the instructions of DEG and LTI; that Kaplan & Stratton did not draw the Loan, Management, and Co-Operation agreements which bound the appellants; that the court was not in a position, and was not asked, to find out which of the audit reports was correct, although the report of Price Water House, the company's appointed auditors, was more reliable than Waithaka Kiarie's report; that the Memorandum and Articles of Association was a contract between the parties and could only be altered by them; that the court could not re-write for the parties the alleged void provisions of Loan, Management, Co-operation and Debenture agreements; that on the evidence, it was not true that LTI opened and ran secret accounts in Germany; that the Receivers were validly and justifiably appointed, and, lastly, that the suit was not maintainable for lack of a company's resolution to sue.

This appeal is against those findings.

THE APPEAL

[29] I had earlier dissected and examined the amended plaint in an endevour to demonstrate the appellants' case as pleaded. The appellants' suit was founded on four causes of action namely, firstly, contravention of section 50A of the Companied Act and Exchange Control Act in acquisition of shares by LTI; secondly, employment of economic duress, Undue influence by DEG and LTI in the transactions; thirdly, the mismanagement of the hotel and misappropriation of revenue by LTI and, fourthly, the arbitrary and capricious appointment of Receivers and Managers.

[30] There are twenty grounds of appeal challenging the Judge's findings but apparently there is no ground of appeal relating to the alleged illegality of the acquisition of shares by LTI. However, the issue was raised at the hearing of the appeal by Mr. Nowrojee, learned counsel for the appellants. Both Mr. Chacha Odera, learned counsel for 1st, 3rd, 4th and 5th respondents and Mr. Njoroge Regeru, learned counsel for the 2nd respondent (LTI) made their respective submissions on the issue. It is therefore expedient, if not just, that all the matters canvassed in the appeal should be addressed.

[31] *Illegality in acquisition of shares by LTI*

The appellants pleaded in paragraph 11 of the amended plaint that it was a term of the contract that LTI would pay for shares in foreign exchange and that in breach of the Exchange Control Act and of the conditional approval by the CBK, LTI paid for the shares in Kenya currency. The appellants contended that as a result of the breach, LTI never became a shareholder of the company. By the amended defence, LTI pleaded, *inter alia*, that in fulfillment of the condition in the Certificate of Approved Enterprise, the parent company of LTI, namely, LTU GMBH, transferred DM 1,890,000, being the equivalent of KShs.30 million from Barclays Bank Frankfurt to Central Bank of Germany on 6th June, 1991; that on the same day, Barclays Bank Dusseldorf, transferred to Barclays Bank, Nkrumah Road, Mombasa (the company's bank) an amount of KShs.30 million, and that, subsequently, on 11th September, 1991, CBK issued a notification that the company had received the KShs.30 million *"in an approved manner"*, Hanfred Schardinger (DW 3), a German, LTI's Chief Officer gave evidence to the same effect and referred to pay-in slips in German language. The evidence of Manfred Schardinger at the trial was consistent with paragraphs 10, 11, 12 and 13 of his affidavit sworn on 27th January, 2003. There was the evidence of Barrack Onyango Omolo (PW2), that the Certificate of Approved Enterprise was conditional upon confirmation by CBK of receipt in DM and that CBK never confirmed such receipt. However, his evidence was discredited at the trial by the fact that he was not aware that CBK had issued a notification dated 11th September 1991 that the company had received KShs. 30 million in an approved manner. There was also the evidence of P.J Hime, DW 1, who applied for, and, obtained the CBK's approvals that, the fact that the investment was designated in DM meant that if the project was a success, LTI would ask CBK to remit its investment's worth to Germany and that the reference by CBK to the letter of Barclays Bank Ltd, Nkrumah Road, Mombasa, indicated that CBK had seen evidence of payment in an approved manner before issuing the certificate dated 11th September, 1991. It should be noted that CBK issued at least three documents relating to the investment by LTI – first, the approval dated 27th February, 1991, for issue of 1,500,000 shares to LTI as a non-resident; second, Certificate of Approved Enterprise dated 29th April, 1991, and, third, the certificate dated 11th September, 1991, that the company had received the KShs.30 million for the shares from LTU *"from external sources in approved manner"*.

[32] In rejecting the appellants' case, the superior court said:

"If there had been any contravention in the Registrar of Companies, the Central Bank of Kenya, the Treasury or the 1st plaintiff (company) itself (with Dr Otara, PW 1 in forefront) should have raised a red flag. It was not for 1st plaintiff to pass a resolution to allot the shares, enjoy the payment thereof and later turn around and impeach the act."

Furthermore, by ***S. 2(2) of the Foreign Investments Protection Act*** (Act):

"... currency shall not cease to be foreign currency by reason of it being in Kenya as well as in some place outside Kenya so long as, in case of currency the relevant sum originated from outside Kenya."

[33] That notwithstanding, there was evidence that LTI's parent company LTU GMBH transferred DM 1,890,000 from Barclays Bank, Frankfurt to Central Bank, Germany on 6th June, 1991. There was no evidence regarding the interrelationship of the two central banks. We do not know whether the two have interbank accounts. It would be a mere speculation to say that CBK had no access to DM transferred to Central Bank of Germany.

Further it is erroneous to say, as pleaded, that, there was a condition in the Agreement that the shares would be paid for in foreign currency for there was no such provision. Indeed, the price of the shares was denominated in local currency.

[34] The interpretation by Mr. Hime is preferable as it is consonant with the main purpose of the Foreign Investments Protection Act – that is, to protect approved foreign investments (even from compulsory acquisition except in conformity with the Constitution) and to facilitate repatriation of the fruits of investment or the investment itself to the country of the investor.

[35] If the appellants' case was that the approval under the Exchange Control Act should have come

from the Treasury and not from the CBK (as it seems to be) then, the answer is that the Exchange Control Act itself indicates that most of the powers and duties conferred on the Minister (Treasury) were delegated to CBK by L.N 18 of 1968 and therefore CBK granted the approval lawfully.

[36] Furthermore, in administrative law, there is a presumption of regularity of the decision of an administrative body – in this case the CBK, until the presumption is displaced by the person contending otherwise. The trial judge wondered why the company knowing the stringent conditions of the law allocated shares to LTI only to turn around 11 years later to impeach the transaction.

In my view the legality of the CBK's decision should have been impeached at the earliest opportunity by judicial review application giving CBK an opportunity to defend its decision.

[37] Lastly, the company pleaded the illegality. As submitted Mr. Regeru, it was the contractual obligation of the company to obtain necessary consents. It is not possible for the appellants to establish a case of illegality of the share sale transaction without relying on illegality of their own conduct. That disentitles them of any relief **(see Lakhani -Vs- Vaitha [1965] EA 452** and **Mistry Amar Singh –Vs- Kulubya [1965] EA 408)**.

THE LAW

[38] *Economic duress*

Undue influence

Unconscionable bargain

The appellants relied on the three doctrines to the extent indicated in the plaint. However they use economic duress and undue influence interchangeably both in the plaint and in the submissions thereby causing confusion as to which of the two they invoke in aid of their case. It is therefore desirable to analyse, albeit in a nutshell, the essence and scope of each of the doctrines and the distinction between them.

Economic duress

[39] While recognizing that in life of commerce and finance many acts are done under pressure and sometimes under great pressure the law now gives relief to a party who has entered into a commercial transaction through illegitimate economic pressure or in Canadian jurisprudence, which, offendes *ordinary standards of commercial morality*. This is a recent development and an off-shoot of the common law doctrine of duress.

The essence of economic duress in pressure rather than the absence of consent although extreme cases of duress may arise where there would be total absence of consent. But the rationale of duress is that the consent is induced by illegitimate pressure, the practical effect of which is compulsion or absence of choice rendering the consent to be treated in law as reversible. It is the nature and gravity of duress as it relates to causation which may ultimately be decisive.

[40] In ***Dimskal Shipping Co. –Vs- ITF [1992] 2AC 153,***the House of Lords recognized illegitimate economic pressure as a form of duress that would justify avoidance of a contract.

In that case Lord Hoff said in part at page 165 para F, G, H:,

"we are here concerned with the case of economic duress. It was at one time thought, that at common law, the only form of duress which would entitle a party to avoid contract on that ground was duress of the person ……., that limitation has been discarded; and it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic

pressure may be characterized as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract."

[41] In **Kenya Commercial Bank Ltd & Anor –Vs- Samuel Kamau Macharia & 2 Others - Civil Appeal No. 181** of **2004** (unreported), this Court recognized the doctrine of economic duress in this jurisdiction. In doing so, the Court exclusively relied on the English jurisprudence – Tunoi JA (as he then was) exhaustively citing the relevant decisions.

[42] It is necessary to refer to two other cases cited therein. In **CTN Cash** and **Carry –Vs- Gallaher [1994] 4 ALL ER.714** the English Court of Appeal in dealing with a lawful threat to stop credit facilities in future if a debt was not paid held in part:

"Although in certain circumstances a threat to perform a lawful act coupled with a demand for payment might amount to economic duress, it would be difficult, though necessarily impossible to maintain such a claim in the context of arm's length commercial dealings between two trading companies especially where the party making the threat bona fide believed that its demand was valid".

In that case Steyn L.J. said in part at p.717 para. J:-

"In a sense the defendants were in a monopoly position. The control of monopolies is, however, a matter for Parliament. Moreover, the common law does not recognize the doctrine of inequality of bargaining power in commercial dealings".

[43] The relevant factors in determining whether economic duress has been established include whether the victim protested, whether there existed an effective alternative remedy, the availability of independent advice, the benefit received and the speed with which the victim sought to avoid the contract **(see Pao on –Vs- Lau Yiu [1979] 3 ALL ER 65 p. 78, 79)**.

[43] Lastly, the effect of duress is to render the contract voidable at the instance of the person who has entered into a contract under duress.

"Consequently a person who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased and if he has voluntarily acted under it with a full knowledge of the circumstances he may be held bound on the ground of ratification, or if after escaping the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it".

(Para 7 – 045 Chitty on Contracts, **Vol 1, 29th Ed. General Principles** – passage quoted with approval in **North Ocean Shipping, Co. Ltd. –Vs- Hundai Construction Ltd [1979]1QB 705, p.720.)**

[45] **Undue influence**

This is an equitable doctrine intended to prevent a person from retaining the benefit of his own fraud or wrongful act. The scope of the doctrine included cases of coercion such as unlawful threats (which overlaps with the modern principles of duress) and cases where, as a matter of public policy and fair play, a person who has acquired influence or ascendancy over another arising from a special relationship should not be allowed to abuse it.

[46] The distinction of the doctrine from common law duress and its application is succinctly stated in **Halsburys laws** of **England 4th Ed.**

Re-Issue Vol. 9(1) at **page 467 para. 712** thus:-

"A court of equity will set aside a transaction entered into as a result of conduct which, though not amounting to actual fraud or deceit it is contrary to good conscience. Many of the cases in which undue influence arises relate to gifts, but the same principles apply to contracts and unconscionable bargains. Whilst the common law doctrine of duress was originally justified on ground of interference

with consent, the equitable doctrine of undue influence has been said to be based on "constructive fraud".

In the field of contract, the doctrine has been defined as the unconscientious use by one person of power possessed by him in order to induce the other to enter into a contract. It applies even where the person benefited by the transaction is a different person from the one who exerted undue influence to bring it about ……..."

[47] **In Royal Bank of Scotland PLC –Vs- Etridge (No.2) [2002] 2AC 773** on which the appellants heavily rely, Lord Nicholls undertook an exhaustive analysis and learned exposition of the doctrine.

In that case Lord Nicholls agreed that the test whether undue influence has arisen is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type and continued:-

"Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instances cases where, a vulnerable person has been exploited. Indeed there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endevour to encapsulate the essence; trust and confidence, reliance, dependence, or, vulnerability on one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place."

[48] Regarding the burden of proof and presumptions, lord Nicholls stated that whether the transaction was brought about by undue influence is a question of fact the onus being on the person who claims to have been wronged but, that, where it is proved that the complainant placed trust and confidence in the other party coupled with a transaction which calls for explanation, a rebuttable evidential presumption of undue influence arises (presumed undue influence). His lordship distinguished cases of presumed undue influence from special class of relationships examples of which, are, parent and child, guardian and ward, trustee and beneficiary, solicitor and client, medical adviser and patient, where complainant need not prove that he actually reposed trust and confidence in the other party because in such cases *"the law presumes irrebuttably; that one party had influence over the other"*.

[49] The case of **National West Minister Bank PLC –Vs- Morgan [1985] IAC 686** is also relevant.

There, the House of Lords held, *inter alia* ,that the principle that justified the setting aside a transactionon the ground of undue influence was the victimization of one party by another; and that evidence of mere relationship of the parties was not sufficient to raise the presumption of undue influence, without, also, evidence that the transaction itself had been wrongful in that it had constituted an advantage taken of the person subject to the influence, which failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.

The House of Lords also disapproved the dictum of Lord Denning **M.R. in Lloyds Bank Ltd –Vs- Bundy [1974] 3ALL ER P. 757 at page 76 para. d-e** that the cases of duress of goods; unconscionable transactions, undue influence, and undue pressure rest on one unifying principle -*"the inequality of bargaining power"*.

Lord Scarman with whom the whole House concurred, said at page 707 E;

"the relationship between a banker and customer is not one which ordinarily gives rise to a presumption of undue influence and that in the ordinary course of banking business a baker can express the nature of the proposed transaction without laying himself open to a charge of undue influence."

[50] On the application of the principle of inequality of bargaining power his lordship said in part at page 708 para A-B.

"the doctrine of undue influence has been sufficiently developed not to need the support of a principle

which on its formulating in the language of the law of contract is not appropriate to cover transaction of gift where there is no bargain. The fact of unequal bargain will, of course, be a relevant feature in some cases of undue influence. But it can never become an appropriate basis of an equitable doctrine and even in the field of contract J question whether there is any need in the modern law to erect a general principle of relief against inequality of barging power. Parliament has undertaken the task and it is essentially a legislative task of enacting such restrictions upon freedom of contract as are necessary in its judgment to relieve against mischief …."

[51] Lastly, as stated **in para. 7-083 Chitty** on **Contracts, 29th Ed. Vol. 1**, **General Principles**, a transaction entered into as a result of undue influence is voidable and not void and that the right to rescind may be lost either by express affirmation of the transaction by the victim, by stopped or by delay amounting to proof of acquiescence.

Unconscionable bargains

[52] This is also an equitable doctrine. There are at least three prerequisites to the application of a doctrine, firstly, that the bargain must be oppressive to the extent that the very terms of the bargain reveals conduct which shocks the conscience of the court. Secondly, that the victim must have been suffering from certain types of bargaining weakness, and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that behavour of the stronger party is morally reprehensible.

[53] In dealing with an appeal relating to the setting aside of contract of lease and lease- back on ground of inequality of bargaining power at the time the lease was negotiated, Dillon L. J said in **Alec Lobb –Vs- Total Oil [1983] WLR 173** at **p.182 para** thus:-

"The whole emphasis is on extortion, or undue advantage taken of the weakness, the unconscionable use of power arising out of inequality of the parties' circumstances and on unconscientiously use of power which the court might in certain circumstances be entitled to infer from a particular – and in these days notorious relationship-unless the contract is proved to have been infact fair, just and reasonable."

His lordship added at page 183 pars D-E:-

"Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal. Any individual wanting to borrow money from bank, building society or other financial institutions in order to pay his liabilities or buy some property he urgently wants to acquire will have vitually no bargaining power; he will have to take or leave the terms offered to him. So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor.

The courts will only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concepts of unconscionable conduct and the exercise by the stronger of coercive power are thus brought in…."

[53] The case of **Greg Saugstad –Vs- Hugh McGillivray & Anor 1994 CanLII 2317(BS SC)–** of the Supreme Court of British Columbia cited by the appellants' counsel illustrates the approach in Canada thus:-

"Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to ignorance, need or distress of the weaker party which would have him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When it has been shown, a presumption of fraud is raised and the stronger must show in order to preserve his bargain that it was fair and reasonable."

In essence, the stronger party in order to be allowed to retain the bargain, should demonstrate among other things, that, the victim was fully aware of the nature of the transaction; that the transaction was not

oppressive, and where necessary, that, the victim received independent advice and that the deal is not morally reprehensible.

The doctrine of unconscionable bargains and undue influence has similarities. In **Irvani Vs Irvani [2000] 1 LLyods 412** The two doctrines were distinguished at page 424 thus:

"Undue influence is concerned with the prior relationship between the contracting parties, and with whether that was the motivation or reason for which the bargain was entered into. Unconscionable bargain is as its title suggests, concerned with the nature and circumstances of the bargain itself and can arise without there being any relationship outside that of immediate contract between the parties."

THE EVIDENCE

[55] Dr. Otara gave evidence at the trial, inter alia, that, after he ran short of funds to complete the hotel he approached DEG which readily agreed to finance the hotel one condition being that LTI would become a shareholder; that LTI also wanted to become a manager of the hotel; that he was introduced to DEG by Mr. Wolfang Hedderich of LTI, that at DEG he dealt with Mr. Heymann and Mr. Bader, that Mr. Heymann introduced him to Mr. Hutchison, an accountant at the firm of Bell House & Mwangi who became Otara's, advisor on finances; that Mr. Heymann also introduced him to Mr. P. Hime, an advocate in the firm of Kaplan & Stratton who drew up all the agreements that is the Management, Technical Assistance, and Pre-opening Agreements which agreements were executed at the offices of Kaplan & Stratton which he and his wife signed after perusing them, that he and his wife later signed the Co-operation Agreement and Debenture Trust Deed. In cross-examination, he testified that he was knowledgeable in business transactions and documents; that he challenged the Management, Technical Assistance and Co-operation agreements because they were one-sided, that they consulted Hutchison who gave them financial advice after he was introduced to him; that a meeting was held on 21st March 1991 in which Mr. Hutchison was present to sort out the shareholding in the company; that it was agreed, at that meeting that changing agreements was too late; that Heymann took them to Peter Hime and told him that he could be their lawyer; that Hime did not tender a fee note for services rendered; that before the agreements, he had known DEG and LTI between 1990 and 1991- when they perfected the transactions; that he knew something about running of the hotels; that he read and understood all the agreements before he signed them; that he signed the agreements under pressure because he wanted a loan to complete the hotel; that he and his wife attended four Board meetings; that he complained in the Board meetings when he found that DEG was not being paid yet local lenders were being paid.

[56] On his part, Peter Julian Hime, (DW1), testified, *inter alia,* that, he acted for DEG and LTI; that he was approached in 1991; that he was instructed by DEG to assist them in all formalities in connection with the securities that DEG would require to procure necessary consents; that he did not prepare the Loan, the management, co-operation and Technical Assistance and pre-opening agreements; that those agreements were prepared in Germany by DEG in-house lawyers and were already signed by representatives of the company; that LTI agreements were sent to him and was asked to request Otaras to sign on behalf of the company and return them to Germany; that prior to signing he had sent over the documents to Otaras, that he did not advise Otaras or the company on the contents of the documents, that at one stage Dr. Otara asked him whether he could advise him on DEG financing and general arrangements; that he declined and told him that he could seek advise from other lawyers, that Otara got advise from David Hutchison a very experienced financial consultant, that after issues regarding Otaras percentage of shareholding, drafts of the agreements were discussed; the final amended agreements were signed in Germany; that it is not true that before the Otaras signed the agreements he assured them that they were protected by some clauses in the agreements, that he acted for LTI in connection with the transaction under which it would become a shareholder in the company; and that he acted for Coopers & Lybrand Trust in connection with Debenture Trust Deed. On cross examination, he testified that he came into contact with Otaras after he had been instructed by DEG; that he was instructed to deal and get information from Dr. Otara on shareholding, directorship and current status of the company; that he acted for the company regarding change of name, alteration of Memorandum and Articles of Association; that the loan Agreement was drawn in Germany in standard form, that, the Loan Agreements and the other agreements had already been sent to Dr. Otara along with their negotiation lines before they came to sign

and that he attended the meeting of 12th March 1991 on request of Deg and LTI.

[57] Monika Erlinghagen, (DW2), a Vice President for Special Operations with DEG at the material time gave evidence at the trial, among other things, that, she was the legal officer in charge of the hotel

Project; that there was no common shareholding or directorships

between DEG and LTI; that Dr. Otara at first met Mr. Flospech, DEG's head in Africa who introduced Dr. Otara to LTI; that DEG insisted that the company do engage an experienced company ready to manage the hotel; and that there should be shareholding bodies financing such project, that LTI could not have been involved in the project had DEG not introduced Dr. Otara to it; that she drew the Loan Agreement; that Article 16(3) is the SALVATIORIAN clause – which is intended to salvage the agreement and not to allow a party to walk out; that she also prepared the Corporation, and, Management Agreements and that there was interest payment arrears by 1994 due to DEG.

Lastly, Mr. Hanfred Schardinger, (DW3), gave evidence on behalf of LTI. He testified, among other things, that Dr. Otara wrote to LTI on 22nd July 1990 appointing LTI manager of the hotel under construction; that Dr. Otara approached the local representative of LTI in Mombasa where LTI was operating; that Dr. Otara also approached DEG; that meetings took place in Germany as well as in Kenya and that minutes were kept; that Dr. Otara had Mr. Gavaghan – a German as an adviser; that LTI became a shareholder as lenders wanted increased shareholding, commitment and professionalism in the hotel management; that LTI did not ask Kaplan & Stratton to act for Dr. Otara; that he knew Dr. Otara very well; that Dr. Otara was knowledgeable; that the hotel project was a viable project and had higher prospects, that after the 1992 Elections disturbances tourist declined; that there were construction overruns and VAT burden, that CBK delayed in giving approvals to pay DEG in DM; that it was easier to pay local loans through standing orders and that by 1992 there was no sufficient funds to pay DEG leading to arrears of interest.

SUBMISSIONS:

[59] I have already spelt out the findings of the court below on various issues. Mr. Nowrojee extensively submitted on the role of the Kaplan & Stratton vis-a- vis the validity of the impugned agreements and faulted the Judge's findings relating thereto. In particular, Mr. Nowrojee submitted among other things, that, the learned judge failed to take into account the Ruling of Mbaluto J disqualifying Kaplan & Stratton from appearing for all the respondents in this appeal; that the Ruling of Mbaluto J. was a highly relevant matter in assessing how the agreements were formed and whether there were grounds for challenging their validity; that the trial judge erred in believing the evidence of Mr. Hime that he never acted for the appellants; that the duty of Kaplan & Stratton was relevant in deciding whether or not the contracts were unconscionable bargains.

Mr. Nowrojee further referred to **Etridge (No. 2)** case and submitted that Otaras reposed sufficient trust and confidence in Kaplan & Stratton – the nominee of the lending bank (DEG); that DEG acquired dominating influence – that of a lender, manager, signatory, director and quorum decider and that the transaction was manifestly disadvantageous to the appellants. Mr. Nowrojee, in addition, referred to Article 81 (a) of the Memorandum and Articles of Association of the company giving LTI, a right to appoint one director and to determine how long that person would hold office and submitted that the Articles were in breach of the Companies Act. Likewise, he submitted that Article 100 which provides in essence, that a quorum for transaction of business of the company are two directors, one appointed by LTI, is beyond the protection that a leader should have. There are also lengthy written submissions filed in the court below by the appellants' advocates which portray the entire transaction as a fraudulent scheme or conspiracy by DEG and LTI to deprive Otaras of the ownership of shares and also to deprive the company of its business and assets.

[60] On his part, Mr. Chacha Odera submitted, *inter alia*, that a distinction should be made between the company as borrower, Otaras as shareholders and DEG as lender; that there was no cause of action disclosed in respect of Otaras; that the issue of independent counsel was first raised in this Court; that the

appellants did not claim that they were forced to use Kaplan & Stratton; or that Kaplan & Stratton misled Otaras; that the four impugned agreements stand alone and a severance clause in one agreement cannot be used to sever clauses in other agreements; that neither DEG nor other lenders has been paid; that Receiver was appointed on behalf of all lenders; that the right to appoint a Receiver crystallized when an event of default occurred; that the length and management of Receivership were not issues at the trial and that the facts which constitute economic duress do not arise in this case.

[61] Lastly, Mr. Regeru, on his part adopted the lengthy written submission filed in the court below. He, in addition, made further submissions in the appeal. He submitted, among other things, that, the transactions were between companies; that Otaras only signed as agents (directors) of the company; that these were international commercial agreements negotiated at arms – length for a period of six months; that the allegations of conspiracy, economic duress, undue influence and unconscionable bargain were not substantiated, that no allegation was made against LTI; that the blame was directed to Kaplan & Stratton who are not parties to the proceedings; that the Otaras were not poor and ignorant persons but, rather, educated; medical doctors; sophisticated, astute business people and hard working who could not be manipulated; that there has been substantial part -performance of the agreements in that Otaras surrendered their properties and got shares of equivalent value, that DEG and two other lenders disbursed the loan; that construction of the hotel was completed, and, that, the hotel opened; that issue at the trial was whether Receivers were properly appointed and not the manner the receivership was conducted; that there was nothing unconscionable in the Memorandum and Articles of Association of the company or in the Debenture Trust Deed and that it would unconscionable for Otaras to challenge the validity of the agreements while retaining the benefits of the Agreements.

[62] The court below after appraising the evidence and considering the respective submissions concluded:-

"It (court) was not satisfied that plaintiffs were subjected to economic duress. The Otaras and particularly Dr. Otara knew DEG as a lender as far back as 1990. He made contact with it, sought the loan, DEG put on the tables its side of the bargain – to change the instruments of the 1st plaintiff and bring LTI on board to manage the project and also to be a shareholder. Negotiations went on. The Otaras had partially built the hotel to a tune of KShs. 105 million. They were seeking DM 5 million, more or less an equivalent. The two are normal adults, well educated and practicing medicine. They ran a hospital in Kisii. To this court's view, proper and valid agreements were drawn up, discussed and agreed. They were all executed in all their respects. The loan was discharged. Business opened. Dr. Otara did not demonstrate at any stage that economic pressure was put on the plaintiffs or if so in what form. It is not enough to merely claim economic duress prevailed e.g. a threat to break contract. Contracts were signed; this court concludes, without pressure. In any event, the plaintiffs were in Kenya while the defendants were in Germany. It has to be demonstrated that this or that kind of pressure was exerted on the plaintiffs. If it was done before the agreements were signed, then this is why the plaintiffs had the option to go elsewhere, they chose for the finance they desired. The defence to this allegation was categorical. No threats were used to get the plaintiffs to sign the agreement (sic) in issue."

ANALYSIS:

[63] It is apparent from the amended plaint that the appellants' case was mainly based on economic duress. The appellants pleaded among other things that they looked to DEG for financial advise and to LTI for advise on tourist hotel management and placed great confidence in both; that the two had a duty to ensure that the appellants got independent legal advise, that they instead advised the appellants to use their own lawyers Kaplan & Stratton.

[64] The appellants further pleaded that Kaplan & Stratton acted for the company, DEG, LTI and Coopers Lybrand Trust in respect of financing of completion of the hotel, preparing and making it operational. They further pleaded that the Otaras greatly relied on the advise of Kaplan & Stratton in signing suit documents and on the advise of DEG and LTI in entering into the contract of borrowing.

According to the plaint the economic duress consisted of threats to break the contract of financing and commencement of the hotel operations. All these allegations were denied.

[65] On the allegation that they relied on DEG and LTI for financial advise in the transaction Dr. Otara did not give such evidence. Furthermore Dr. Otara did not give any evidence that any official of DEG, particularly Heymann threatened at any time to break the contract of financing the completion of the hotel. Similarly, Dr. Otara did not give any evidence that any official of LTI particularly Wolfang Hedderich, ever threatened to break the contract for the management of the hotel.

[66] On the contrary, there was evidence from Otara and from both Monika Erlinghagen and Hanfred Schordinger of prolonged negotiations for the financing and management of the hotel which lasted from about June 1990 when Dr. Otara wrote the letter dated 22nd July 1990 appointing LTI as the management company to June 1991 when the Co-operation Agreement was executed. The negotiations according to the evidence were done locally and in Germany. There was evidence that even when the agreements were reached between DEG, LTI and Otaras the drafts were sent to Otaras.

[67] There was evidence that Dr. Otara had a German financial adviser – one Gavaghan. It was also admitted by Dr. Otara that Mr. Heymann of DEG introduced him to Mr. Hutchison – an accountant in the firm of Bellhouse Mwangi Ernest & Young who advised the appellants generally on the commercial aspects of the transaction.

Indeed Mr. Hutchison wrote a letter dated 5th March 1991 to Mr. Hedderich of LTI relating to capital structure of the company, financing of the project, alteration of Articles of Association and currencies relating to the project. There was also evidence from Mr. Hime which was admitted by Dr. Otara that a meeting of 12th March 1991 was held to sort out some technical problems arising in the project. This was before any agreement relating to the project was executed. Dr. Otara confirmed by an affidavit sworn on 4th May 1998 thus:-

"5. …..it was Mr. Heymann an employee of first defendant who introduced and recommended to me Mr. David Hutchison as a good financial adviser who advised the first defendant which had invested in a number of hotels at Kenya coast including Robinson Baobaob Club and Leisure Lodges ltd. The first and second plaintiffs and I accepted his recommendations and I hired Mr. Hutchison as our financial adviser.I do not remember the exact time I met him but it was when the plaintiffs, first and second defendant were negotiating the loans in dispute. Before then I had not met Mr. David Hutchison. In the capacity of a financial adviser Mr. David Hutchison wrote a number of letters to Mr. Wolfang Hedderich, the representative of the second defendant".

[68] Peter Julian Hime denied that he was instructed by Dr. Otaras to act for the appellants in any matter. He however admitted that the firm acted for the company in making application to CBK for approval to create the charge; drafting the alterations to the Articles of Association of the company to give effect to the loan and co-operation Agreement; in dealing with the change of the company's business name, and in the proprietorshi of the name to accord with the new situation and, lastly, in drafting and filing a contract covering the issue of fully, paid up share capital. In the affidavit sworn on 13th June 1994 Hime deposed that Kaplan & Stratton did not act generally for the company or for Otaras in the transactions and that he offered no advice with regard to legal and commercial terms of the transaction and that he personally told Dr. Otara that he should seek separate legal advise as Kaplan & Stratton were not prepared to give him or his wife any advise of the desirability of transaction from their point of view.

[69] It is true as submitted by Mr. Nowrojee that the appellants successfully applied at the trial for an injunction to restrain M/s Kaplan & Stratton from acting for the respondents. However, the Ruling of Mbaluto J granting the injunction was restricted to the matters that Hime admitted that the firm acted for the company and the injunction was granted on the basis that in such matters Mr. Hime may have received confidential information which might, inadvertently, be revealed to the respondents to their prejudice. In the Ruling, Mbaluto J did not find, as contended by the appellants, that Kaplan & Stratton acted for the company in connection with the financing and implementation of the project nor that the

appellants relied on the advice of Mr. Hime in signing the agreements.

[70] The four preparatory or preliminary agreements – namely, the Management, Co-operation; Loan and Technical Assistance and Pre-Opening Agreements were prepared in Germany in standard form and were not prepared by Kaplan & Stratton. That was a clear indication that Kaplana & Stratton was not involved in the commercial viability or financing of the project. Rather the evidence shows that by the time Kaplan & Stratton came in the picture all the parties including the appellants had negotiated on all aspects of the project including the hotel management and had substantially agreed on the pertinent matters. Indeed, the Loan Agreement between the appellants, DEG and LTI which was an important document in the process was not signed before Mr. Hime. It is evident that the execution of some agreements before Mr. Hime and the nature of matters on which Mr. Hime acted for the Company were merely a facilitation of the agreements already reached between the parties. The trial Judge considered the conflicting evidence regarding the role of Kaplan & Stratton and made a finding that Kaplan & Stratton were not instructed by the appellants and that they did not draw the documents which bound the parties. On the preponderance of the evidence at the trial I am satisfied that the trial judge reached the correct decision.

[71] It follows from the foregoing that the complaint by the appellant that DEG and LTI threatened to breach the contracts; that the appellants did not get independent advise and that DEG and LTI caused Kaplan & Stratton to act for the appellants is not supported by evidence and is therefore incorrect.

[72] Furthermore, it is plain from the reliefs sought in the plaint and from the evidence of Dr. Otara that the appellants are not impeaching the entire respective documents. Rather, they only impeach a few selected clauses in each agreement. Regarding the Loan Agreement and Co-operation agreement the appellants impeach them to the extent that they deprived the Otaras the ownership of the shares by converting a borrowing contract to an agreement for sale; to the extent that they offend the company's majority rule by permitting DEG to arbitrarily place the company under receivership and to the extent they permitted LTI more that reasonable management fees. The Articles of Association are impeached to the extent that they denied the majority shareholders (Otaras) quorum to transact the company's business and to the extent that they vested sole control and virtue ownership of the company's in DEG and LTI .

The Debenture Trust Deed was impeached to the extent that it clogged the appellants' equity of redemption and to the extent that it gave DEG arbitrary power to appoint Receivers and Managers.

By the plaint, the appellants sought severance of the impugned clauses on the basis of Article 16(3) of Loan Agreement which provides:-

"Should any of the provisions of this Agreement be invalid, illegal or unenforceable for any reason whatsoever, validity of the remaining provision shall not be affected. In such event the parties to this Agreement shall forthwith replace the ineffective provision by a legally binding one which in its consequences shall proximate the ineffective provision as closely as possible."

[73] Monika Erlinghagen who drew the Loan Agreement referred to this clause as Salvatorian clause intended to salvage the agreement. She clarified that the clause is not intended to allow a party to walk out of the agreement. On true construction of the clause, it is manifest that it is intended to save the entire agreement from invalidity should any clause be found to be invalid, illegal or unenforceable by replacement with a valid clause. The clause does not allow a party to challenge the validity of any clause through a suit, as has happened in the instant suit. Article 16(3) provides that in such event the parties should replace the clause or clauses by similar legally binding one.

In as much as the appellant rely on Article 16(3) for severance of the impugned clauses in various agreements the suit is incompetent. The fact that the appellants are complaining about a few clauses in each of several documents which documents contain numerous clauses is indicative of the fact that the parties were generally *ad idem* and that the documents were executed without any coercion.

[74] The evidence of Dr. Otara show that he only raised concern before Mr. Hime about the Management

Agreement in so far as it gave total control of the hotel to LTI and the Co-operation Agreement so far it indicated that the Articles of Association would be amended to satisfy the needs of DEG and LTI. He testified that he read and understood the agreements before he signed them and that he noticed that they were one – sided. He nevertheless signed the agreements. At the time the Otaras signed the Management, Co-operation and Technical Assistance and the opening Agreements before Mr. Hime no officer of DEG or LTI was present .

[75] It was the appellants' case that the Agreements were a conspiracy to deprive the Otaras of the ownership of their shares in the company and also to deprive the company of its business; that the Management Agreement gave total control of the hotel to LTI and the alteration of the Articles of Association denying the majority shareholders (Otaras) quorum in the absence of LTI, a minority shareholder, offended the company law principle of majority rule and was thus ultra vires the Companies Act. The appellants counsel expended a lot of time in the court below and in this court in advancing that issue. Similarly, the respondents' counsel made a valiant effort to demonstrate that the Agreements were not one sided and that they were fair and reasonable commercial agreements.

[76] In my view, it is not necessary to consider the provisions of the Co-operation Agreement, Management, Technical and Re-opening Agreements, in detail for in my view, they are no longer operative. Pursuant to the Management and Technical Assistance and Re-opening Agreements, LTI took over the management of the hotel for a term of ten years which was renewable by a further 5 years. CBK approved Management Agreement for 5 years which was reviewable and renewable if necessary. DEG applied for extension of the terms of 5 years to CBK but it is not clear whether or not CBK extended the term. Even if it was extended to run for 15 years, it is now 20 years since. Thus the Management Agreement has expired by efflution of time. Furthermore the management of the hotel by LTI was terminated by the Receivership of the hotel in July 1994.

We were informed from the bar by Mr. Regeru that the Receivers and Managers retained LTI as managers. In June 2010 Mr. Regeru told us that LTI ceased managing the hotel 5 years previously (that is about 2005 my reckoning) and that the Receiver Managers now ran the hotel.

[77] Thus any dispute about the management of the hotel including the prayer for provision by LTI of restated accounts has been overtaken by events. Most of the provisions of the Co-operation Agreement have been effected and superseded by the alteration of the Articles and execution of the Debenture Trust Deed.

[78] I earlier referred to Article 5(5) of the Co-operation Agreement which provides:-

"the Otaras also jointly and severally hereby covenant with LTI that they will purchase all shares held by LTI in the company strictly in accordance with the provisions of the Articles relating to Transfer of shares the ARTICLES OF ASSOCIATION of the COMPANY (as approved by LTI and DEG pursuant to Article 3.5 d) of this Agreement) on occurrence of any of the following events:

(a) If the MANAGEMENT AGREEMENT is terminated for any reason;

(b) If an extended MANAGEMENT AGREEMENT (referred to in Sub -clause 4 of this Article 5) is not executed by the COMPANY or cannot be performed or is terminated for any reason.

(c) If LTI is prohibited for any reason from holding shares in the COMPANY or if any authorization is withdrawn for it hold such shares."

[79] The Management Agreement has been terminated both by the onset of receivership and by exffluxion of time. It seems to me that the investment by LTI in the company was for purposes of effective management as required by the lenders and was co-extensive with the period of management. What remains now is for Otaras with approval of LTI and DEG to set in motion the process of purchasing LTI's shares in accordance with the Articles of Association of the Company. It is for this reason that it is not necessary to inquire whether or not the Articles of Association regarding quorum at

the meetings of the company is *ultra vires* the Companies Act.

[80] That notwithstanding it is important to appreciate the nature of the transactions and the purpose of each Agreement. The main transaction which gave rise to other transactions is the Loan Agreement between DEG and the company. That transaction brought in two other lenders and it gave rise to the Management Agreement between LTI and the Company. It also gave rise to a joint venture between LTI and the company whereby LTI invested in the company and became a shareholder. DEG is a different entity from LTI. There is no common shareholding or directorships.

[81] There was evidence from Monika Erlinghagen that regarding the lending policies of DEG – that it insists on a professional manager being engaged by a borrower and on joint venture being entered. There was also evidence that LTI was not interested in a joint venture. The purpose of LTI becoming a shareholder was explained as among other things giving LTI incentive during management. By insisting that the hotel the construction of which it had financed should be run by a professional manager who should also have equity in the borrowing company, DEG obviously intended to secure the payment of the loan - to make sure that the hotel would run profitably so that the company would be able to service the loans.

[82] I have already shown that the intention of the parties as gathered from Article 5(5), of the Co-operation Agreement was that the investment by LTI in the company would be pegged to the duration of the Management Agreement after which LTI's Investment in the company would be transferred to Otaras. DEGs relationship with the company was solely that of a Banker and customer while LTI's relationship with the company was that of hotel owner and hotel manager as well as that of company and shareholder.

It has been submitted, correctly, in my view, and I find that, the case for economic duress or undue influence as between DEG and the company did not arise and was not proved. Similarly, as between the two relationships between LTI and the company a case of economic duress or undue influence did not arise and was not proved. The provision in the Articles of the Association of the company requiring that a director of LTI should be present to form a quorum was intended to protect LTI from the Otaras who were the majority shareholders. That was a reasonable provision which cannot be said to be unconscionable. Looking at the impugned provisions of the Agreements objectively, I am satisfied that they were fair and reasonable provisions in the circumstances of this case.

[83] On the question of the independent legal advise, I have already found that the company and the Otaras had independent financial advise. It was clear from the evidence that the Otaras who were the agents of the company are highly educated. They are also astute business people. Dr. Otara admitted that he read all the documents and understood them. As I have already found the transaction were not disadvantageous to them. The construction of the hotel was successfully completed. These commercial transactions do not call for any explanation.

[84] Further, the Otaras do not say that Kaplan & Stratton forced them to execute any document that they did not intend to execute or that they did not know the nature of the documents they were required to execute. They were acting as agents of the company and if they thought that it was necessary to seek legal advise then they were free to do so. The fact that they did not do so implies that they were doing everything according to their plans.

[85] In conclusion, the appellants have not proved that they entered into the impugned transactions either under illegitimate economic duress or under undue influence. Rather, the evidence shows that they entered into the transaction out of commercial necessity. They needed money to complete the construction of a hotel in which they had already heavily invested. After approaching DEG for finance, it turned out that the hotel required Shs. 270,000,000 to complete - about three times the money that the Otaras had already injected into the project. Ultimately a syndicated loan was arranged, DEG advancing DM 5,000,000; two local banks advancing a total of Shs. 85,000,000,and LTI injected Shs. 30,000,000 into the equity of the company.

[86] The Otaras were fully compensated for the value of the land and the value of the uncompleted hotel with allocation of shares worth Shs. 75,000,000 in the restructured company. The conditions of the loans were fully satisfied with full participation of Dr. Otara. He facilitated the passing of the necessary resolutions by the company and in obtaining the necessary approvals for the project. The project according to the evidence was viable and the hotel initially performed better than the neighbouring hotels until 1992 when the political and economic climate adversely affected the profitability of the hotel. Each side obtained full benefits of the agreements.

[87] Furthermore even if the appellants had proved economic duress or undue influence, which they have not, they would not in my view be entitled to any relief because they took no steps before the contracts were performed to avoid the contracts and are in the circumstances deemed to have affirmed or ratified the contracts by conduct. In that respect, Mr. Regeru submitted that there has been substantial part performance of the contracts in that the Otaras surrendered their properties and got shares in compensation; DEG disbursed the money and the hotel was completed and opened.

[88] Indeed, the contracts have been wholly executed to the extent that it is not possible to reverse some transactions in law or for appellants to do restitution. The properties offered as securities for the loans were changed from freehold to leasehold; the original company was restructured to form the first appellant with substantially increased share capital. The original hotel has been reconstructed and Shs. 270,000,000 injected into the hotel; its value has been greatly enhanced. The hotel and the property are mortgaged to three banks as securities for substantial loans.

Debenture Trust Deed: Appointment of Receivers and Managers

[89] The appellants aver in para 11 of the plaint, in essence, that, the Debenture Trust Deed was entered into through duress or undue influence and that the Debenture in void to the extent that it clogs the company's equity of redemption and gives DEG arbitrary and capricious power to appoint Receivers and managers with power to sell the company's business. They seek declaration that the Debenture Trust Deed and the charges are *bona fide* mortgages, charges, and not disguised sales of the subject matter of the securities; that the Debenture Trust Deed has clogged the equity of redemption and that the appointment of the 4th and 5th respondents as Receivers and Managers was illegal.

[90] The court has power in equity to interfere with a mortgage if it is unconscionable. The essential tenets of a mortgage is that, a lender under a mortgage is only entitled to repayment of the principal, interest and costs. If a lender additionally stipulates for a premium or other collateral advantage the court will not enforce such additional stipulation unless it is reasonable. But equity will not rewrite an improvident contract where there is no disability on either side. Further, equity will not relieve a party from the harsh consequences of unforeseen events occurring after the date of execution of the contract. **(See Multi Service Book Binding Ltd –Vs- Marden [1979] 1 ch 84.)** The unconscionability of a transaction is determined as at the time it is made. **Gustav & Co. Ltd. –Vs- Macfied Ltd 2008 NZSC 47**. In this case the appellants did not impugn the Debenture Trust Deed on the ground of unconscionability. Indeed, the plaint refers to only two transactions which are alleged to be unconscionable bargains. First, the appellant pleaded in para. 12 of the plaint that that part of the Memorandum and Articles of association which ousts the democratic principles regarding quorum at meetings of a company is an unconscionable bargain. Secondly, the appellants pleaded in para 15 of the plaint that any agreement between Coopers & Lybrand Trust and the Receivers and Managers as to remuneration would be an unconscionable bargain.

[91] Furthermore, the appellants have not referred specifically to any clause in the Debenture Trust Deed as objectionable. They have not shown any abnormal clause showing that the Debenture Trust Deed is not in reality a normal security for the three loans advanced by DEG and two local banks. The Debenture Trust Deed and the legal charges are normal securities for three substantial long term loans. They contain the usual clauses giving the lender a right to realize the securities in the event of default nor do they contain any unconscionable terms or in effect clog the company's equity of redemption.

[92] The Receivers were appointed because DEG had not been paid in accordance with the Loan

Agreement and Debenture Trust Deed. The court below made a finding that the company had defaulted in the payment of the loan. There was ample evidence to prove default in addition to admissions. Monika Erlinghagen, Hanfred Schardinger,, Hezron Kamau Waithaka and Dr. Otara all stated that the DEG loan was not being serviced. There were also admissions in the correspondence, for example M/s K. H. Osmond who were acting for Dr. (Mrs) Otara wrote on 19th September 1999 that debenture holders were entitled to invoke receivership but asked that receivership be revoked. There was also admissions in the pleadings in the previous suits and in the present suit. In para 14 of the plaint in the present suit the appellants pleaded that LTI refused to pay DEG interest payable under the Loan Agreement thereby inducing insolvency. Manfred Schardinger categorically stated in his evidence that due to adverse economic climate and unfavourable political climate, tourism business declined and that in 1992 there was no money to service DEG loan. He also referred in his affidavit to other unfavourable circumstances which made it difficult to service the DEG loan such as delay by CBK to allocate foreign exchange, V.A.T burden and sharp fall of the value of local currency in relation to DM.

[93] It is clear therefore that there was an event of default as stipulated in the Debenture Trust Deed giving a right to DEG to appoint Receivers and Managers. It is clear from the correspondence that Coopers & Lybrand Trust followed strictly the stipulated procedure before appointing Receivers and Managers with the concurrence of Barclays Bank and DFCK.

[94] The court can only interfere with a validly appointed receivership if, among other things, it is proved that the conduct of Receivers and Managers was seriously oppressive or not in accordance with the recognized principles of law and of commercial practice or where there are clear and compelling reasons to do so. It is also true, as strongly submitted by both Mr. Chacha Odera and Mr. Regeru that the suit only challenged the right to appoint receivers and not the management of the receivership. Indeed, the appellants' case was that the Receivers and Managers were prematurely appointed.

[95] It is however true that the receivership has continued for a long time. The reason appears to be that this dispute has been pending in court for several years. The first suit HCCC No. 1579/94 was filed by Dr. (Mrs) Otara on 28th April 1994. Dr. Otara filed a second suit HCCC No. 2409/96 sometime in 1996. This third suit was filed later. At one time there was an attempt by Coopers & Lybrand Trust to sell the hotel to LTI as the highest successful binder but the proposed sale was successfully challenged in court by the appellants.

[96] The appellants plead in para 15 of the plaint that the Receivers and Managers have performed better than LTI. Substantial loans were advanced by the three entities. In my view it would be inappropriate and indeed unjust to interfere with lawful receivership without any wrong doing by Receivers and to lift receivership before the full indebtedness of the company is ascertained. That was the view of the trial Judge.

However a case for accounts in term of prayer (q) of the plaint has been established.

[97] For the forgoing reasons I am satisfied that the appeal other than the prayer for account against Receivers and Managers has no merit.

Accordingly, I would dismiss the appeal and the grounds for affirmation of the appeal save that I order Receivers and Managers to provide accounts of receivership in terms of prayer (q) of the amended plaint.

I would give ¾ of the costs of the appeal to the respondents.

Dated and delivered at Nairobi this 18th day of November, 2011.

E. M. GITHINJI

.....
JUDGE OF APPEAL

JUDGMENT OF J. W. ONYANGO OTIENO, J.A.

The second appellant and the third appellant, ***Dr. Charles Gekonde Otara*** and ***Dr. Mrs. Christa Marianne Otara*** respectively, are husband and wife. They are both medical practitioners. At the relevant time, both of them were practicing medicine at Kisii where they were jointly running a hospital. Sometime before 1986, they acquired Land Parcels L.R. No. Kwale/Diani Beach Block 810, 868, 869 and 870. They conceived an idea of developing a tourist hotel on these properties which were apparently adjacent to each other or near each other. The record shows that they applied for and obtained change of user from the Commissioner of Lands for that purpose. They then incorporated Kisii Safari Inns Limited as a limited liability company. That was done on 4th November 1986. Dr. Otara took one share in that company while Dr. Mrs. Otara had two shares. The four properties were transferred to the company and construction of a hotel started on the properties. In 1990, the hotel was constructed to 75% completion with 182 bedrooms, swimming pool, tennis courts, access roads, and other necessary amenities all to the cost of Ksh.105,625,000/-.

That having been done, all that remained was to complete the remaining bit of construction and operationalise the hotel. That required substantial funds which the second and third appellants did not have as their resources were exhausted in financing the construction of the hotel and those other amenities. They needed assistance from a financier. They approached first respondent Deutsche Investitions –und Entwicklungsgell Shaft (to which I shall refer as DEG) for a loan to operationalise the hotel. DEG is a company incorporated in Germany. DEG agreed to give the loan, but as usual with all financiers, such a loan had to come with conditions. First condition was that the second respondent LTI – Hotel Betweilgungs –und Investitionsgesellschaft MBH (referred to in this judgment as LTI) to have shares in the company which was at that time still Kisii Safari Inns Limited and secondly, the second respondent would also manage the hotel. Second respondent, LTI was also a German Company. The loan agreement was dated 16th June 1991 and co-operation agreement was dated 27th June 1991. To comply with those conditions, the memorandum and article of association for Kisii Safari Inns Limited had to be altered to incorporate the second respondent not only as a shareholder but also as manager and the name of the company had to be changed. In the meantime, DEG had given advanced loan of DM 1 million. The two German Companies had Kaplan & Stratton as their advocates for these purposes in Kenya. The second and third appellants state that they did not have legal advice and were not advised by Kaplan & Stratton, advocates, or by the first and second respondents to seek independent legal advice. The two respondents refute that claim and say at all times they had no duty to advice them to get independent legal advice and Kaplan & Stratton denies any allegations of misleading the two appellants on their rights to independent legal advice. That however, will abide my later consideration of the entire matter and must await that time. To reflect the entry of the second respondent as one of the share holders, the share capital of the company was increased from Kshs. ten (10) million to Kshs. one hundred and five (105) million divided into 5.250,000 of Ksh.20 each. This was done on 20th May 1991. The second appellant was allotted 2,299,999 shares, third appellant had 1,579,998 shares whereas the second respondent had 1,500,000 shares. The name of the company was changed to LTI- Kisii Safari Inns Ltd, which is the first appellant in this appeal. To secure its shares in the first appellant, it was agreed that the second respondent would pay Ksh.30,000,000/- in foreign currency in compliance with the law then obtaining. The parties, i.e. first, second and third appellants on the one hand and the first respondent on the other hand thereafter entered into a loan agreement specifying under what condition the loan would be advanced, some of which conditions are set out above. There was also to be a debenture trust deed which would provide for appointment of Receivers in case of default in the payment of the loan. As between the appellants and second respondent, the parties entered into a management agreement spelling out the way the hotel would be managed. There was also need for technical assistance and that attracted technical agreement between the parties. I add here that Barclays Bank of Kenya Ltd and the Development Finance Company of Kenya Ltd too were to lend working capital to the first appellant but they do not appear to have featured prominently in the proceedings before us as apparently no serious problems involving them arose. Be that as it may, loan agreement for DM 5 million advanced to the first appellant was prepared and duly signed by the second appellant on behalf of the first appellant on the one hand and the first respondent on the other hand. On 24th April, 1991, the first appellant entered into management agreement

and technical assistance and pre-opening contract with the second respondent. The second respondent paid Kshs.30 million for its shares.

Although second respondent paid Kshs.30,000,000/- shares in first appellant, the appellants maintain that the second respondent was not in law a shareholder in the first appellant as it did not pay for the shares that were allegedly allotted to it by foreign currency as was required by law. They maintain that that being so, the amount of Kshs.30,000,000/- paid by the second respondent to acquire the same shares be treated as a loan to the first appellant. The respondents would have none of that. That again is an issue to be gone into in this judgment later.

Back to the facts. ***Article 81 (a)*** of the new Articles of Association states as follows:

"81 (a) For so long as LTI either alone or in conjunction with any holding company or any subsidiaries of such holding company within the meaning of section 154 of the Act shall hold not less than 28% in nominal value of the issued share capital of the company, it shall be entitled to at any time and from time to time to appoint one person as a Director to determine the period for such person is to hold office and to remove any such director from office …….".

And ***Article 100*** of the same Articles of Association States:-

"The quorum necessary for the transaction of the business of the Board shall be two Directors present either personally or by alternate, or by representative one of whom must be a Director appointed under Article 81 or representative or Alternative of such Director. One person whether a Director or not, although a duly appointed alternate or representative for one or more Directors, shall not constitute a quorum".

Annexture A to the articles was Arbitration Contract which was also signed by the parties. That provided for disputes arising to be referred to arbitration. Along with the loan agreement, management, Technical Assistance and pre-opening agreements and Debenture Trust deed, there was also Corporation Agreement. All these agreements were signed by all parties and none raised any serious complaints before executing them. The number of bed space in the hotel was increased from 182 to 193. Bank Accounts were as would be expected opened and one of them was opened in Germany. The appellants said they knew nothing of this account in Germany until much later, but the respondents said this account was opened with the knowledge, consent and authority of the second appellant. That is another issue for me to decide as to who is credible and the effect of that on the entire suit. I leave it to latter part of this judgment. It was however not in dispute that the Management Agreement signed on 24th April, 1991 referred to the first appellant as the owner and LTI as the Manager and ***Article 2.1 (a) (b)*** and ***(c)*** and ***(d)*** state as follows:-

"2.1 <u>General Rights and Obligations of Manager and owner.</u>

(a) Owner herewith authorizes manager, and manager herewith assumes responsibility to direct exclusively for and on behalf of and at the expense of owner the entire management and operation of the hotel in accordance with first – class international standards throughout the terms of this agreement and always within the provisions of the approved budget.

(b) Subject to the terms and conditions of this agreement, manager shall have sole control and discretion in the operation of the hotel.

(c) Manager shall operate the hotel solely as a first-class resort hotel and for all activities in connection therewith which are customary and usual in such an operation in so far as such operations are feasible, and in its opinion advisable. Manager shall conduct such operations always in the best interest of owner.

(d) Owner shall have the obligation to obtain all necessary licenses and permits for the employment of the hotel manager and all other expatriate staff according to article 5.6.

(e) Owner will not encroach upon the day to day management of the hotel or interfere into any matter of usual and ordinary operation and take part in its management only in the manner stipulated expressively (sic) under the terms of this agreement."

All the above agreements between the appellants on the one hand and the first and second respondents on the other hand were confined to the life of the loan i.e. they were to be in operation so long as the loan was still outstanding. In case, the loan was not paid as stipulated in the loan agreement, then the first respondent would, in accordance with the loan agreement, and particularly in compliance with the provisions of the Debenture Trust, appoint a Trustee who would in its/his powers appoint receiver or receivers to run the affairs of the first appellant till the entire loan was repaid. Under the Debenture Trust Deed, made on 25th July 1991, between first appellant and the third respondent Coopers & Lybrand Trust Corporation Limited, third respondent named in the Deed as Trustee would enforce the security spelt out in that deed upon the happening of any of the events enumerated in clause 9.01 of the deed on behalf of the first respondent. In so enforcing the security the third respondent was under clause 11 authorised to appoint receivers. Clause 11.01 and 11.02 state as follows:-

"11.01. At any time after the security shall have become enforceable, the trustee may, in its discretion, and shall, upon the request of the holders by an extraordinary resolution, in writing under the hand of one of its officers or attorneys or under its common seal, appoint any person or persons (with power to act jointly or severally), whether an officer of the trustee or not, to be a receiver of the company and of all or any part of the property and assets of the company forming part of the charged assets upon such terms as to remuneration and otherwise as the trustee shall think fit and may in like manner from time to time remove any receiver so appointed and appoint another in his place.

11.02. Every receiver shall be the agent of the company and the company shall alone be liable for his acts, defaults and remuneration and he shall have authority and be entitled to exercise the powers conferred upon the trustee under the provisions of clause 10.02 in addition to and without limiting any general powers conferred upon him by law."

After all the above agreements were executed, the first respondent availed to the first appellant the amount of DM 5 million; construction of the hotel was completed and the hotel was operationalised. According to the provisions of loan agreement the loan was to attract interest rate of 10.75 per cent per annum and the repayment of the principal and interest was to commence on 30th October 1994. The appellants state that the second respondent managed the first respondent's businesses from 15th December 1991 when the hotel began operations.

It is not in dispute that for one reason or the other, the loan was not serviced fully. The first appellant had to start repayment on 30th October 1994. Before that only interest was payable. The appellants saw that as a consequence of mismanagement, by the second respondent with accounts not being rendered, monies being kept in bank accounts in Germany and income being converted to the use of the first respondent. At one time the appellants felt the activities of the second respondent were geared towards depriving the appellants of their property and their business. The first and second respondents however, vehemently deny this and blame the second and third appellants for the problem. I will in due course consider this in this judgment. However, whatever were the causes the loan was not repaid as per agreement as there were interest repayment arrears and loan repayment arrears. The first respondent appointed the third respondents under the Debenture Trust Agreement to be receivers in respect of the first appellant. The third respondent in turn appointed Keith Law Grant Sinclair the fourth respondent and Pratul Hemraj Shah, the fifth respondent as receivers of the first appellant. These two were partners in Coopers & Lybrand Kenya and Directors of the third respondent. They were appointed on 7th July 1994. Thus the first appellant was placed under receivership by the first respondent. The second and third appellants were not amused. Third appellant filed HCCC No. 1579 of 1994 seeking to restrain DEG and other debenture holders from appointing receivers. The parties entered consent in that case to the effect that DEG would not appoint receivers in the event the first appellant paid monies in the account of M/s Kaplan & Stratton, Advocates for the first respondent, in default DEG would proceed to appoint receiver. That consent order was to last till 11th July 2004. By 11th July 2004, the second respondent through Monika Erlinghage

(DW2) said the amount of DM 633,586 was still due and unpaid. Vide another suit – HCCC No. 2409 of 1996, ***Dr. Otara vs LTI, DEG and Coopers & Lybrand*** sought reliefs against the respondents herein. That suit did not see the light of the day. It was dismissed. These two suits are the subject of the respondents' notices of grounds for affirming the decision of the learned Judge of the superior court. Be that as it may, the appellants were not satisfied notwithstanding that suit No. 1579 of 1994 filed by the third appellant and suit No. 2409 of 1996 filed by the second appellant had been finalized in one way or the other, they filed HCCC No. 1517 of 1997 at Nairobi against the five respondents herein. That suit was transferred to Mombasa and was assigned Civil Case No. 8 of 2004 and was eventually concluded at Kisumu as Civil Case No. 83 of 2006. This is the case of which decision, this appeal has been preferred. That plaint was amended. In that amended plaint appellants set out several complaints against the respondents. In summary the appellants contend that the respondents were under a duty to ensure that the appellants got independent legal advice before they entered into contracts with them but they failed in this duty and instead got the appellants introduced to their own advocates who also did not give that advice to the appellants with the result that the appellants entered into several agreements with the respondents which agreements disadvantaged the appellants; that as the second respondent did not pay for shares allotted to it in foreign currency, it was in contravention of ***section 50A*** of Companies Act and thus the purported purchase of the shares by the second respondent was null and void and so the alleged amount of Ksh.30 million paid for those shares became a loan granted to the first appellant attracting interest at a reasonable rate; that the original memorandum and articles of association was replaced through economic duress or undue influence exacted upon the first appellant; that the set of memorandum and articles of association that replaced the original one, vested the first and second respondents, the sole control and virtual ownership of the first and second respondents, and thus they read conspiracy in the move to replace the original Memorandum and Articles of Association; that the entire loan agreement was signed by the second appellants as a result of undue influence and economic duress exacted upon the appellants and were against the interest of the appellants; that the loan agreement dated 16th June 1991 was void to the extent to which it converted borrowing contract into an agreement for sale of the first appellant's business to the first respondent and was thus under ***clause 16 (3)*** of the said agreement, severable; that the debenture deed dated 25th June 1991 was void to the extent that it clogged the first appellant's equity of redemption; that the provisions in the Memorandum and Articles of Association providing on how meetings of the general meeting were to be carried out were *ultra vires* the Companies Act and that the loan agreement dated 16th June 1991 and Co-operation Agreement dated 27th June 1991 were void to the extent that they deprived the second and third appellants of their ownership of 71.4% shares in first appellant, offended the principle of majority rule in running of the first appellant's business and permitted the first respondent to arbitrarily, capriciously and unreasonably replace the first plaintiff's undertaking under receivership. The appellants set out in that amended plaint particulars of economic duress, undue influences, and conspiracy and its execution. That amended plaint which as the learned Judge of the superior court said in his judgment, was drafted in such a way that it looked more like a submission rather than a plaint, ended in seeking twenty one prayers to be granted in the judgment. These were:-

"(a) A declaration that under article 16 (3) of the loan agreement dated June 16, 1991, the first plaintiff is entitled to a severance of all the provisions of the loan agreement dated June 16, 1991, the co-operation agreement dated June 27, 1991 and the debenture trust deed dated July 25, 1991.

(b) A declaration that the omission of the principle of majority rule from the memorandum and article of association as from May 1991 and which vested the entire control and ownership of the first plaintiff's business in the second defendant is ultra vires the Companies Act and is null and void.

(c) A declaration that the second and third plaintiffs can, at general and board meetings of the first plaintiff, lawfully transact the first plaintiff's business in the presence or absence of the second defendant.

(d) A declaration that under the debenture trust deed dated July 25, 1991, the first defendant cannot capriciously, arbitrary (sic) or unreasonably place the first plaintiff's undertaking under receivership and appoint persons as receivers and managers.

(e) A declaration that the first defendant has, under the debenture deed dated July 25, 1991 clogged the equity of redemption.

(f) A declaration that the purported appointment on July 7, 1994 of the fourth and fifth defendants as receivers and managers was illegal and that their presence on the first plaintiff's premises was and continues to be trespass.

(g) A declaration that through the loan agreement dated June 16, 1991, the co-operation agreement dated June 27, 1991 and the debenture trust deed dated July 25, 1991, the first plaintiff has not lost its business or transferred the same to the first and second defendants.

(h) A declaration that the debenture trust deed dated July 25, 1991 and the charges over L.R. No. Kwale/Diani Beach Block 810, L.R. No. Kwale/Diani Beach Block 868, L.R. No. Kwale/Diani Beach Block 869 and L.R. Kwale/Diani Beach Block 870 are bona fide mortgages /charges and not disguised sales of the subject matter of the securities.

(i) A declaration that under both the memorandum and articles of association of the first plaintiff and the management agreement dated April 24, 1991, the management of the first plaintiff's business is vested in the first plaintiff's board of directors and the second defendant on the basis of the majority principle.

(j) A declaration that the purported allocation of 1,500,000 shares to the second defendant was in contravention of section 50A of the Companies Act and is null and void.

(k) A declaration that the second defendant is under a duty to remit to the Republic of Kenya all the first plaintiff's revenue outside Kenya from the tourists and tour operations.

(l) A perpetual injunction to restrain the first defendant from depriving the plaintiff of the ownership of the first plaintiff's business and the 71.4% share holding respectively, in the first plaintiff.

(m) A perpetual injunction restraining the first defendant from capriciously and arbitrary placing the first plaintiff's business under receivership.

(n) A perpetual injunction restraining the defendants from interfering with the plaintiff's right to manage the first plaintiff's business.

(o) An order that the second defendant do supply to the plaintiff's a restated account as from December 15, 1991.

(p) A declaration that the fourth and fifth defendants are entitled to reasonable remuneration.

(q) An order that the fourth and fifth defendants do supply to the plaintiff's accounts making allowance for reasonable remuneration for the services they have rendered to the first plaintiff.

(r) An order that the second defendant accounts to the first plaintiff for all moneys retained by it over and above the amount agreed by the first plaintiff and the second defendant.

(s) General damages.

(t) Such other relief as this Honourable Court may deem fit to grant.

(u) The cost of this suit."

The respondents in their various defences did accept that a loan agreement with conditionalities was agreed upon and executed by the first respondent and the first appellant, but they maintain particularly the first and second respondents maintain that the conditions spelt out in the loan agreement were readily

acceptable to the appellants who were in no way unduly influenced in executing the same agreement, nor were there any economic duress imposed on the appellants to lead them into signing the same loan agreement. They denied any conspiracy to deprive the second and third appellants of their shares in the first appellant and maintained that the second and third appellants were not advised to get legal advice from M/s Kaplan & Stratton advocates. In their contention, the second and third respondents had advice from a third person and were not in any way misled into executing all the agreements. In particular, the first respondent's defence in brief was that the fourth and fifth respondents were validly appointed Receivers and Managers of the first appellant; that the loan agreement of 16th June 1991 and the co-operation agreement of 27th June 1991 set out all that were agreed upon between the first respondent and the appellants; that the appellants were at all times prior to their signing the loan agreement, free to decide for themselves whether or not to enter into the loan agreement; that the particulars of the allegation of economic duress/undue influence and conspiracy were denied and that the same particulars, even if they were true, did not amount to economic duress/undue influence and/or conspiracy. It denied being under any duty to advice the appellants to obtain independent advice on any of the matters set out in the plaint and denied making any threats to the applicant. While it admitted that the memorandum and articles of the first appellant were altered and that it was a party to the co-operation agreement, it nonetheless denied that those resulted in the vesting of the entire control and ownership of the business of the first appellant in the second respondent and said the power to appoint the Receivers and Manager was not vested in it but in the third respondent. It also denied that loan agreement made any provisions for severance of parts of it and maintained that democratic principle did not exist in the context of the transaction invoked. In concluding its defence, the first respondent claimed that the claims made in the plaint were vexatious and abuse of the process of the court as the same were similar to the allegations which had been made in HCCC No. 2409 by the second appellant and in HCCC No. 1579 of 1924 by the third appellant.

The second respondent filed defence and amended defence. In the amended defence, the second respondent denied the allegations against it in the plaint contending that the first appellant had no authority to sue the respondents as no board meeting of the first appellant sanctioned such an action as is required by law; that the fourth and fifth respondents were properly appointed receivers pursuant to Debenture Trust Deed made between the first appellant and the third respondents, as the trustee for the first respondent and other lenders; that its management of the first appellant company and its taking a shareholding in the first appellant were matters agreed upon by all lenders including Barclays Bank of Kenya, and Development Finance Company of Kenya after lengthy discussions with the appellants. It also denied owing any duty to anybody to ensure the appellants had independent legal advice. It denied conspiracy with first respondent or anyone to deprive the appellants of their businesses: threatening anyone to breach contracts with appellants; advising appellant to use Kaplan & Stratton as its advocates, and procuring or using economic duress/undue influence to alter the original Memorandum and Articles of Association. It further stated that it was agreed by all parties that the appellant would pay interest on the loan agreed at the rate of 10.75% per annum and repayment of the principle and interest would commence on 30th October, 1994 and asserted that the Memorandum and Articles of Association were altered with the knowledge and consent of all the parties involved and the appellants specifically consented to a provision that no meeting of the directors could be held without a representative of the second respondent being present, and that all the agreements; including Debenture Trust Deed were freely entered into without any coercion. It also stated that ***article 16.3*** of the loan agreement did not make any provisions for the severance of any terms not contained in the loan agreement. It denied running the hotel contrary to the agreed terms and that it converted into its own use any revenue received from tour operations and that it failed to supply to appellants particulars of any accounts and that it banked in Germany bank any monies belonging to the first appellant and refused to pay the same to the first appellant leading to insolvency of the first appellant all thereby placing or necessitating the first appellant being put into receivership. The second respondent further stated that it paid for the shares it acquired in the first appellant in accordance with the then legal requirements and obtained the approval of the required authorities as was then set out in law. It transferred DM 1,890,000 being the equivalent of Ksh.30 million from Barclays, Frankfurt to Central Bank of Germany on 6th June 1991. That amount was transferred to Barclays Bank Nkrumah Road, Mombasa and a certificate acknowledging its receipt by the first appellant was duly issued by the Central Bank. Further it maintained that there were specific provisions in the loan agreement for the replacement of any provision which might be invalid, and that the second and third appellants were not excluded from any board meetings relating to the management of

the plaintiff, and averred that it carried out its work of managing the hotel diligently although the two appellants interfered excessively and while conceding that at times, it banked the business money in Germany, it stated that it did so with the consent of the two appellants. As to insolvency the second respondent denied being responsible for the insolvency of the first appellant and contended that when it became necessary to inject some money into the business to avoid insolvency, the second and third appellants refused to do so although the second respondent was ready to do so. As at the time of the suit, the second respondent stated it was managing the hotel on behalf of the fourth and fifth respondents appointed by the third respondent. Lastly, the second respondent also pleaded that the suit was *res judicata* and an abuse of the court process due to the earlier cases filed and dealt with i.e. HCCC No. 2409 of 1996 and HCCC No. 1579 of 1994 and for all those reasons, it sought dismissal of the suit.

The third, fourth and fifth respondents filed joint defence which was a short defence in which they denied the main part of the plaint. At paragraph 10 of that defence, they denied that the fourth and fifth respondents were appointed as Receivers and Managers by the second respondent and asserted that they were validly appointed by the third respondent in accordance with the provisions of the Debenture Trust Deed on 7th July 1994. They also deny having been paid Ksh.26 million and stated that the true figure paid to them was Ksh.23,940,000/- which included fees upto 30th April 1997. They denied the allegations that that fee represented an unconscionable bargain and was void and also denied that that fee exceed fee paid on a *quantum merut* basis and they ended up also seeking the dismissal of the suit.

After those pleadings, it would appear that the parties did not agree on issues to be decided upon by the court although each appellant drew and filed their considered issues and the respondents also filed theirs. Apparently those were not filed by each appellant but by the appellants on one hand and respondents on the other hand. Whatever happened, the learned Judge eventually heard the case which took a fairly long time to complete. The appellant's side called four witnesses who were the second appellant, Dr. Charles G. Otara, Barrack Onyango Amolo who was dealing with the implementation of Foreign Investments Act, Chapter 518 Laws of Kenya and was also dealing with Companies Act particularly as pertains to allotment of shares to non-resident body corporation and transfer of such shares at the Ministry of Finance, Hezron Kamau Waithaka, a Senior Partner with Waithaka Kiarie and Partners – Certified Public Accountants, and Gabriel Ayongo who was employed by the second respondent as from 1992 to 1998. On the side of the respondents Peter Julian Hime, who featured prominently as respondent's advocate and who was alleged to have acted for the appellants to their disadvantage and without advising them to seek their own independent legal advice, gave evidence as DW_1. The other two were Monica Mrika Exlinghagen (DW_2) who was the legal officer in charge of the project LTI Kisii Safari Ltd and DEG, and Schardinger Hanfred who took over as second respondent's Chief Officer from one Hedderich Wolfgang. The hearing started on 22nd January 2002 and final submissions were made on 27th July 2007 over five years later. In a lengthy judgment delivered on 26th October 2007, the learned Judge of the superior court (Mwera J.) who framed eighteen issues and considered each issue in turn, concluded:-

"After all the foregoing, this Court concluded that the plaintiff had not proved their claims. Their suit must fail."

and thus dismissed the appellant's suit with costs to the respondents.

The appellants felt aggrieved by that judgment and hence this appeal premised on twenty (20) grounds of appeal which are on the main that the learned Judge misapprehended the nature of the case that was before him; that the appellant's submission on both facts and the law were not adequately considered; that whereas the appellant's case was based on the exceptions to the doctrine of the sanctity of contract, the learned Judge failed to consider those exceptions such as that the subject contract was procured by economic duress and was therefore null and void and that the terms of the subject contract were unconscionable; that the terms of the contract of lending and management between the first appellant and the first and second respondents were unconscionable and unenforceable and were procured by economic duress; that the learned Judge failed to appreciate that in the rule in ***Marshalls Valve Gear Co. vs. Manning Co. (1909) 1 Ch. 267*** there is no need for a board of directors resolution to commence and proceed with a suit; that the learned Judge erred in basing his judgment on the proposition that

shareholders or potential shareholders and non shareholders can contract out of the majority principle in the Companies Act; that he erred in holding that the doctrine of economic duress did not apply to the management agreement, the alteration of the Memorandum and Articles of Association of the first appellant, the loan agreement, the co-operation agreement and Debenture Trust Deed; that the learned Judge erred in failing to apply the proposition that a lender or a bank is responsible for the actions of the receivers and managers appointed by him under its Debenture Trust Deed; that the learned Judge erred in law in failing to hold that there was a conspiracy between the first and second respondents to deprive the first appellant of its property and its business; that the learned Judge failed to consider, the conflicting interest of the appellants and the second respondent created by the appointment of the second respondent as the manager of the first appellant's business during the term of the loan; that the learned Judge contradicted himself in three holdings to wit as regards whether or not the firm of Kaplan & Stratton Advocates acted for the appellant as stated in the first respondent's defence, and in stating that he was not asked to find that any of the reports gave the correct position and also finding that the financial position of the first appellant had to be known and directing the firm of Price Water House to furnish accounts as the purported receivership could not last for ever and finally that having noted that Merss Kaplan & Stratton Advocates admitted having acted for the appellants, to some extent, nonetheless held that they advised the appellants to seek independent legal advice; that the learned Judge erred in fact in preferring the report of Price Water House to that of Bell House Mwangi Ernest & Young to that of Waithaka Kiarie & Mbaya on two grounds which were factually incorrect and in preferring the evidence of the first and second respondents on financial status of the first appellant to that of Hezron Kamau Waithaka, in failing to examine the acts of the first and second respondents notwithstanding that one, Wolfgang Heddrich, the Chief Executive of the second respondent was a former employee of the first respondent, in holding that the first and second respondents did not induce insolvency of the first appellant, in holding that the first respondent's loan was not repaid by the second respondent, and in rejecting the evidence of the first appellant's accounts by Hezron Kamau Waithaka; that the learned Judge erred in rejecting the appellant's evidence that there was conspiracy by the first and third respondents and second respondent to enable second respondent to fraudulently take the first appellant Kaskazi Hotel under guise of a contract of lending and a management contract; that the evidence of the appellants that second respondent siphoned the hotel revenue and refused to render any accounts to the appellants was not considered; that the court should have considered that the first appellant's hotel was patronized by tourists from Germany where the first and second respondents were domiciled where revenue of the first appellant was banked; that the learned Judge failed to determine the financial position of the first appellant both at the time the fourth and fifth respondents were appointed as receivers on 7th July, 1994 and at the time of the judgment on 26th October, 2007 and lastly erred in rejecting the appellant's prayers for orders that the respondents do supply to the appellants the accounts of the first appellant's business as he should have done.

The second respondent filed notice of grounds for affirming the decision in which it raised four matters as follows:-

"1. That the suit before the superior court was time barred as regards any alleged cause of action for conspiracy between the 1st and 2nd respondents.

2. That the suit before the superior court disclosed no reasonable cause of action against the 2nd respondent.

3. That the suit before the superior court was res judicata as the issues therein had been the subject of HCCC No. 1579 of 1994 Dr. Mariane Otara vs. LTI Kisii Inns & 4 others, which had been instituted by the 3rd appellant and HCCC No. 2409 of 1996 Dr. Charles Gekondi Otara vs. LTI Kisii Safari Inns & others, which had been instituted by the 2nd appellant.

4. That the matters in question in the above two suits having been the same as the matters in question before the superior court, the suit was in any event vexatious abuse of the court process and ought to have been dismissed.

Before us, Mr. Nowrojee , the learned counsel for the appellants who teamed up with Mr. Mogaka,

addressed us at length on the grounds set out above. The best I can do is to set out in this judgment an abridged version of his submissions which was that the provisions of the new Memorandum and Articles of Association which provided at ***article 81*** that the second respondent was a shareholder as well as manager of the first appellant company was in breach of the provisions and purpose of the Companies Act, and the provisions for annual meeting of the first appellant's shareholders were also not proper as it gave one shareholder the power to appoint a director and that usurped the process of the annual meeting of the company. He further submitted that the provisions stating that the quorum of the Board of Directors would not be realized unless the second respondent's representative was present was also not proper in law. That provision was disadvantageous to all appellants who were the majority shareholders. In his view, this disadvantageous arrangement is blamed on the firm of Kaplan & Stratton, Advocates who prepared the Memorandum and Articles of Association for first appellant in that skewed way and failed to advice the appellants to seek independent legal advice before executing the document as the same firm of advocates purported to act for the appellants as well notwithstanding that the parties had conflicting interests. Mbaluto J. had, in another ruling, vindicated the appellants on the same issue. Mr. Nowrojee submitted that the learned trial Judge of the superior court did not consider that aspect of the complaint and accepted evidence of Mr. Hime an advocate in that firm who gave evidence for the respondents; that was in his view, an error in law as in accepting Hime's evidence the learned trial Judge overturned Mbaluto J's decision. He further contended that the scenario amounted to undue influence upon second and third respondents and referred the court to several decided cases to which I will as necessary refer and consider hereafter. He also felt that with Hime representing the respondents and with the respondent not having the advantage of an independent adviser on matters of law, the bargain was unconscionable on the part of the appellants as the advocate put higher duty to the first and second respondent than to the appellants, as indeed, according to him Mbaluto had found that Hutchison was not a proper person to advice on the matters that were obtaining. In his view, the learned Judge erred in holding that as the appellants had signed the various agreements and started to operate the hotel, he was not disadvantaged. In this case, Mr. Nowrojee submitted that the lender, first respondent nominated manager and who also runs the business, appointing the receiver and all. At one time when the first respondent wanted to sell the property, he decided to sell it to the manager and all this was not normal. He observed that the respondents never called any witness on the crucial issue of accounts despite their indication earlier that they would do so. This, he said was important as the first respondent was in effect the lender, the manager and the receiver all in one and thus the relationship was protective and all that evidence should have been appropriately weighed but was not so weighed by the learned Judge. He castigated Mr. Hime for failure to advise the appellants appropriately or to advise them to hire a legal adviser on the many issues or to stop acting for any of the parties for, arising from his improper handling of the matter, the entire business and control of the first appellant was placed into the hands of the first respondent and the second respondent notwithstanding that the second and third appellants were the majority shareholders. He further contended that receivers were appointed on the basis of Debenture Trustee Agreement which was one of the agreements not properly entered into by the appellants and prayed that as debenture deed was not executed through free will of the second appellant, it should be set aside and thus the receivers, upon its strength be removed as the deed was an unconscionable document. The failure of the second respondent to service the loan was by extension the failure of the first respondent who appointed the second respondent and who ensured that they controlled the first appellant to the detriment of the second and third appellants who were the majority shareholders but had no hand in the control of their business. He also submitted that the first appellant was put into receivership on wrong financial basis and appointment of receiver was not independently done. Report from Benson Mwangi accountant on the state of the first appellant's true financial position should have been considered but it was not considered, instead the first appellant was put on receivership on report from Cooper Lybrand & Trust Corporation who then appointed Sinclair and Shah as receivers. Firms such as Waithaka Kiarie Mbaya and Company prepared and produced reports favourable to the appellants but those were ignored. He said the court also did not consider the effect of the two accounts withheld in Germany; the manager's fees and other matters such as missing documents and the fact that the appellants could not access the business. On the whole, Mr. Nowrojee contended that there was no reliable accounts upon which the superior court could uphold the appointment of the receivers as being bona fide and that it was not proper for the third respondent to appoint the same people whose management had led to the first appellant being put in receivership to be the receivers of the company. Thus in his view, the receivership of the first appellant was an induced receivership as management was in breach of loan agreement, and in breach of management

agreement. He faulted the learned Judge for rejecting Waithaka's report on grounds that it was not authorized by the management whereas the report was availed when the first appellant was already in receivership and there was no board in existence. Mr. Nowrojee took us through several parts of evidence to demonstrate that no proper case was made out by the first respondent for putting the first appellant in receivership and that in fact the available evidence militated against the action. For example, Waithaka said in cross-examination that the fifth respondent gave him permission to carry out audit of the accounts and the fifth respondent did not give any evidence rebutting that. That in effect meant, according to Mr. Nowrojee that the ground given by the learned Judge for rejecting Waithaka's report was non-existent and added that since 1994 when first appellant was put in receivership, no proper accounts reports have been availed and the management of first appellant continues on abstracts of accounts only which are in themselves not reliable at all but show that the receivers should not have been appointed and in any case, as on the date of the learned Judge's decision, the receivership had been in place for over thirteen (13) years. As it was not in accordance with the law, Mr. Nowrojee sought its lifting as it was clear that putting the first appellant in receivership was done in bad faith. He also submitted that the equity of redemption had been clogged as at no time had the first respondent given to the appellants a specific figure of the amount due so as enable the debtor to reduce the mortgage account. The first respondent had a duty to give accounts before the receivers were appointed and after the receivers were appointed, the receivers i.e third respondent together with fourth and fifth respondents were under duty to give that account but they failed to do so. Further, he contended, the second respondent's action of paying all local loans and not paying the German loan (i.e. for the first respondent), was not proper. It was in any case illegal for a local firm to hold money in foreign bank without complying with certain requirements. Mr. Nowrojee ended his submissions by submitting that the requirement of the law as it stood then that the payment for shares in the local company, if by a foreigner be made in foreign currency, was not complied with. Mr. Mogaka later held his brief and also made submissions which were *inter alia* that the first and second respondents breached the provisions of ***section 8*** of the then Exchange Control Act before it was repealed as they paid salaries to some staff in Germany and they also retained accounts in Germany and also paid rebate for companies in Germany before the money arrived in Kenya. Further he said there was breach of Foreign Investment Act No.5. All these breaches of the law were countenanced by the trial court. This was not proper as it is trite law that courts do not sanction illegality and that the doctrine of estoppel cannot operate against statute. In his view as Cooper & Lybrand Audit report which was used to put the company into receivership was not put to evidence, there was no basis in the record to have receivership which was in any case put in place through mischief continue in existence. He expressed the appellant's fear that keeping the receivership in existence for now well over fifteen years is perhaps so as to enable the respondents sell the business and properties to the second respondent under the pretence that the debt owed to first respondent is not being paid whereas they do not avail proper accounts on the monies received and how it is used. He submitted that as in this case the receiver is not acting in good faith, the court is in law entitled to intervene. He ended up his submissions by stating that the respondent should not be allowed to reap the benefits of their own wrong doing and asked us to allow the appeal with costs.

Mr. Chacha Odera addressed us on behalf of the first, third, fourth and fifth respondents. He opposed the appeal and also highlighted his grounds confirming this judgment of the learned Judge. He also addressed us at length and I can only produce a summary of the same. He submitted that the second and third appellants disclosed no cause of action against the respondents as throughout the trial, the dispute was between the first appellant and the respondents only. Management agreement is between the first appellant and the second respondent and the second and third appellants are not party to it. Loan agreement is between first appellant as borrower and first respondent as lender- the second and third appellants are not parties to it. It was only the co-operation agreement where the second and third appellants are parties but that agreement was not, in Mr. Chacha's view, the main subject of the dispute between the parties as it merely regulated the shareholding relationship between the second and third appellants and the respondent. In his view, the loan agreement provides at ***clause 16 (3)*** for severance of the loan agreement and applies to the lending of D. M. 5,000,000 and contemplated that if a clause was found to be non-binding then parties would replace it with another so as to secure the lending. He contended that that provision was to give effect to the intention of the parties. He referred us to ***articles 1*** and ***3*** of the agreement and submitted that the first appellant accepted the loan on conditions set out there and thus the first appellant was under obligation to ensure compliance with conditions set out at ***article 3, clauses 2*** and ***3***. As the first appellant failed to comply with those conditions, it cannot ask the court to

declare the agreements illegal so as to get away with it. He further submitted that the applicant's contention that when they signed the various agreements, they did so without the advice of an independent counsel cannot stand because there was no evidence to show they were compelled to use advocates they used and in any case they had not sued the alleged advocates and those advocates were not parties to the suit. The reason the second appellant signed the agreement was as the second appellant said in evidence and that was because he needed the money. The appellants did not raise the issue of lack of independent counsel as is now raised in this appeal. In the superior court they did not raise it and all they asked for was disqualification of that advocate. In that scenario, Mr. Odera maintained the learned Judge of the superior court could not be faulted. He added that the appellants amended Memorandum and Articles of Association were on their own. They were not tied to the agreement and could have opted out of it if they wanted. Equally second appellant could have refused to execute the loan agreement if the co-operation agreement did not meet his aspirations. The appellants even went as far as accepting that the court would be Cologne, in the Federal Republic of Germany. He submitted further that even in a letter written by the first appellant to first respondent, they agreed to meet certain payments even though money had been disbursed. The Debenture Trust Deed made clear provisions to the effect that if the appellants defaulted in the repayment of the loan, the first appellant would be put into receivership. He thus contended that the learned Judge was plainly right in refusing the appellants prayers, as in any event the doctrine of overriding objective could only be applied within the law. In this case, the parties contracted within the law and court's duty was only to enforce the law. There had been litigation on receivership and he cited HCCC No. 1579 of 1994 and HCCC No. 2409 of 96 and said the suit was in that respect *res judicata*. On the complaint that equity of redemption was clogged, Mr. Odera submitted that the appellants never asked to redeem the loan and so that complaint cannot stand. Equally he submitted that the complaint that the respondents intend to take away the suit property is not based on any evidence and should be ignored. Further Mr. Odera said as the first appellant had not paid the loan outstanding as was spelt out in the loan agreement, the first appellant had the power to appoint a receiver and the receiver had powers under the management agreement to appoint a Manager. It was therefore proper for the third respondent to appoint a manager under that agreement and those appointed were not trespassers to the subject property and felt that the main issue that was before the superior court was the appointment of receivers and not the management of the receivership. On the appellants' allegation of conspiracy by the respondents, he submitted that the appellants had the duty in the superior court to allege that conspiracy and prove it, but in this case, the appellants failed to prove conspiracy as the second appellant readily admitted in his evidence that he read and proved all agreements before he executed them. Those agreements were to lend money and secure the money lent and were not agreements to conspire to take over the first appellant's property in any way and, in his view all the respondents did were pursuant to the provisions of the agreements and no more. ***Article No.9*** of the loan agreement stated that appointment of receiver depended only on whether there was default in repayment and not on the financial management of the business. On the role played by Mr. Hime of Kaplan and Stratton, advocates, Mr. Odera sought to correct the impression that Mr. Hime prepared the loan agreements, corporation agreement, management agreement, Debenture Trust Deed and Technical Assistance Agreement. He said that was not correct as Mr. Hime's role was only to check the agreements. He did not prepare them. He said in evidence that they were made in Germany. Monica confirmed that evidence. The terms of the agreements were drawn by the parties after negotiations as witnessed by letter of offer in the record. In any case, Mr. Odera argued, as Kaplan and Stratton, advocates had not been joined in the suit, it was not proper to complain against them in their absence. Thus he submitted that the deal was contractual, and the second respondent knew the effects of each agreement but as he wanted money he signed the agreements. There was no conspiracy in the deal. The parties were each bound by their respective obligation under the agreements. On default, he submitted that second respondent agreed they had not serviced the loan and so appointment of a receiver became inevitable. On Waithaka's report, Mr. Odera submitted that Mr. Waithaka, in his evidence conceded that a debenture holder had a right to appoint receiver any time there was default in repayment of the loan and all that was important was whether there was default. In this case, he maintained all that was important for first respondent was to see whether there was default and if so, to take action of appointing a receiver and to him Waithaka's report dealt mainly with management affairs of first appellant which were not of importance to the first respondent of which main concern was to recover its money lent to the appellant. First respondent's rights to appoint receiver crystalised upon default, Mr. Odera added. He distinguished the ***Royal Bank of Scotland vs. Elridge*** ***(No.2) (2002) 2AC 773*** which was cited several times by Mr. Nowrojee in support of the appellant's case being a case between husband

and wife and submitted that the undue influence cited in that case could not fit into the facts of the present case where the second and third respondents were at all times at liberty to take appropriate action on their own volution or to hire services of a legal adviser. In this case, Mr. Odera further added, the second and third appellants entered into agreements fully aware of the circumstances and the case that was before the court was not a case against a solicitor in any event. If they felt they wee wrongly advised. Mr. Odera said, they should have sued the advocate directly for professional negligence. The second appellant said he signed the agreements because he wanted money, so Mr. Odera could not see when the issue of undue influence came into the matter. He said this was not a case of trust as there were two people with different interests one had interest in lending and the other had interest in borrowing. If the borrower was misadvised in any way, he could only see the advocate who misadvised him and not the lender. Here the lender had no duty of care to the borrower as each sought or should have sought its own advice on the transaction. He ended his argument by saying that all the cases relied on by the appellants were distinguishable and could not apply here neither could the recent amendments to ***section 3*** of Appellate Jurisdiction Act apply here as the appellants have argued their case on appeal on new matters that were not canvassed before the trial court.

Mr. Njoroge Regeu the learned counsel for the second respondent in another lengthy submission also opposed the appeal. In a summary, his main points were that that the learned trial Judge dealt with everything that was before him meticulously and arrived at the only conceivable conclusion which was that the appellants had not made out a case in their favour. The second respondent set out four grounds why it felt the decision should be affirmed. Mr. Regeu cited these grounds in his submissions. These were that the suit was time barred as regards alleged cause of action for conspiracy between the first and second respondents; that the suit disclosed no reasonable cause of action against the second respondent; that the suit was *res judicata* in view of HCCC No. 1579 of 1994, and HCCC No. 2409 of 1996, the first having been instituted by the third respondent against the first appellant and four others and the second having been instituted by the second appellant against the first appellant and others and that by virtue of those suits, the suit that was before the trial court and which is the subject of this appeal was vexatious and an abuse of the court process and should have been dismissed. He submitted that the second respondent's duties were confined to managing the hotel business only and not the entire first appellant company which was a limited company. The second and third appellants were educated people and none could take advantage of them. The second respondent started running the hotel in 1991 and ran it till 1994 when receivers came in. When receivers came in, they asked the second respondent to continue running the hotel business and they continued till about four or five years back, but he contended they were no longer there. Receivers were appointed pursuant to the provisions of Debenture Trust Deed issued to the third respondent who in turn appointed the fourth and fifth respondents as receivers. In his view, the appellants introduced before us brand new arguments that were never canvassed before the trial court. These new matters are such as economic duress, undue influence, all matters that were not before the superior court. The law does not allow this, Mr. Regeu submitted. He added that the overriding objectives do not allow parties to open up their case a new on appeal and he cited the Appellate Jurisdiction Act and at last two decided cases in support of that contention. He contended that the second and third appellants started the saga. They approached the first respondent for a loan and the second respondent to manage the hotel business for them. The loan agreement was willingly signed by the second appellant and it spelt out conditions of the loan which were clear. That loan agreement, Mr. Regeu contended, carried normal conditions that any borrower is expected to comply with and were not unique to the first appellant; the second and third appellants not being the borrowers at all. They and second respondent, he conceded, were interested parties as they had shares in the first appellant. He also submitted that ***Article 16 (3)*** of the loan agreement provided for severance in case that became necessary, but that the appellants had not pointed out any defective clauses and had not made any attempt to seek remedy for such alleged defective clauses. He went on to say that in his evidence, the second appellant stated that he signed the agreements after he read and understood them, and although he said at one point that he felt before he signed the loan agreement that it was one sided, he nonetheless voluntarily signed it as he needed money, and that he accepted that he had adviser namely a Mr. Hutchison, and that they agreed to go to court in Cologne in Germany. They were not forced to accept that. He invited us to accept that a court of law cannot rewrite a contract for parties. He contended that no proof was availed for the allegations of undue influence, economic duress and conspiracy. On technical assistance and preopening contract, Mr. Regeu's take was that as evidence on record show that second respondent was not paid the

money in the agreement, the appellant could not rely on the doctrine of equity. On corporation agreement, he said the shares allocated to second respondent was as a motivation to enable it manage the business effectively and evidence showed that it was the second appellant who approached second respondent to manage the hotel as the first respondent insisted on professional manager to be in place before it could advance finances for the project. He referred to page 192 of the record and submitted that the way the money was to be shared out was fair and demonstrated that the second and third appellants would get the full value for his land. In fact, that there is evidence that management was renewed only went to show that management was efficient, according to Mr. Regeu. The agreement provided for voting rights and was therefore not unfair nor oppressive. He referred us to several parts of the agreement such as those providing for arbitration and dividend policy, and submitted that the agreement was not unfair at all and problem came only when the company was unable to make profits and pay dividends. On Debenture Trust Deed, Mr. Regeu submitted that the second respondent was not a party to that trust deed, but he took us through several provisions and ended by submitting that right to appoint receivers was imbedded on that trust deed and so appointing the receiver as was done was not out of tune with the provisions of the deed but he also contended that the suit had nothing to do with the conduct of receivership as all the complainants have been only against the appointment of the receivers and the urge to have them removed. The allegations made before us of misconduct of the receivers were new matters not canvassed in the superior court. On the management agreement, he maintained that the second respondent managed the hotel business entrusted to it in the best possible manner. The owner i.e. first appellant had a right of inspection but it never utilized that right properly. On Memorandum and Articles of Association, Mr. Regeu said second and third respondents together had majority shareholding with second respondent being the chairman of the Board of Directors throughout the relevant period and had a second and casting vote and thus would break any deadlock anytime problems arose at the Board. The provision in the Articles of Association that quorum of the board meeting could not be reached if the second respondent was absent was based on sound commercial principles as there were three directors with the second and third appellants being husband and wife which meant the two could arrange meetings, pass resolutions without the second respondent if such a clause was not entrenched in the Articles of Association. He submitted that at General meetings voting was by a show of hands and thus the second and third appellants being the majority could always carry the day notwithstanding the provisions for the quorum in respect of the Board of Directors' meetings and thus no breach of Companies Act was made by the respondents. In his view, the second and third appellants, being well educated and doctors in medicine could not be easily manipulated as they wanted the court to believe. The allegations of economic duress and undue influence could not apply to them as they were in any case astitude business people and he felt that Mbaluto J's ruling was taken out of context. He referred to evidence of Mr. Hime before trial court and said the appellants were advised by Hime to seek independent legal advice and were being advised by Mr. Hutchison. In law, he said, it was the duty of every party to a transaction and to a contract in particular to seek its own legal advice and none stopped the appellants from seeking their own legal advice. It was not anybody's duty to direct them to go for independent legal advice. In the case where duress is pleaded, it must be shown that the payment made on the subject contract was not as a voluntary Act, it must be shown that there had been illegitimate pressure, the practical effect of which is compulsion or absence of choice. Appellants failed to demonstrate this, he said. He went on and submitted that the appellants had alternative course open to them in that they could have gotten the money they required from elsewhere but they found it unnecessary to avoid the contract. The appellants did not claim actual undue influence but rather relied on presumed undue influence which was not proved. He submitted that in all cases of undue influence, the relationship between the parties must be personal, a scenario that never obtained in this case as the second appellant admitted in evidence that before he signed the agreements, he read them and understood the contracts but he signed them under pressure because he needed money. Mere inequality of bargaining power cannot be enough to set aside a contract willingly entered into. They had a duty to exercise due diligence and thus to seek legal advice. In distinguishing the case of ***Royal Bank of Scotland Plc vs. Etridge*** (No.2) to which I will refer hereafter, Mr. Regeu said that case involved marital aspects and also dealt with eight consolidated appeals before the House of Lords unlike the case before us where the only matter that put second and third appellants on one hand and second respondent on the other side together was only that they were directors of first appellant and shareholders in the same company. In his contention, the principles of the Etridge case do not and cannot apply to this case. As to second respondent's share, he submitted further that the shareholding by the second respondent was proper in law as the second respondent paid for the same shares, in a manner

approved by the then existing law and there was certificate from the relevant authorities to that extent as indeed the funds for purchasing the same were sourced from Germany. He referred us to several parts of the record to demonstrate that point. That money Kshs.30,000,000/- for purchase of shares was brought in foreign currency i.e. DM 19,000/- which was equivalent of Kshs.30 million and he dismissed the evidence of Barack Onyango Amolo (PW2) as unreliable. He submitted that the Kshs.30,000,000/-, was for purchase of shares as per agreement it was not a loan and there was no legal basis for treating it as a loan, as it was an investment which the court has a duty to safeguard. On the allegation of mismanagement of business and conspiracy to take over the business, by the second respondent, Mr. Regeu submitted that these were not proved as the second appellant had carried out its assignment to the hilt. He maintained that payment of Kshs.800,000/- to Cooper Lybrand Ltd was an obligation that was properly explained; allegations that rebates were given were fully explained as well as those of alleged forged cheques. He dismissed those allegations as unfounded and misplaced and referred us to penultimate paragraph of a letter dated 15th October 1993 from the third appellant to the second respondent in which the former thanked the later for buying the first appellant take off in business. He also referred us to the minutes of the meeting of directions of the first appellant held on 4th February 1993 and invited us to accept that the allegations of mismanagement had no basis. He drew our attention to the evidence of Schardinger Hanfred (DW3) on the number of accounts and manner of operating them as was outlined by the management agreement –these were owners account and operative account and that the second respondent was only operating operative account only and that was proper as the arrangement did take care of emergency cases and cases that required finances every now and again. He also referred to weekly reports and monthly reports on the record as well as other documents in the record and submitted that management was properly done. The reports were produced on regular basis and were duly signed by relevant people such that the documents clearly showed the second respondent could not be faulted on the management of the first appellant company. On the allegations that second respondent did not pay loans to creditors as was required, Mr. Regeu's view was that payment of loan was to be done by first appellant and not by the second respondent which was only a manager of the first appellant's business and shareholder of the first appellant. All payments were to be determined by the owner, he contended. On allegations of holding banking accounts in Germany by the second respondent, he conceded that there was account held in Germany, but he stated that was done with the knowledge, consent and authority of the second appellant and he executed documents for that transaction. In fact according to Mr. Regeu, the second respondent opened the alleged accounts himself in the name of the first appellant. There were three accounts in Germany and the second appellant was fully aware of all these accounts and was signatory to them or gave authority to seek other signatures as the third account was opened in the second appellant's personal name Dr. Charles Otara. There was thus no impropriety in respect of the accounts in Germany and no fraud existed in the opening and running of those accounts. He also added that registered office for the first appellant remained in Kenya and was never transferred to Germany as was alleged by the appellants although some dealings took place in Germany. Waithaka Kiarie Mbaya & Company, auditors were appointed unilaterally by the second and third appellants but the legitimate auditors remained Price Water House and the same auditors warned the first appellant company of the need to inject more capital into the business if winding up was to be avoided, but the second and third appellants refused to inject any more money into the business and that is what caused insolvency, Mr. Regeu asserted. In his view, the second appellant sought services of Waithaka Kiarie Mbaya & Company so as to get some more loans as a result of a favourable report. He said the learned trial Judge dealt with the report fully as was required of him and arrived at a proper conclusion on the report which was inevitable and that was, according to Mr. Regeu, to decline to rely on the report. On the overriding objectives, Mr. Regeu submitted that the principle can only benefit a person acting within the law and not otherwise. In this case he contended that the appellants, having brought into this Court new issues not canvassed before trial court, cannot hope to have the overriding objectives assist them and he referred us to several authorities in support of his argument. On illegality he said the appellants were part of what went on and cannot benefit from any illegality if any existed as equity cannot allow one to benefit from his own illegal action. As to whether the directors of a limited liability company can move to court without a resolution of the company, Mr. Regeu said it can only happen in a case where the majority shareholders refuse to pass a resolution, and then the minority shareholders can move to court without the company resolution. He denied any conspiracy and concluded his submission by asking us to uphold the sanctity of private contracts and assure foreign investments by dismissing the appeal.

As I have stated, the learned trial Judge (Mwera J.) in a lengthy judgment covering about 64 typed pages, analysed the evidence that was before him in details and also considered the submissions by the learned counsel and after doing so, resolved that the issues that were before him in the entire case revolved around fifteen issues that were set out by the appellants from their submissions before him upon which, according to him the respondents also submitted upon. Having answered all of those issues, together with three others that he found necessary to also consider, he dismissed the appellant's case.

I have anxiously considered the pleadings, the evidence together with the accompanying exhibits, the submissions before us, the judgment of the learned Judge of the superior court and the law.

What at first appears clearly odd and revolting is the period that the receivership has been in place in this case. However, in my view, much as that appears unhappy, there is no time limit set for receivership to take, and it would appear that so long as the debt is not cleared, receivership can continue. I do think this is not a proper thing but my hands are tied by the law and I must move to other avenues to see if the circumstances and facts of this case are what have necessitated that obnoxious occurrence.

The thrust of the appellant's case as I understand it is that the second and third appellants, though medical practitioners by profession, wanted to venture into hotel business as well. They acquired land in their name at the well known tourist attraction area of Kenya namely the coast part of Kenya, and they obtained finances in Kenya for development of a tourist hotel which after putting up its structures, they needed more money for full completion and operation. They did not have this money locally and whereas they got it from the first appellant, the conditions under which they got it were so onerous that they in fact landed into serious loses as a result of those conditions. They blame their predicament on their lack of independent legal advice which they say was perpetrated by misleading advice by an advocate from Kaplan & Stratton, Advocates, Mr. Hime to whom they were introduced by the first appellant and who purported to help them but all along remained advocate for the first respondent and did not advise them as he should have done, according to them to seek independent legal advice elsewhere. As a result of that failure to have independent legal advice and through their ignorance, they replaced the original Memorandum and Articles of Association for the company they originally contemplated to run the hotel namely Kisii Safari Hotel with a new Memorandum and Articles of Association having a new name of a company with entrenched articles some of which drastically affected the shares each was to hold, introduced new shareholder who obtained the same shares illegally by not paying for them as the law required and provided that a manager be appointed who would hold some shares and would have to be at the Board meeting before the meetings could be said to have quorum to enable such meetings pass any valid resolutions. Further, as a result of the introduction as a manager of the second respondent, the appellants were left with no powers to supervise the business which they conceived as theirs and as if that was not enough, they lost financial control of the second respondent who according to them opened some accounts in Germany and was giving rebate to tourists most of who were from Germany, in Germany. In the appellants view, as a result of this mismanagement of the business and finances, as well as lack of proper co-ordination, the first appellant was alleged to be insolvent at a time when it was not insolvent, and a receiver was appointed when it was not necessary to appoint one. The appellants-particularly the second and third appellants claim that the advocate, Mr. Hime unduly influenced them into entering in such a loan agreement and other agreements such as management agreement, co-operation agreement, technical agreement and debenture trust agreement. In their view, there was undue influence upon them by the respondents through the advocate Mr. Hime to whom they were sent by the respondents. There was also economic duress upon them in that they were told that they had to accept the conditions spelt out in those agreements if any money in the form of loan was to be released to them. They also saw the mismanagement of the business and the activities of the second respondent in opening accounts in Germany, giving rebate to tourists there and using biased financial accounts reports as ways of ensuring insolvency of the first appellant and thus to them, the receivership was an induced receivership and hence their prayer for several declaratory and injunctive orders as well as for supply of various accounts to them by the respondent.

On the other hand, the respondents maintain that the appellants sought a loan from the first respondent and as condition for such a loan, the first respondent needed to be assured that the same loan would be fully repaid, and to that extent, it required to be certain of the management of the business for which the

loan was sought to have certain conditions fulfilled by the appellants for the grant of that loan. These conditions were spelt out in the loan agreement which was prepared in Germany and sent to Mr. Hime, their advocate for perusal and advice before Mr. Hime passed it over to the appellants. The appellants signed it on their own volition having perused them and having satisfied themselves that it was proper. It is the respondents' case that they had no duty supplying second and third appellants with independent legal advice as in any case the second and third appellants were well educated persons and they had advicer in a Mr. Hutchison who was well advanced on such matters. Further, the respondents argue that the provisions that were later found to be offending provisions were willingly accepted by the second and third appellants and these were, in that loan agreement provisions for severing any conditions that were found inapplicable and that window should have been used in case any conditions were found inappropriate. Further the respondents say that the business was properly managed by the second respondent in accordance with the agreements and as to bank accounts in Germany, these were opened with the active concurrence of the appellants and documents for the same were duly signed by the appellants. The second respondent admitted that rebate was paid to tourists from Germany in Germany, but stated that that was necessary to attract more tourists. In their view, receivership was genuine as the first appellant was insolvent; debt to the first respondent remained unpaid and the appellants refused to inject more capital into the business. These resulted into insolvency and hence putting into effect the Debenture Trust Deed Agreement which gave the first respondent power respondent to appoint the third respondent a receiver and the third respondent appointed fourth and fifth respondent receivers. Those decided that the second respondent would continue to manage the business. Thus in their view, the appellants willingly and without any coercion entered into a contract for loan to be given to the first appellant. They also entered into consequential agreements such as management agreement, co-operation agreement, technical agreement and debenture trust deed agreements, and they were bound by the same agreement. They cannot, claim according to the respondents that they had no independent legal advice and thus were subject of undue influence and economic duress by the respondents through their advocate as it was not respondents' duty to ensure they had independent legal advice and in any case they were not unduly influenced because they were well educated people and they entered into the contracts on their own and further, they had that independent adviser in Mr. Hutchison. As to whether the shares held by the second respondent were properly paid for, my understanding is that the respondents maintain they paid for the shares in the manner required by the then existing law and there was no illegality on that. The respondents also state that in any event the matters such as undue influence and economic duress now being raised on appeal were not raised in the trial court and so that court cannot be faulted for its decision and in law those matters should not now be raised on appeal. There is also the issue that the suit that was in the superior court was *res judicata* as two other suits had been filed and dealt with in one way or the other and the other issue that the appellants brought the suit without a resolution of the company and so the suit should have been dismissed by the trial court. Lastly, issue of limitation of actions was not taken up before us and I say no more on it.

This is a first appeal. In law, I am duty bound to revisit the evidence that was adduced before trial court afresh, analyse it, evaluate it and arrive at my own independent conclusion provided that I bear in mind at all times that the trial court had the advantage of seeing the demeanour of the witnesses and hearing them and I must give allowance for that. In the well-known case of ***Selle and another vs. Associated Motor Boat Company Ltd and others (1968) EA 123,*** Sir Clement De Lestang V.P. had this to say:-

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Seif vs. Ali Mohamed Sholan (1955), 22 EACA 270)."

I have set out above in a summary, the facts of the case that was before the superior court and my understanding of the issues that the court was being asked to deal with. I have done so because although

the learned Judge proceeded by way of the issues as were framed by the appellants, those issues, I note, were not endorsed by the respondents and that being so, it appears to me that the issues that were to be resolved by the court remained at large and had to be crystallized from the evidence that was adduced at the trial.

In my view, the starting point is to consider whether the suit was *res judicata*. As I have set out above, this was an issue raised in the notice of grounds for affirmation of the trial's court's decision. The issue was canvassed before the trial court but that court did not make any decision on it though the learned Judge was fully alive to it. He dealt with it as follows:-

"ISSUE 14: Per Judicata

The 1st, 3rd, 4th and 5th defendants submitted that HCCC 1579/94 and HCCC 2409/1996 which the 2nd plaintiff filed against the 1st plaintiff (DEG) with or the two defendants concerned the same subject matter as in this suit. And that whatever the outcome of these suits, and they were said to be in favour of the 1st and 2nd defendants, the plaintiff had their day in court and so "quieting of actions" should now came into play. Litigation must stop. With no more said about the importance of the rule of res judicata this court has gone into the whole of this suit for five years and has chosen to determine it on merits. That ends there."

Perhaps what the learned Judge was alluding to is that such legal points as the issue of *res judicata* should have been raised as a preliminary issue, dealt with and finalized before the hearing of suit commenced. He may very well have been saying that as he had gone though the entire hearing it would not have been proper to turn around at the point of determining it fully and in the judgment and proclaim it *res judicata* thereby throwing all that work by the parties, their advocates and the court into the dustbin. To that extent, I do agree with him. I may add that in any event the record shows that in HCCC No. 1579 of 1994, the plaintiff was only the third appellant, and the defendants were the first appellant in this appeal, together with the first, second and third respondent. The fourth and fifth respondents were not parties to that suit and in that suit the prayers sought which were in all thirteen, (13) were to an extent different from the prayers sought in the suit giving vice to this appeal, prayers such as that the defendants in that suit he restrained from appointing or nominating receivers and in particular from going into or remaining in or taking possession and control of the first defendants hotel (in this case the first appellant's hotel) are matters that are not the subject of the suit giving rise to this appeal, as when the suit giving rise to this appeal was filed, the same receivers had been appointed and are now the fourth and fifth respondents. Likewise, in HCCC No. 2409 of 1996, the plaintiff is one and that is Dr. Charles Gekunda Otara, the second plaintiff in the suit the subject of this appeal whereas the defendants in that case includes the first plaintiff in this case who is the fourth defendant and again in that case, the fourth and fifth defendants in the subject suit were not parties. Further, the prayers in that case were different to a large extent from the claim in the suit the subject of this appeal. ***Section 7*** of the Civil Procedure Act Chapter 21 Laws of Kenya which was in operation at the relevant time stated:-

"7. No court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantively in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same titles, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

In my view, I hold that the suit, the subject of this appeal did not fall under the provisions of ***section 7*** above and was therefore not *res judicata*. Thus although, I do feel it was not proper for the learned Judge to refuse to consider that argument by the respondents, nonetheless, having considered it as I am duty bound to do, this being a first appeal, I find that this limb of

defence had no merit and I do reject it.

The other issue was the question as to whether the second respondent was a lawful shareholder of the shares it purportedly obtained

as a result of the agreements between the parties. It was alleged that in law, the second respondent in purchasing shares in the first appellant, did not comply with the then legal requirements in that the same shares were not purchased with in foreign currency. Thus the appellants sought an order to treat whatever money was paid for the same shares as no more than a loan to the first appellant. To that effect the appellants sought a declaration that the purported allocation of 1,500,000 shares to the second respondent was in contravention of ***section 50A*** of the Companies Act and is null and void. The appellant argues that the money used for purchase of the shares was paid in Kenya Currency and not in foreign currency and this was in contravention of the provisions of ***section 50A*** of the Companies Act and thus no valid allocation of the shares to the first appellant did take place and that being the case the second respondent could not be treated as a shareholder. The second respondent in response argued that it acquired the same shares through DM 1.89 million which was equivalent of Ksh.30 million, and which was sent from Barclays Bank (Frankfurt) in Germany to Barclays Bank Mombasa in Kenya where first appellant's account was. A certificate of Approved Enterprise was issued from the Treasury and Central Bank of Kenya and thus to the second respondent, the shares were acquired properly and in an approved manner. ***Section 50A (1)*** of the Companies Act which has been repealed by Act No. 6 of 1994 provided:-

"50A (1) A company having share certificate shall not allot any of its shares to a body corporate which is not a company found and registered under this Act without the prior consent in writing of the Treasury to such allotment, and any allotment made without such consent as aforesaid shall be void."

The learned Judge of the superior court heard evidence on this issue given by Barack Onyango Amolo (PW2) and Peter Hime (DW1). Barack Onyango Amolo was an employee of the Ministry of Finance at the relevant time. He was in charge of the Administration of Cap 518 Foreign Investment Act which concerned foreign investments. He identified a Certificate of Approved Enterprise No. B/912 dated 24th April 1991 which he preferred and was signed by his senior who had passed on as on the date the suit was heard. That certificate was issued to the second respondent who bought shares in the first appellant which was a local company. He said that certificate was a conditional certificate issued subject to receiving foreign funds. According to him, the payment for shares was to be made in foreign currency. However in cross-examination, he said:-

"The Treasury gave its approval by letter form. Certificate of Approval Enterprise fell under Cap 518. It would thus be a final document. Certificate No. B/912 we issued to LTI. It was not final because it was subject to doing evidence of paying for the shares."

This is rather confusing as the alleged money had been paid through Barclays Bank Frankfurt in Germany in DM and was paid into appellant's account in Kenya. The DM amount was equivalent to Kenya Shillings 30 million. Putting into mind that it was paid to the bank in DM, can one say it was not paid in foreign currency? Peter Hime in his evidence said:-

"From looking at Doc. 4 in letter dated 11/9/1991from CBK (Exchange Control) to Chief Manager Barclays Bank Ltd; Nkrumah Road Branch, Mombasa. Referring to service letter of 9.7.1991, that Kisii Safari Inns Ltd, had received Sh.30 m being share subscription funds in respect of 1.5 m shares acquired by LTI for external services in an approved manner. I remember seeing this letter:-

By it, CBK had seen evidence of share purchase of LTI. With these two documents, CBK needed no other document in this transaction."

The learned Judge after hearing the evidence part of which is reproduced above concluded as follows on this issue:-

"On the issue of the necessary approvals, consents etc for the 2nd defendant to hold shares in the 1st plaintiff company, this court listened to evidence of Barrack Onyango Omolo (PW2) and Peter Hime, an official from the treasury and advocate for Kaplan & Stratton respectively, fully. It was satisfied that all the necessary steps for the 2nd defendant to hold shares in the 1st plaintiff were basically taken. It brought and paid for 1.5 million shares in the 1st plaintiff in a manner that did not contravene the law. If there had been any contravention the Registrar of Companies, the Central Bank

of Kenya, the Treasury or the 1st plaintiff Company itself (with Dr. Otara, PW1 in the forefront) should have raised a red flag. It was not from the 1st plaintiff a special resolution to allot the shares, enjoy the payment thereof and later turn round and impeach the act. The court was satisfied from the evidence, oral and documentary that this point has no merit and it has to fail."

I have considered this point anxiously as I must do. I do however, with respect agree with the learned Judge. In considering the totality of the evidence that was before the court as well as the behavior of the appellants and of the authorities on this matter, I cannot but accept that there was consent which founded in writing in the form of Certificate of Approval Enterprise issued from the Treasury. The condition upon which it was issued was, in my view clearly complied with when the money paid for buying the shares was paid in Deutche Mark in Barclays Bank in Germany and was channeled to Barclays Bank in Kenya which put it in its Kenya currency equivalent. In any case, I may add, as the learned Judge rightly observed, it would be against the rules of equity for the court to reverse the transactions after all parties had benefited from it much as I do agree that the principles of estoppel do not operate against the written law but here there was an approved certificate upon which all parties acted to pass a resolution allocating the shares to the second respondent. In my judgment this issue cannot succeed and I reject it.

I now move to what I see as the main thrust of this appeal and which in my view is the issue covered by several grounds of appeal which are nonetheless set out differently though as distinct grounds but they altogether raise the same question i.e., whether the several agreements namely, the loan agreement, management agreement, the Debenture Trust Deed, Amendment to the Memorandum and Articles of Association, the corporation agreement, were matters that the appellants and particularly the second and third appellants could have participated effectively without proper legal advise and whether the respondents and their advocate namely Kaplan and Stratton did advice the appellants of the need for such legal advice and if not, then the effect of the failure to do so upon the entire transaction and particularly on the receivership into which the first appellant has been placed. On the main they raise the issue of whether the normal law of contract as is normally applicable in our jurisprudence to the effect that parties are bound by their agreements and that the courts should enforce the agreements and not rewrite the agreement was applicable in this matter or whether in this case the contracts encompassed in the loan agreement that caused the amendment to the Memorandum and Articles of Association of the first appellant, the Management Agreement, the Corporation Agreement and the Debenture Trust Deed, were unconscionable and were secured through economic duress such that what went on in this case could be treated as an exception to the normal contractual law and thus the court's intervention would be called into play to ensure justice to all parties.

I have carefully perused and considered the evidence adduced in the superior court and the judgment of the learned Judge of the superior court as regards this aspect of the case. The learned Judge lumped those together as issues 2, 3, 4, and 5 and in a summary set them out as:-

"Whether the amendment of 1st plaintiff Memorandum and Article of Association, the execution of the Management Agreement, the Loan Agreement and the Debenture Trust Deed were a result of economic duress; whether the 1st and 2nd defendants were obliged to tell plaintiffs to seek independent advice in transactions; the role of Kaplan of Stratton Advocates in the four documents."

He then considered those aspects at length and concluded:-

"This Court heard all the evidence for and against this point on undue economic duress. It was not satisfied that the plaintiffs were subjected to economic pressure to execute the agreements. The Otaras and particularly Dr. Otara knew DEG as a lender as far back as 1990. He made contact with it and sought the loan. DEG put on the table its side of the bargain to charge the instruments of the 1st plaintiff and bring LTI on board to manage the project and also to be a shareholder. Negotiations went on. The Otaras had partially built the hotel to a tune of Sh.105 million. They were seeking DM5 million, more or less an equivalent. The two are normal adults, well educated and practicing medicine. They run a hospital at Kisii. To this court's view, proper and valid agreements were drawn up discussed and agreed. They were executed in all their respects. The loan was disbursed. Business

opened. Dr. Otara did not demonstrate at any stage that economic pressure was put on the plaintiffs or if so in what form. It is not enough to merely claim that economic duress prevailed e.g. on threat to breach a contract. Contracts were signed, this Court concludes, without pressure."

And as to the role played by Mr. Hime of Kaplan and Stratton, Advocates, the learned Judge concluded:-

"Lastly on the same set of issues, this Court concluded that Kaplan & Stratton drew up the amended instruments of the 1st plaintiff on instructions of their clients (the 1st and 2nd defendants). That firm of lawyers did not draw up the 3 agreements (Loan, Management, Corporation) that bound the plaintiffs and defendants. It drew up the Debenture Trust Deed. All these instruments were signed by the Otara's before Hime of Kaplan & Stratton, Advocates. Kaplan & Stratton had no responsibility over those documents."

The second and third appellants are learned in medicine. They are not lawyers, but even if they were lawyers there would still have been need to be advised by a third person preferably an expert in that field on the legal complexities involved in undertaking an enterprise of such a magnitude involving foreign funding in the form of a loan and conditions attached in managing of such a high class tourist hotel intended to cater for well over one hundred people. There was need for advice on the implications of taking loan and offering securities and their consequences on failure to honour the terms of such loan particularly advice on the consequences posed by the Debenture Trust Deed drawn by Kaplan & Stratton Advocates. In this case, however, that need was even of a higher scale. This is because when the first and second appellants sought loan from the first respondent, several serious conditions were set out for obtaining such a loan. First was that the Memorandum and Articles of Association had to be amended to provide for second respondent to be a shareholder and not only that but to be a manager of the business as well and even of far reaching effect was that no quorum of the Board of Directors' Meeting could be realized without the presence of its representative at such meeting. Further, as concerns the management agreement, there were clauses that the second respondent would be the sole manager of the business for and on behalf of the first appellant but at the expense of the first appellant. It cannot escape one's observation that the second respondent who was to manage the business was also by virtue of having bought 1.5 shares in the first appellant, on the same stand as the second and third appellants who were in fact together the majority share holders in the first appellant and also that later, when first respondent put first appellant on receivership, and third respondent appointed fourth and fifth respondent's receivers, the second respondent who was a shareholder and a manager of the first appellant was interestingly made to manage the first appellant on receivership for a considerable period notwithstanding that its earlier management may have resulted into the company being placed into receivership. There was also the issue of financial accounts being held in foreign banks in Germany and most of the tourists to the hotel being sourced overseas in Germany. All these aspects demanded that the first, second and third appellants be given proper legal advice before they committed themselves to the venture. I heard the arguments as to whether the firm of Kaplan & Stratton, through their advocate did or did not help the second and third appellants in this aspect. Without saying more and having perused evidence of Peter Hime (DW1), and the ruling of Mbaluto J. in respect of a complaint that was lodged by the second appellant in a relevant matter, I am far from being convinced that Mr. Peter Hime carried out his professional obligations to the appellants. That he acted for them to some extent, however minor is not in doubt. At least he prepared Debenture Trust Deed for all parties and read and explained the other agreements to second and third appellants. That he should not have done so is also not in doubt. From his evidence, it is also in doubt as to whether he duly advised the second and third appellants of the need for such independent legal advice on this monumental matter. Mr. Chacha Odera and Mr. Njoroge Regeu both maintain and emphasize that the second and third respondents are well educated people and as such knew the need to get proper legal advice on such matters. True they may be well educated and are doctors in medicine, but that is as far as that goes. They are as I have said not lawyers and as to law, they remain laymen and in my view needed the advice particularly from Mr. Hime who was handling the matter on behalf of the respondents in Kenya to have their own lawyers on the matter. It is also true, that there is no evidence that second and third appellants paid Kaplan & Stratton as advocates to act for them and as such one might say Mr. Hime was not in a position of trust in respect of the two, but there is also the evidence that they went to him, queried certain provisions and he told them that there were fallback provisions in the agreements in case of any difficulties. Further the first and second respondents knew very well the effects of their seeking to

have Memorandum and Articles of Association amended and the effects of having a condition in the loan agreement that the second respondent would manage the business during the life of the loan. In my view, the first respondent, being a banker and a creditor who was only inclined to release the loan to the first appellant upon grounds that the second respondent was to manage the subject business as well as be a shareholder in the first appellant, and also entered into Debenture Trust Agreement, with the first appellant, had obligation to specifically require the appellants to get the services of a legal expert. The stakes were too high to be encountered without any legal knowhow.

In the end, here is a situation where the loan was granted upon a serious interference with the first appellant's Memorandum and Articles of Association such that a loan which was for a limited period altered the status of first appellant so seriously that it no longer remained the company contemplated by the second and third appellants in the first place. Its directors were increased to three from two and one of them was made manager and was also made to acquire shares in the same company. No meeting of the Board of Directors could be held without its representative being present at such a meeting. In short even meeting to resolve to file a suit by the first appellant could not be possible if the second respondent did not favour it and agree to attend a meeting to pass such a resolution. In my view, such contract was not fair and must have been secured by the first respondent in conjunction with the second respondent through unfair means upon the second and third appellants. But even worse, when eventually the first appellant became unable to meet its obligation of repaying the loan, it was not put in mind that this occurred as the second respondent was the one managing the first respondent and that the first respondent's alleged inability to repay the loan could have resulted partly or mainly through the inefficient management of the first respondent's business – namely the Hotel. The second respondent states that the inability to repay the loan was caused by the refusal of the second and third appellants to inject more money into the first appellant's business. That might have been so, but one question still remained. At the time the loan was advanced and business started, there was sufficient fund to put the business off the ground. What then happened midstream that required more capital to be raised to enable it continue. None but the second respondent; being the manager had the full knowledge of what could have happened. What however baffles me is that even after the business of the first appellant was placed under receivership, still although fourth and fifth respondents should have managed the business in their capacity as receivers, nonetheless the same manager who was possibly responsible for its being put under receivership was appointed to manage it yet again. I do not find this proper. How could a shareholder in a company under receivership be again appointed to manage it? What new ideas was it expected to introduce that it could not use earlier to stem the company from being placed under receivership? It is thus not a surprise that the receivership has continued now for well over fifteen years perhaps one of the longest receivership, I have heard of in the legal history of this country.

In addition to all the above and perhaps contributing to the putting of the first appellant into receivership, some other bank accounts were operated in Germany and there was no proper audit report acceptable to all parties on those bank accounts. Further, as I have stated, there was evidence that most of the tourists to the hotel were mainly from Germany and payments were made in Germany in most cases by those tourists. If those accounts were not properly audited or even if properly audited, there was no proper audit report on the same acceptable to the appellants and the first two respondents, then the cumulative effect of all is that the second and third appellants were in the dark as to what resulted in the first appellant being put into receivership. It was clearly a contract into which they entered purely because they needed money to complete their hotel and start business but because of lack of exposure to the legal advice, and as a result of none advice from the banker's manager and their advocate, they could not have understood what was involved and hence could not understand the situation that resulted into receivership. In any case, from what I have stated above, the entire contract it was heavily biased against the appellants. When the second appellant raised objections or queried any aspect, he says he was told by Mr. Hime that the loan would not be given to the first appellant if he did not accept the terms spelt out. That response must be interpreted in the light of the needs of the second and third appellants at the time they were being told so. It must have meant, take it or leave it. If you leave it you miss all. That is what might have been felt later by the appellants as economic duress. When one is through economic constraints forced to accept to enter into a contract which is clearly biased in favour of the other party but he does so because he finds himself with no alternative condition as at the time the offer is made. In his evidence in chief, Dr. Otara stated:-

"These 3 agreements were concluded at the offices of Himes (sic) at Kaplan & Stratton Advocates. Hedderich of 2nd defendant, my wife and myself signed those agreements after perusing them. My wife and I expressed dissatisfaction of the management agreement since it gave total control to the 2nd defendant. But Hime (sic) convinced us that it was a good agreement having clauses that protected us. That we would control the companies finances. Hime said that if we did not sign, money which was needed badly would not be forthcoming. So we signed. (sic)"

He went on and stated on the loan agreement as follows:-

"We perused this loan agreement which worried us even more. Again Hime convinced us to sign it because he said that article 1 (showed to us) would protect us. The point of worry was altered Articles of Association to suit 1st defendant."

And yet again on the Loan Agreement, Debenture Trust Deed and Management Agreement, Dr. Otara said:-

"I challenged these documents because at the time I was asked to sign them they were one sided. I wanted to decline to sign. But the defendants told me that if I did not sign the loan I desired would not issue."

And in re-examination he said:-

"Before signed (sic) these agreements, I noted that they were one sided. But I needed the loan to complete my hotel and funds would follow. I was also shown some clauses in these which would invoke for my relief in case I came up a hardship."

In my view, the second appellant was apprehensive of the risks that were entailed in his signing the agreements but was assured by Hime's remarks that the agreements were good and although Hime in his evidence denies telling Dr. Otara that there were fall back clauses in the agreements, I cannot rule out that comment having been made.

I think I have said enough to show that in my view, the totality of the evidence adduced in the case and conduct of the respondents particularly in eventually appointing the second respondent manager of the hotel even after the first appellant was placed into receivership and the none ending receivership are strong pointers to the fact that the entire transaction was heavily tainted with serious bias against the appellants.

The learned trial Judge felt there was no evidence of economic duress. I have cited above evidence that the second appellant and the third appellant said they signed the loan agreement, the management agreement and the debenture trust deed not because they were happy with them but because they needed money and were told they would not be paid that money and further they were told that the agreements were good for them. However, in law, the totality of the entire transaction must be looked upon to infer undue influence, or economic duress or whether the alleged contract is unconscionable. In this case, it would appear that as Mr. Chacha Odera points out, the issue of undue influence was not brought out at the trial. However, the evidence some of which I have reproduced hereinabove were adduced and parties canvassed them so that the trial court could base a decision on them if it was minded to do so. See the case of ***Odd Jobs vs Mubia (1970) EA 476.***

In the cases of ***Royal Bank of Scotland Plc vs. Etridge (No.2), Barclays Bank Plc vs. Hanis and another, Midlan Bank Plc vs. Wallace and another, National Westminister Bank Plc vs. Gill and another***, UCB ***Home Loans Corporation Ltd vs. Moore and another*** (Conjoined Appeals); ***Barclays Plc vs. Coleman and another, Bank of Scotland vs. Bennet and another and Kenyon Brown vs. Desmond Banks & Co,*** all reported as heard together and reported as ***Royal Banks of Scotland vs. Etridge (No.2) 2 AC 773***, to which we were referred by all parties, it was stated as regards the proof required to demonstrate undue influence as follows:-

"Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence vests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient; failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of those two facts is prima facie evidence that the defendant abused the influence be acquired in the parties relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

The report goes on and cites the observations of Lord Scarman in the case of ***National Westminister Bank Plc vs. Morgan (1985) AC 686, 707*** which was that:-

"a relationship of banker and customer may become one in which a banker acquires a dominating influence. If he does, and a manifestly disadvantageous transaction is proved, "there would then be room for a court to presume that it resulted from the exercise of undue influence."

In this case, as I have endeavoured to indicate above, there are several disturbing instances. Added to these is the issue of the accounts. In respect of that the learned Judge, after considering the evidence stated:-

"The view of this Court is that the 1st plaintiff's accountants, Price Waterhouse, did come to a position that the plaintiff could not service its financial obligations. The current liabilities exceeded the assets. The court heard that the plaintiffs had to raise and inject more capital in the business. The Otaras could not hear of that. On their own, they got two firms, Bellhouse Mwangi and Waithaka Kiarie to write reports tending to imply that Price Waterhouse was wrong in its audit report. Nobody from Bellhouse testified here. But Waithaka audited 1st plaintiff's accounts report June 1994 observing that the 1st plaintiff's accounts needed restating and correcting. That such an exercise could show that 1st plaintiff was solvent. This court is not in a position, nor was it asked to find that this or that audit report gave the correct position in the circumstances like this. It is inclined to say that the appointed auditors (Price Waterhouse) report is the one to rely on. The other reports had no authority from the board of the 1st plaintiff."

I find it difficult to appreciate the reasons why Waithaka's evidence given before the court was rejected and evidence of audit reports prepared by auditors who did not give evidence in court was preferred. The learned Judge in preferring those reports on grounds that they were reports of appointed auditors, did not with respect, appreciate the difficult situation created by the amendment to the Memorandum and Articles of Association which was to the effect that for the board to meet, second respondent was to be present. That amendment could have been used to stop a board meeting that would have appointed Waithaka & Kiarie as auditors. In any event, that there were opposing audit reports only showed that there was something wrong with the management of the first appellant's accounts and that was a matter to be considered, it being that the first plaintiff was placed into receivership when the second respondent was the manager and that some accounts were held in banks in Germany. If Price Waterhouse report was proper and could he relied upon them one wonders why the learned Judge found it fit to order that all their reports be made available to date.

Even as the matter was in court and receivers were managing the business of the first appellant, it does

not appear that even the receiver furnished the court with an upto date report of the finances of the first appellant much as receivership had by then gone on for many years. In the case of ***Gulf Stream Tours and Hotel Ltd vs. Development Finance Co. of Kenya Ltd*, *(1996) LLR 493 (CAK),*** this Court differently constituted said:-

"There is also the fact that the Receiver has not prepared a statement of account and there is consequently no way of telling whether or not he has executed the receivership faithfully and honestly. Although the primary duty of any receiver is to collect the debt owed to the creditor who appoints him, he is also under a duty to act faithfully towards the deposit and not to erode the security for instance by managing the business or disposing of the security at a throw away price."

Here the receivers' i.e. third and fourth respondents did not give evidence and the trial court could not be certain of the accurate financial state of first appellant and hence that order. I do not think the second respondent was wholly without blame for the placement of the first appellant into receivership by the first respondent. And for the same second respondent to be appointed to manage the business of the first appellant in receivership sounds to me unfortunate and an abuse of the position of the banker which had set out in its conditions for granting loan to the appellants, and amendment to the Memorandum and Articles of Association of the first appellant, to include second appellant as manager and shareholder who had to be present at all valid Board of Directors' meetings. In my view these were manifestly disadvantageous transactions when looked at in totality. They eventually landed the first appellant into receivership which as I have said is by any standards the longest or one of the longest known in Kenya, much as we were told from the bar that the operations of the hotel business and the room occupation were not below average going by the standards of Kenya Tourist Hotels. In my view the length of the receivership speaks volumes as regards the honesty or dishonesty of the entire transaction from its inception to date. There were allegations of credits and rebates given to some tour operators in Germany who allegedly brought large numbers of tourists to the hotel during low seasons. The learned Judge accepted explanations given by DW3 for that action, but as these were challenged, it was an indication that there were activities carried out without the majority shareholders' full and active participatory knowledge and that in my view did not meet the standards of practice particularly where finances were involved. However, against the above, there is the unchallenged fact that the second and third appellants acting as Directors of the original Kisii Safari Inns Limited were the ones who approached the first respondent for a loan and were thus not forced to take the loan for the first respondent much as the terms of the same loan were onerous and unfair. Even after their protestations, some of which I have reproduced hereinabove, they nonetheless received the loan and much as it was not certain how it was used, there being conflicts between the audit reports that were before the trial court. Further, there was no evidence by the appellants that they made every effort to source funds from other institutions but in vain and lastly there was some evidence that the second and third appellants knew of the accounts held in banks outside Kenya i.e. in Germany and although they did not come out clear on this I believe the respondents are not wholly unreliable on that issue. Considering all these, I do not think the allegations of economic duress or of undue influence upon the appellants was proved to the standard that would lead me into declaring the loan agreement between them and the first respondent a nullity or void. I do however, hold that actions of the first respondent and the second respondent as narrated above led to the first appellant being put under receivership. Further, as I have stated, even during that receivership, no proper evidence has been adduced to show why it should continue.

I have, in what is stated above, touched on matters that were in issue in one way or the other. On the issue as to whether the first appellant could sue without the resolution of the company, the learned Judge did hold that the suit before him was maintainable. In my view this should have been dealt with as a preliminary issue in the first instance as whether the first appellant should have gone to court without a resolution of the company being passed first was a matter that should have been decided before the entire trial proceeded. As the entire trial had proceeded, and it was not raised till the end, I will not say much on the issue, but I do agree that in the circumstances obtaining in this case, and the clear evidence that the second respondent had to be at the board meeting before such a resolution could be passed and noting that the directors of the first appellant took different stands on the issues that eventually went to court and that first appellant was one of the complainants, I cannot fault the learned Judge's decision on that issue. On my part, it will stand.

I think I have said enough to indicate that in my view, there is some merit in this appeal. The appellants in their appeal seek judgment as follows:-

"1. That this appeal be allowed.

2. ***That the judgment of the superior court delivered on 26th October, 2007 be set aside and be substituted with an order the judgment be entered for the appellants as prayed in the amended plaint.***

3. That the appellants be awarded costs of this appeal and of the superior court's suit.

That in effect takes me to the amended plaint to see what prayers are being sought and which ones can be allowed. I have reproduced the prayers that were sought in the amended plaint herein above. I have considered each of the prayers in the light of the above. As in my view the loan agreement, co-operation agreement, management agreement and the debenture trust deed, though apparently skewed against the appellants cannot be declared null and void and indeed there is no such prayer, I cannot, grant prayers ***(a) (b) (c) (g) (h) (i) (n).*** As to prayer (d) I note that as at the time this case was heard before the High Court, the first appellant's undertaking had been placed under receivership and thus it would be futile to grant that prayer. On prayer (j) I have already stated above that the purchase of 1,500,000, shares by the second respondent was approved by the relevant authorities. The first appellant has benefited from the purchase and to treat it as a loan would not only be unfair but would be illegal and would constitute undue enrichment to first appellant. I would not grant that prayer. On prayers (k) (o) (q) and (r), I have stated above that the learned Judge of the High Court, in my view erred in preferring the accounts that were presented to the court and not defended as opposed to the accounts presented by Waithaka which were presented by a witness who faced cross-examination in defending the same. In my view, the entire saga in this case which ended in the first appellant being placed under receivership was the uncertain accounting system that prevailed during the period under review. I do allow these prayers and order that an independent reputable firm of accountants be appointed to carry out the full auditing of the accounts of the first appellant from inception to date such accounts to be supplied within six months of the date hereof. Prayers (l) and (m) are not clear. No evidence was adduced to prove that the first respondent wanted to deprive the first appellant of the ownership of its business and 71.4 % share holding save that the first respondent was pushing for execution of the Debenture Trust Deed. Whether this was wrongly done as a result of the muddled accounts, or not, it could not amount to seeking to deprive the first appellant of its business. That prayer cannot be allowed. Prayer (p) was not canvassed before us and it cannot be granted. Equally the appellants did not address us on the issue of general damages. It cannot be granted. On prayers (f) and (t) it will be clear from all the above that in my view, the circumstances of the entire case plus the accepted claim that the accounts as appears in the record, were not properly run and in my view that that heavily resulted in the first appellant being placed under receivership coupled with the fact that there was no proper accounts produced by receivers i.e. third, fourth and fifth respondents who never gave evidence on how they were running the first appellant's business, I would order that the receivership be removed. To this extent I would thus dismiss the notice affirming the decision.

On costs, the appellants have not succeeded fully. They would be entitled to half the costs which I would grant i.e. half the costs of this appeal and half the costs of the High Court.

Dated and delivered at Nairobi this 18th day of November, 2011.

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

JUDGMENT OF TUNOI, J.A.

This is an appeal from a judgment of the High Court of Kenya at Kisumu (Mwera, J) given on 26th

October, 2007 by which the learned Judge dismissed the appellants' suit against the five respondents on the ground that the appellants "***had not proved their claims***."

For the purposes of convenience, I shall hereinafter refer to the 1st appellant as LTI Kisii Safari, the 2nd and the 3rd appellants as the O*taras*, the 1st respondent as DEG, the 2nd respondent as *LTI Hotel* and the 3rd, the 4th and the 5th respondents as the receivers and managers.

Background

-

The Otaras are both medical doctors and are husband and wife. Both are citizens of Kenya. Between 1982 and 1983 they bought four parcels of land known as L.R. Nos. Kwale/Diani Beach Blocks 810, 868, 869 and 870 measuring approximately 24 acres for Shs.30,000,000/-. They intended to construct a Four Star tourist hotel to be known as Kaskazi Beach Hotel. As is common in the commercial world, they incorporated a company known as Kisii Safari Inns Limited and subsequently transferred the four parcels of land to this new company, the 2nd appellant taking one share and the 3rd appellant taking two shares therein. By 1990 the appellants had managed to put up a hotel on the said beach plots comprising of 182 rooms, a swimming pool, tennis courts and access roads. They also did land-scaping. The construction costs were estimated at Shs.105,625,000/-. Unfortunately, funds ran out when the hotel was about three quarters built.

The Otaras approached DEG and LTI Hotel to procure the funds needed to complete and run the hotel. The two respondents are famous German based registered companies engaged in development financing and management of hotels. They are also in tour operations.

In order to facilitate the funding of the project, the two respondents proposed that LTI Hotel become a shareholder in the said Kisii Safari Inns Limited. It was further negotiated that the name of that company be changed to the current one of the 1st appellant – LTI Kisii Safari Inns Limited and that it be managed by LTI Hotel until the money advance was paid in full. It is apparent that upon agreement being reached between the parties, LTI Kisii Safari Inns Limited entered into a management and technical assistance agreements as well as a pre-opening contract with LTI Hotel on 24th April, 1999 and on 20th May, 1991, following which the share capital of LTI Kisii Safari Inns Limited, which hitherto was Shs.10,000,000/- was increased by Shs.95,000,000/- to Shs.105,000,000/- divided into 5,250,000 shares of 20/- each. 1,500,000 of the shares were allotted to LTI Hotel, 2,299,999 shares to the 2nd appellant and 1,519,999 to the 3rd appellant. In respect of its allotted shares, LTI Hotel paid Shs.30,000,000/-.

The Case for the Appellants Before the Superior Court

It is the case for the appellants, as can be discerned from the plaint, the amended plaint and all the records placed by the parties before us and the testimony tendered in the trial court that:

(i) Since the appellants looked to DEG for financial advice and LTI Hotel for advice on tourist hotel management and placed great confidence in them, the two respondents were under a duty to ensure that the appellants got independent legal advice before they entered into contracts with them, but, instead directed their own lawyers - Messrs. Kaplan & Stratton, Advocates, to act for both the appellants and the respondents in the transaction; and that by doing so, the said advocates acted to the detriment of the appellants due to a conflict of interest; and also, applied economic duress, undue influence and threats which led to the appellants entering into a loan agreement with DEG that virtually gave the LTI Hotel freedom to take over the appellants' property;

(ii) In breach of its obligations under the contract to pay LTI Kisii Safari for 1,500,000 shares in Deustchemarks, DEG paid for them in Kenya currency and in contravention of the Exchange Control Act; and accordingly it never acquired any shares at all. Further, being a foreign company "buying" in a local company it contravened section 50A of the Companies Act (Cap 486) because no prior Treasury consent was obtained before such an allocation.

(iii) To their prejudice LTI Hotel did dictate terms to the appellants.

The terms related to:

(a) altering the Memorandum and Articles of Association;

(b) repayment of the loan at 10.75% per annum w.e.f. 30th October, 1994;

(c) any invalid portions of the agreement not to affect the rest of that agreement, except that those invalid ones would be replaced by the parties thereto.

(iv) Through economic duress and undue influence and the threat to rescind the financing contract DEG and LTI Hotel:

(a) failed to advise the appellants to seek independent legal/financial advice,

(b) departed from the agreement made on 31st March, 1991,

(c) threatened to break the agreement of 31st March, 1991 unless the Memorandum and Articles of Association were amended. The same threats being extended to the loan, corporation and debenture trust agreements involved,

(d)arranged that the appellants also use the same lawyers the respondents had engaged, M/s Kaplan & Stratton (above).

(v) through these illegal acts the appellants capitulated and they did as the respondents wanted in all areas alluded to; and to their great detriment and loss. These arose as follows:

(a) The altered Memorandum and Articles of Association in essence conferred on LTI Hotel power to permit or refuse the holding of any board meeting of the LTI Kisii Safari. Accordingly the Otaras' 71.4% ownership of LTI Kisii Safari was rendered worthless.

(b) LTI Kisii Safari charged its four plots (above) to secure DM 5 million from DEG. Then between December 15th 1991 and July 6 1994 LTI Kisii Safari's business was run solely and exclusively by LTI Hotel which received income and converted it to use of DEG.

(c)Accounts were not rendered and monies were banked in Germany, none of it coming to the appellants.

(d)Consequently, insolvency of LTI Kisii Safari was induced leading to its being placed under receivership.

(e)All this was seen as a scheme to take away the appellants business.

(vi) The respondents, fraudulently and through conspiracy excluded the Otaras from the management of the business; failure by LTI Hotel to supply accounts and other financial data/information of the business, banking money in Germany and failing to remit it to Kenya; LTI Hotel's failure to repay the loan or interest thereto due to DEG while paying the same to the two (2) local financiers - Barclays, Development Finance, DEG forcing insolvency on LTI Kisii Safari and that LTI Hotel frustrated the intentions of the Otaras to repay the loans owed.

The Reliefs Sought

The prayers sought by the appellants were mainly in the form of declarations. In my view, the main reliefs sought are, inter alia:-

1. A declaration that under article (16(3) of the loan agreement dated 16th June, 1991 LTI Kisii Safari is entitled to severance of all the provisions of that Loan Agreement, the Cooperation Agreement dated 27th June, 1991 and the Debenture Trust Deed of July, 25th 1991.

2. A declaration that the omission of the principle of majority rule from the Memorandum and Articles of Association w.e.f. May, 1991 vesting the entire control and ownership of LTI Kisii Safari in LTI Hotel is ultra vires the Companies Act and thus null and void.

3. A declaration that the Otaras can transact the business of LTI Kisii Safari with or without LTI Hotel being present at the board meetings.

4. A declaration that under the Debenture Trust Deed of July 25, 1991 (omission) cannot arbitrarily place LTI Kisii Safari under receivership.

5. A declaration that DEG clogged the appellants\' right of redemption under the Debenture Trust Deed.

6. A declaration that the appointment of the 4th and the 5th Respondents as receivers/managers w.e.f. July 7th, 1994 was illegal and their presence on LTI Kisii Safari premises constitutes a trespass.

7. A declaration that the allocation of 1.5 million shares to LTI Hotel contravened section 50A of the Companies Act and was therefore null and void.

8. A perpetual injunction restraining the DEG from depriving the Otaras of their ownership of 71.4% shares in LTI Kisii Safari.

9. Another perpetual injunction restraining DEG from placing LTI Kisii Safari under receivership

10. An order that LTI Hotel do furnish a restated account from December 15th, 1991.

11. General damages.

Statements of Defence

The respondents, as defendants in the suit, filed detailed statements of defence, in essence, denying each and every claim in the plaint, but, of course, admitting only what was not in dispute. They admitted that LTI Hotel became both a shareholder and director in LTI Kisii Safari with effect from 1991 but denied it had any influence over DEG. The respondents pleaded that the 4th and the 5th respondents were validly appointed receivers and managers in accordance with the freely executed debenture trust deed by LTI Kisii and the 3rd respondent as trustee for DEG. All allegations of conspiracy, undue influence and threats were denied seriatim. DEG further averred that it had no duty to inform the respondents to seek independent legal or financial advice in the whole transaction nor did it depart from any agreement at all and neither did it arrange for the appellants to use the legal service of Messrs. Kaplan & Stratton, Advocates. The respondents countered the allegations that the debenture trust deed contained a clause to clog the appellants' right of redemption. DEG perceived the whole suit against it as vexations.

Equally, too, LTI Hotel, as the 2nd defendant filed a lengthy detailed statement of defence substantially similar to that of DEG. It pleaded that three basic agreements were freely and voluntarily entered into by all the concerned parties. It denied any underhand dealings or designs. It averred that the bank account maintained in Germany was with the knowledge of the Otaras and that there was no refusal to remit any money to Kenya. It maintained that it did not in any way procure the hotel's insolvency and that it continued to run the hotel on behalf of the 4th and the 5th respondents – the receivers over the time and with better results.

Messrs Kaplan & Stratton, Advocates, also filed the defence on behalf of the 3rd, the 4th and the 5th respondents, the receivers and managers. It is dated 30th July, 1997. It was shorter and more or less on the lines of the defence of the rest of the respondents of which have been already reproduced above. In short the defence averred that the Debenture Trust Deed herein was not unconscionable or unfavourable. It was a result of negotiations and when circumstances to appoint the receivers/managers arose they were properly put in place. They ascerted they were being paid fair fees according to their performance. Finally, the 4th and the 5th respondents they averred were thus not trespassers on LTI Kisii Safari premises.

The Trial

The trial in the superior court was somewhat protracted. It spanned a total period of about six years. It was largely punctuated by many applications and rulings, most of the applications, in my view, were frivolous and probably only meant to delay the hearing and determination of the suit. The frequent transfer of the learned trial Judge, also, contributed to the rampant delay, necessitating the trial to be conducted in Nairobi, Mombasa and Kisumu.

Also, many documents were put in as evidence. These attracted long examination either way. Dr. Otara, the second appellant, took the stand on 22nd January, 2002, followed by his three witnesses. The respondents called in total a seven witnesses. The record shows that the appellants lodged sixteen issues while the respondents filed ten.

Judgment of the High Court

The learned trial Judge held that LTI Hotel, the 2nd respondent, is a bona fide shareholder of LTI Kisii Safari, the 1st appellant and that the appellants were not in any way subjected to economic pressure to execute the agreements. He stated:-

"The Otaras and particularly Dr. Otara knew DEG as a lender as far back as 1990. He made contract with it and sought the loan. DEG put on the table its side of the bargain – to change the instruments of the 1st plaintiff and bring LTI on board to manage the project and also to be a shareholder. Negotiations went on. The Otaras had partially built the hotel to a tune of Shs.105 million. They were seeking DM 5 million, more or less an equivalent. The two are normal adults, well educated and practicing medicine. They ran a hospital at Kisii. To this Court's view, proper and valid agreements were drawn up, discussed and agreed. They were executed in all their respects. The loan was disbursed and business opened. Dr. Otara did not demonstrate at any stage that economic pressure was put on the plaintiffs or if so in what form. It is not enough to merely claim that economic duress prevailed e.g. a threat to break a contract. Contracts were signed, this court concludes without pressure. In any event the plaintiffs were in Kenya while the defendants were in Germany. It has not been demonstrated that this or that kind or pressure was exerted on the plaintiffs. If it was done before the agreements were signed then, why, the plaintiffs had the option to go elsewhere they chose for the finance they desired. The defence on this allegation was categorical. No threats were used to get the plaintiffs to sign the agreement in issue. (See Barton vs. Armstrong [1975] 1 All E.R. 465).

The learned Judge also observed that the debenture dated 25th July, 1991 was drawn by Kaplan & Stratton, Advocates and was issued by the LTI Kisii Safari to the 3rd respondent which was acting as trustee to DEG lender of DM 5 million to the appellants along with two others. Its provisions included calling in receivers in case LTI Kisii Safari defaulted in its obligation to repay the loans secured. The debenture naturally followed the Loan Agreement of 16th June, 1991. The learned Judge was satisfied it was not executed through coercion.

Further, he held that LTI Hotel and DEG were not obliged to advise the appellants to obtain independent legal and financial advice on tourist business or on any transaction since there was no duty placed on them to do so.

To the learned trial Judge, the court did not have any evidence of collusion or conspiracy and dismissed the persistent allegations of them as made by the Otaras.

In the opinion of the learned Judge, the model Articles set out in the Companies Act are only for the companies who adopt them. Otherwise each company is at liberty to pen such articles as suits its internal operations. Once such Articles are accepted and registered, they operate as a contract among those involved. He thought that the Otaras and LTI Hotel restructured, and reconstituted LTI Kisii Safari as per the Articles they subscribed to. They were bound by them. They alone can alter those Articles, not even the court. The learned Judge added that there they agreed that the Otaras by their majority shareholding alone shall not form a quorum at a board meeting. A representative of the minority shareholder LTI Hotel must always be present at any one-board meeting in order to validly transact the business of the company which business affects them both. The trial court saw nothing wrong with that and moreover the Otaras still held majority shares and thus, in properly called board meetings they could even prevail over LTI Hotel and the resolution would still be valid and that it was not to veto resolutions of the board but to be present when they were being discussed.

The learned trial Judge held that he could not interfere with the sanctity and operation of the agreements between the parties since courts do not re-write contracts for parties, save that courts may only interfere in limited situations.

On the question of secret bank accounts in Germany, the learned Judge was far from being satisfied that they existed.

The most important issue in the whole case, in my view, relates to the validity of calling in of the receivers. Were they validly and justifiably called in? The learned Judge answered the question in the affirmative as he thought the debentures provided for their appointment in the event of default which had occurred. However, to him, auditing did not cease and the accountants should make available all the audit reports to date. He cautioned:

"Receivership cannot last forever it is this Court's observation that thirteen years has (sic) been quite a long time."

Finally, the learned Judge concluded that the appellants had not proved their claims and dismissed the suit with costs.

The Grounds of Appeal

Obviously, the appellants were dissatisfied with this decision and have preferred twenty grounds of appeal against it. On the other hand, the respondents (1st, 3rd, 4th and 5th) have filed a Notice of Grounds for Affirming the decision. The main grounds of appeal as enumerated by the appellants in the memorandum are, inter alia, are that the learned Judge erred in law in founding his judgment on the doctrine of the sanctity of contracts instead of founding the same on the doctrine's exceptions which the appellants relied on, namely, that courts will not enforce contracts whose terms are unconscionable, and further that any term of a contract procured by economic duress is null and void and that the learned Judge erred in not holding that terms of lending and management entered into by LTI Kisii Safari and DEG and LTI Hotel (the 1st and 2nd respondents) were unconscionable and unenforceable. The appellants further faulted the learned Judge for founding his judgment on the proposition that a resolution of a board of directors is necessary for filing of a suit even where the majority of shareholders invoke the rule in ***MARSHALLS VALVE GEAR COMPANY V MANNING COMPANY [1909] 1, CH. 267*** and that shareholders or potential shareholders and non-shareholders can contract out of majority principle in the Companies Act. Another major complaint advanced by the appellants against the judgment is that the learned Judge erred in law in holding that the restitutionary doctrine of economic duress did not apply to the Management Agreement, the alteration of the Memorandum & Articles of Association of the 1st appellant, the Loan Agreement, the Co-operation Agreement and the Debenture Trust Deed.

It is also contended that the learned Judge ought to have held that a lender or a bank is responsible for the

actions of the receivers and managers whom it appoints under its Debenture, puts in control of charged properties and directs it as to the operations of the charged business and assets. The issue of conspiracy is raised in ground 12 which states that the learned Judge erred in law in not holding that there was a conspiracy between the 1st and 2nd respondents to assist the latter to enrich itself with the revenue of the 1st appellant and ultimately to confiscate the 1st appellant's immovable properties and business under the guises of becoming a partner or purchasing it following pretended or self-induced insolvency.

A detailed complaint relating to possible acute conflict of interest of the appellants and LTI Hotel created by the appointment of LTI Hotel as the manager of the business during the term of the loan is raised in grounds 14 and 15.

The appellants have also faulted the learned Judge for:

i. Holding that the court was not asked to determine the financial position of the 1st appellant;

and

ii. In holding that because the auditing firm of Price Water House which, in May or June, 1994, recommended that the 1st appellant be placed in receivership, is re-known worldwide, its report on the financial status of the 1st appellants was to be preferred to the reports of Bell House Mwangi Ernst & Young and Waithaka Kiarie & Mbaya.

The issue of refusal by the respondents to render any accounts at all to the appellants is also a major ground of appeal. It is averred that the learned Judge erred in failing to make determinations of the financial positions of LTI Kisii at the times of both the purported appointment of the receivers and managers of LTI Kisii business on 7th July 1994 and the time of judgment on 26th October, 2007; and for rejecting the appellants' prayers for orders that the respondents do supply to the appellants with accounts of the hotel business.

These grounds of appeal were argued by Mr Nowrojee, learned Senior Counsel for the appellants, either in the numerical order in which they were set forth out in the memorandum of appeal or in a cluster.

The Respondents' Case in the Appeal

All the respondents supported the judgment of the learned Judge stating that it captured all the different aspects and issues relating to the dispute between the parties. They averred that there were no grounds for this Court to interfere with the said judgment. It is their submission that the parties who are all educated and sophisticated freely and knowingly executed the Debenture Trust Deed. They dismissed as unfounded the allegations of conspiracy. They contended that the concepts of economic duress and undue influence were brand new arguments advanced for the first time in the appeal. The respondents stated that the suit before Mwera, J was *res judicata* as the issues raised therein had been raised and finally determined in HCCC No. 1579 of 1994 and in HCCC No. 2409 of 1996; and consequently, the said suit was, in any event, an abuse of the process of the court and ought to have been dismissed.

Powers of this Court

As a first appellate Court, it is our duty to treat the evidence and material tendered before the superior court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this – ***SELLE V ASSOCIATED MOTOR BOAT COMPANY LIMITED*** ***[1968] EA 123*** and ***ARROW CAR LIMITED V BIMOMO & 2 OTHERS*** **[2004] 2 KLR 10**. It is on the basis of this principle that I will now proceed to critically examine the issues raised in the appeal taking into account the evidence recorded before the learned Judge.

Lack of Mandate to Sue

In my view, I think, the issue of lack of mandate to sue ought to be looked at first, because if the appellants could not institute the suit in the first place, then the suit was a non-starter. It was submitted by the respondents that LTI Kisii Safaris' resolution was not first passed or obtained before instituting the suit, and accordingly the suit was invalid. The appellants on the other hand argued that the directors were challenging the validity of appointing receivers and so would and did the only conceivable thing in the circumstances, namely, to use the name of LTI Kisii Safari. Both sides had agreed that a resolution to sue was not passed. It is plain from his judgment, that the learned Judge skirted the issue by merely stating the basic principle of company law that "***a company being an artificial person should go to court only via its own authority by resolution or a resolution passed by its shareholders at a validly called meeting".***

The appellants have urged this Court to render substantive justice to the parties by the application of the principle commonly referred to us the "*overriding objective*" (oxygen or 0_2 principle). However, the respondents, do not see how this principle could be introduced herein.

Though the learned Judge did not specifically hold that the suit was invalid, he nevertheless decided the issues in the trial on the basis that the suit was not properly before his court, despite the fact that the appellants had genuine grievances against the respondents and that the appellants had resorted to the court as an independent and impartial forum for settlement of dispute.

To hold in the circumstances that the appellants' case was invalid would have been tantamount to denying the appellants justice.It is trite jurisprudence that the ultimate goal of a court is to do justice between the parties according to law. However, this objective is not to be compromised by invoking undue rigidity in the application of procedural requirements.

In ***CROPER V SMITH [1884] 26 Ch D 700 AT p.710*** Lord Justice Bowen stated:

"It is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights".

He added:

"I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party".

In ***IRON & STEEL WARES LTD V C. MARTYR & C (1956) 23 EACA*** it was held that: the function of Rules is to facilitate the administration of justice and not otherwise. This principle found expression in the 2009 amendments to the Civil Procedure Act and the Appellate Jurisdiction Act, which govern procedure in civil matters in the High Court, subordinate courts and Court of Appeal, respectively. The amendment introduced Sections 1A and 1B to the Civil Procedure Act and Sections 3A and 3B to the Appellate Jurisdiction Act the principle referred to as the 'Overriding Objective' (Oxygen or 0_2 Principle).

The 'Overriding objective' of the Civil Procedure Rules is designed to ensure that the cases are dealt with justly. This includes ensuring that the parties are on an equal footing; saving expense; ensuring that the case is dealt with fairly and expeditiously; and dealing with the case in a way that is proportionate to the amount of money involved, the importance and complexity of the case and the parties' financial position.

The constitution has further boldly stated in ***Article 159 (2) (d)*** that:

"Justice shall be administered without undue regard to procedural technicalities."

With the advent of the new constitution and a new set of civil procedure regime, the courts have been sufficiently enabled to apply substantive justice rather than seek refuge by way of short-cuts to technicalities. In the situation presenting itself before this Court, the learned Judge should have

operationalised the concept and elements of substantive law so as to ensure that the parties' rights and obligations are guaranteed, protected and enforced without imbalance between the appellants and the respondents. In my view, the suit was properly before the superior court and the appellants had the right to sue.

Mr Nowrojee has assailed the contract between the appellants and the respondents on the ground that its terms were one sided and unconscionable. He submitted that it had been crafted in Germany and was in complete breach of the ***Companies Act,*** especially ***Clauses 81 and 82*** of the contract which set aside powers of the majority shareholders and all the provisions regarding the Annual General Meeting. He averred that these provisions went beyond the protection of a lawyer and gave rise to the state of affairs which led to receivership. Moreover, the documents were drawn by advocates who were partial and interested only in preserving the interests of the respondents. He maintained that the entire contract was disadvantageous to the appellants and the consequence thereof was to give sole and exclusive management of LTI Kisii to DEG.

Dr Otara testified that for the purposes of negotiating the loan, drawing up the agreements and all *"other organizations"* of the company he was led to the firm of Kaplan & Stratton Advocates, by Mr Heimans from DEG. No one advised the Otaras to get independent legal advice. After the agreements had been prepared, they perused them and found that the agreements gave total control of their hotel to the respondents. The Otaras raised the issue with Mr Hime, advocate of Kaplan & Stratton Advocates, but he convinced them that the agreements were good and had clauses which protected them and if they did not sign them, then the money which they badly needed would not be forthcoming. That is why they signed the agreements.

In a nutshell, Mr Nowrojee contended that the bargain procured from the appellants by DEG was unconscionable and offends the sanctity of contract and was, also, illegal in that it was calculated to seize the appellants' property.

Debenture Trust Deed

The Debenture Trust Deed was issued by LTI Kisii to Coopers & Lybrand Trust Corporation Ltd and was also executed by the parties on 25th July, 1991. The latter was appointed as trustees and debenture holders of DEG. Under Clause 11.01 of the said Deed the trustees were given unlimited powers and discretion to appoint receivers of its own choice even itself and or its officers as receivers. Thereafter, in a scheme difficult to comprehend, the receiver managers appointed the LTI Hotel to continue managing the hotel. The appellants also, protest that under the continued management of LTI Kisii, DEG's loan was never being repaid, has never been repaid for well nigh 20 years and in spite of non-repayment of the loan, DEG has remained comfortable, and has never complained and is happy with the *status quo*.

The respondents' answer to these allegations is that LTI Kisii breached its obligation to repay the loan together with interest to DEG and the 3rd respondent, in the capacity of agent of DEG; that the receivers/managers were lawfully appointed and that the Debenture and all the agreements are valid.

Conduct of Messrs Kaplan & Stratton, Advocates

On 16th February, 2001, Mbaluto, J held, in an application under ***Order 1 rule 10*** for an order to restrain the said firm of advocates from continuing to act for the respondents, that if the said firm continued to act in the case for the appellants, the appellants would be greatly prejudiced, as the firm might inadvertently reveal some confidential information to the respondents. It was Mr Nowrojee's submission that Mwera, J misunderstood the role of Messrs Kaplan & Stratton Advocates, and did not weigh or consider at all whether or not there was proper advice to the appellants. He contended that the advocates failed to advise the appellants that DEG had acquired a dominating influence and control over the hotel and was in total grip of the appellants' property. He submitted that it befell the said advocates to advise the appellants not to agree to enter into the agreements but, they failed to do so. They averred that an independent solicitor would have advised the appellants not to enter into the agreements.

Bargaining Power and Competent and Independent Advice

It was well established by a series of English decisions that *"where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction"*. See ***FRY V LANE (1885) 4 Ch. D 312, 322***. The expression *"poverty"* and *"ignorance"* has been generously interpreted, on their face, to open the door to the possibility of relief in a substantial number of contracts where the terms are exorbitant or unconscionable, and the party aggrieved did not have independent advice. ***BACKHOUSE V BACKHOUSE (1978) 1 W.L.R. 242*** and ***CHITTY ON CONTRACTS (26th Edn) Para 539***. Having carefully considered these authorities, I am of the view that there is no absolute rule as to the necessity or sufficiency of independent advice. Further, it would appear that advice relied upon to support the transaction must not only be independent but, must be given with knowledge of all relevant circumstances and must be such as competent and honest adviser would give if acting solely in the interests of donor. See also ***INCHE NORIAH V ALLIE BIN OMAR (1929) AC 127***.

Again, competent and independent advice does not, in my view, mean independent and competent approval. All that is necessary is that some independent person free from the taint of the relationship or of the consideration of interest which would affect the act should put clearly before the person what the nature and the consequences of the act is. Thereafter, the concerned person shall be at liberty to act as her or she wishes. I would agree with Mr Regeru that it is for adult persons of competent mind to decide whether they will do the act or not. This principle, too, applies to adults who are competent to form an opinion. In ***CLIFFORD DAVIS MANAGEMENT LIMITED V WEA RECORDS LIMITED [1975] 1 ALL ER 274*** it was held that where an agreement between the plaintiff and another party was made in circumstances in which there was inequality of bargaining powers and the other party had received no independent legal advice before signing the agreement and the terms of the agreement were manifestly unfair it followed that there was a presumption that the agreement was invalid.

The Privy Council, also, in ***TUNGUBHAI V YASHWANT 1945 BOM 189 an in MACKENZIE V ROYAL BANK OF CANADA [1934] AC 486 (P.C.)*** upheld the plea of undue influence in cases of a husband exercising undue influence over his wife who was illiterate though she could sign her name, whose properties he was managing and she passively acquiesced in what he did and signed whatever documents she was asked to execute. In the celebrated case of ***ROYAL BANK OF SCOTLAND PLC V ELRIDGE NO. 2 [2002] 2 AC 773***, it was held that:

whenever a wife offered to stand surety for the indebtedness of her husband or his business, or a company in which they both had some shareholding, the lender was put on inquiry and was obliged to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction. It was further held, inter alia, that the steps reasonably to be expected of a lender in relation to past transactions were to bring home to the wife the risk she was running by standing surety, either at a private meeting with her or by requiring her to take independent advice from a solicitor on whose confirmation the lender might rely that she had understood the nature and effect of the transaction and that the solicitors should have given face-to face meeting in the absence of the husband, and its contents need not be directed to the commercial wisdom of the transaction but should include, as a core minimum, an explanation of the documentation, its practical consequences and inherent risks based on the financial information provided by the lender.

Mbaluto, J found that there was solicitor client relationship between the appellants and Messrs Kaplan & Stratton Advocates. In the circumstances, the advice of the solicitors was to cover the nature of the documents to be executed and to point out to the appellants the risks involved in case of default and the practical consequences that would have befallen the appellants in such an event. It mattered not, in my view, that the Otaras were literate people.

It is plain according to the evidence on record that the Otaras were taken to the offices of Messrs Kaplan & Stratton Advocates, by DEG and it appears that they had no option of choice of solicitors. In essence, the said advocates were actually the solicitors for DEG and the other respondents. These solicitors simply abandoned the appellants and did not safeguard their interests. This is shown by the fact that the said

solicitors readily filed defence on behalf of the respondents despite the fact that they had drawn up several documents for both parties and acted for the parties in the correspondence with third parties. They cared not whether there was conflict of interest or not.

In such a situation, the said solicitors had a legal duty to cease acting for the appellants but they did not do so until ordered by Mbaluto J, despite the knowledge that a conflict of interest had arisen and that the desire to protect the respondents' interest or duties might inhibit further advice to the appellants. It is obvious that Messrs Kaplan & Stratton Advocates and DEG were from the beginning aware of possible conflict of interest between the appellants and the respondents.

I have carefully studied the contracts embodied in the amendment to LTI Kisii's Memorandum and Articles of Association, the Management Agreement dated 24th April, 1991, the Loan Agreement dated 16th June, 1991 and the Debenture Trust Deed dated 25th July, 1991. I have no hesitation whatsoever to hold that the transactions were all manifestly disadvantageous to the appellants and there is no doubt in my mind that an independent solicitor or advocates would have advised the appellants not to enter into the transactions. My holding is fortified by the fact that according to the Management Agreement of 24th April, 1991, the LTI Hotel was not a mere manager for the owner which is LTI Kisii. In effect the said manager was made the actual owner as it indeed turned out to be the case when the performance of that agreement commenced. This was contrary to the contract concluded as of March 1991. According to clause No 2.1 of the Management Agreement at page 102 of P Exh 1 the owner "authorizes manager and the manager herewith assumes responsibility to direct exclusively for and on behalf of and at the expense of the owner the entire management and operation of the hotel."

Pages 102 to 105 thereof spell out how DEG was to have total control of the hotel to the exclusion of the owner LTI Kisii Hotel. According to clause No. 2.9 (b) page 110 "the bank operating accounts" were to be operated under the sole responsibility of the managers.

Under clause No. 2.9 (b) at page 110, the LTI Hotel was to collect all the hotel's revenues. The operating accounts were to be operated under the sole responsibility of LTI Hotel. Under clause No. 2.11 at page 112, LTI Hotel was to give the LTI Kisii access to all books of accounts. As Dr Otara told the court, since the LTI Hotel took over the running of the hotel in 1991, he has violated this covenant. His stance as revealed by DW 2 is that it will not do so until or unless it is so ordered by the courts. Further, clause No. 5 (b) of the Agreement provides that the invalidity of the provision does not render the whole Management Agreement void.

The respondents aver that the appellants made an independent decision to approach the respondents and that they ought to have known that funding from any financial institution carries along with it certain conditions precedent to the said funding. The conditions for funding in the material case were read out to the appellants and discussed at length between the parties before the appellants agreed to abide by them. The appellants, therefore, fully understood, appreciated and voluntarily consented to the said conditions that had to go with funding. The Agreements were only drafted and signed after lengthy discussions and negotiations. The appellants cannot now say that they did not know what they were getting into and cannot therefore purport to resile from their obligations therein.

Mr Regeru has in this regard submitted that the general presumption is that a person who appends his signature to a contract has read it and is therefore bound by its contents. It is no defence for such a person to say that he did not read the contract, that he did not understand it and that the print was too small because if he signed it then it is an indication of his acceptance. The Otaras are highly learned and sophisticated people, being medical doctors of many years' experience. It is therefore not open for them to allege that they did not know the nature of the contracts they were getting into. He asserted that the allegation is misleading, dishonest and lacks any credibility.

It is trite law that freedom of contract is permissible provided that it does not lead to taking advantage of the oppressed or depressed people. This principle contemplates the case of a person already indebted to a money lender, probably a shylock (*The Merchant of Venice*), contracting a fresh loan with him on terms on the face of them obviously and plainly unconscionable. In such a case, a presumption is raised that the

borrower's consent was not free. Though the presumption is rebuttable, the burden of proof is on the party who has sought to make an exorbitant profit of the other's distress. In ***MULTISERVICE BOOKIBINDING LTD V MARDEN (1979) CH. 84, 110***, the House of Lords held:

"The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible, well-advised person would have accepted."

In ***CREDIT LYONNAIS BANK NEDERLAND NV V BURCH [1997] 1 ALL ER 144***, the facts were as follows: The defendant was employed in a junior capacity at a modest wage by a tour operating company which wished to increase its bank overdraft limit from £250,000 to £270,000. The plaintiff, the main shareholder and alter ego of the company, asked the defendant to provide the security required by the bank for the increased overdraft by giving a second charge over her flat and an unlimited all moneys guarantee. The flat was valued at £100,000 and the defendant's equity was £70,000. The defendant signed the mortgage document presence at the offices of the bank's solicitors. At no time was the defendant informed either by the bank of the company's indebtedness to the bank or the extent of the overdraft facility being granted. The bank's solicitors wrote to the defendant pointing out that the guarantee was unlimited both in time and amount and advising her to seek independent legal advice before entering into the transaction but she did not do so. The company later went into liquidation and when the bank was unable to recoup from the plaintiff the full amount owing on the overdraft, some £60,000, from the defendant and when the defendant failed to pay it, issued proceedings in the county court for possession of the defendant's flat. The county court judge found that there was a relationship of trust and confidence between plaintiff and the defendant which gave rise to a presumption of undue influence which had not been rebutted and dismissed the action and set aside the bank's charge over her property. The bank appealed to the Court of Appeal, contending that it had discharged its duty to the defendant by urging her to seek independent legal advice and that it was not responsible for the consequences of her choosing not to do so.

The Court of Appeal in England, held that the transaction was so manifestly disadvantageous to the defendant, in that without knowing the extent of the liability involved she had committed herself to a liability far beyond her means and risked the loss of her home and personal bankruptcy to help a company in which she had no financial interest and of which she was only a junior employee, that the presumption of undue influence on the part of plaintiff was irresistible. The bank, the court further held, had not taken reasonable steps to avoid being fixed with constructive notice of that undue influence, since neither the potential extent of her liability had been explained to her nor had she received independent advice. Moreover, it went on to hold it was not sufficient for the bank's solicitors to tell her that the guarantee was unlimited both in time and amount since without being informed of the amount of the company's indebtedness to the bank or the extent of the overdraft facility being granted she was in no position to assess thesignificance of the guarantee being unlimited nor was it sufficient for the bank's solicitors to advise her to seek independent legal advice since, in the circumstances, the bank was required to ensure that she obtained independent legal advice. The Court further held that the bank was aware that the relationship between the plaintiff and the defendant was that of employer and employee and should have been aware that it was capable of developing into a relationship of trust and confidence with the attendant risk of abuse. Finally, the court held that the fact that the defendant chose not to seek independent legal advice should have alerted the bank to the possibility that the defendant was acting under the undue influence of the plaintiff and accordingly, found the transaction had properly been set aside and dismissed the appeal.

In my view, the *ratio decidendi* of this case is very relevant to the issues raised in the appeal before this Court and I would adopt it fully.

Consequences of Unconscionable Bargains

The equitable rule is that if the borrowers is in a situation in which he is not a free agent and is not

capable of protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so. *In* ***VANZANT V COATES*****. [1969] 14 D.LO.R. 256** it was held that the transaction would, in the foregoing circumstances be rescinded.

The traditional view that *"if people with their eyes open wilfully and knowingly enter into unconscionable bargains, the law has not right to protect them*"- as held in ***FRY V LANE 1888 40 Ch. D 312*** – has long been altered. Also I would think that this old traditional view cannot any longer hold ground after the enactment of the new Constitution and the coming into effect of the new Civil Procedure Regime which introduced the principle of *"overriding objective"* which require all courts to swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it.

The position in England in cases involving inequality of bargaining power was succinctly stated by Lord Denning M.R. in ***LLOYDS BANK LTD VS BUNDY [1975] Q.B. 326 AND SCHROEDER MUSIC PUBLISHING CO VS MACANLAY [1974] 1 W.L.R. 1308***, when he said that by virtue of it, the English law gives relief to one, who without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

In the case before us, there is no doubt that there was dominance and superiority of the lenders on one side and inferiority and inequality on the side of the borrowers. The respondents were the dominant and the dictating party while the appellants were the inferior party on the receiving end. There was no equality in the bargaining transactions leading to lopsided agreements which were in all aspects detrimental to the appellants.

I have no doubt in my mind that all the Agreements including the Debenture Trust Deed were oppressive to the Otaras in overall terms. They had obvious bargaining weakness, lacked independent legal advice since Messrs. Kaplan & Stratton was in all respects the solicitors for the respondents who at all instances knew that they were taking advantage of the appellants.

The doctrine of the sanctity of contracts cannot be applied in view of my findings above. Its application is misplaced and the learned judge erred in invoking it.

I would find for the appellants on the ground that the terms of the contracts of lending and of management entered into by the 1st appellant, LTI Kisii Safari and the Otaras on one side and the 1st and the 2nd respondents, DEG and LTI Hotel on the other side were unconscionable and unenforceable. The consequence of my finding would mean that the appellants shall be entitled to a declaration that under Article 16 (3) of the Loan Agreement dated June 16th, 1991, the LTI Kisii is entitled to a severance of all the provisions of the Loan Agreement dated June 16th, 1991, the Co-operation Agreement dated 27th June, 1991, and the Debenture Trust Deed dated 20th July, 1991.

Financial Accounts

It was argued by Mr Nowrojee that the LTI Kisii was put in receivership on wrong accounts and wrong accounting procedures. Relying on the evidence of Mr Waithaka (PW 3), a senior partner in the firm of Messrs Waithaka Kiarie Mboya & Company, Certified Public Accountants of Kenya, Mr Nowrojee further submitted that by 1995 and before the receivership was effected, the only outstanding and unpaid money was that of DEG – the overseas lender. It is worthy of note that the receivers were appointed on 7th July, 1994, and Mr Waithaka went into the hotel after 18th September, 1995 and made his Audit Report on 28th November, 1995, after an intensive investigation.

The Audit Report which was produced by Mr Waithaka during the trial, showed that the cash book was not properly maintained in that it did not give details of receipts, payments and balances to reconcile with bank statements. In it, he detected weak internal accounting mechanisms which had resulted in theft and

forgeries.

Further, Mr Waithaka detected that the receivers withheld the accounting records from him. These related to purchases of food and other supplies to the hotel on the ground that the store in which they were kept had been burnt down. Again, the receivers had not availed him the inventory of the hotel and all property therein. In conclusion, Mr Waithaka was of the opinion that:

i) the Management Agreement had given LTI Hotel sole accounting responsibilities with the majority shareholders being left to receive reports and budgets only;

ii) LTI Hotel had misused the Management Agreement by, among others, transferring the LTI Kisii Hotel business revenues to their sister companies through issuance of credit notes by giving them rebates and special offers and discounts;

iii) as a result of deliberate diversion of revenue by LTI Hotel, LTI Kisii's liquidity was so low that it could not afford to repay interest due on DEG loan;

iv) it was evident from the operation by the recivers that there was a clear case of conspiracy between LTI Hotel, DEG and LTU Tour operators to run down LTI Kisii with the intention that one of these entities would have a chance to buy it which was manifested by LTI Hotel making a bid to purchase it.

Mr Regeru countered these averments and submitted that LTI Hotel managed the hotel and not the entire company which was managed by the board to which was presented the budget without fail. To him, under the Management Agreement, it was not the duty of the Manager (LTI Hotel) to repay the loans. Its job was to update the Board on the progress of the Hotel and the decision on whether to repay a certain loan or not did not lie with it.

Mr Regeru also submitted that PW 3's report was fundamentally flawed in many aspects. The counsel submitted that PW 3 was hired by Dr Otara for two things; firstly, to make a representation that the company was solvent for purposes of capturing the KCB loan. Secondly, that PW3 was needed to help the Otaras in their fight against the 1st and 2nd respondents. He contended that since the auditor was Otaras' agent and he had to earn his remuneration by making a report satisfactory to his principal. This report, he argued, cannot be relied on whatsoever as it is not a balanced or objective report. The counsel submitted motives for the preparation of the report are clear and that robs the report of any credibility. It was the respondents' counsel assertion that the legitimate company Auditors were Price WaterHouse who had been properly appointed under the company's Memorandum and Articles of Association and that since the PW3 was neither the 2nd respondent's agent nor the Otaras' it ordinarily stood a better chance of giving a free and fair report on the performance of the company than PW 3 who was hired for the aforementioned purposes.

It is my view after analyzing the evidence of the two contesting sides and the submissions by the learned counsel for the parties that the accounts of LTI Kisii during the material time were not accurate but had been falsified. I say so because; first, LTI Hotel has persistently and all over the years, refused to supply the appellants with bank statements and other relevant accounts and financial reports; second, LTI Hotel does not at all file its financial statements, accounts nor statement of affairs. This breach is serious in that it is trite that under the Companies Act, LTI Hotel and the receivers in the circumstances such as appertaining herein come under a duty to furnish a statement of the affairs of the company to the Registrar of Companies, the trustees for the Debenture holders and the debenture holders themselves, unless to do so would be detrimental to the best interests of the Company. Thirdly, there has not been any meeting of the Board for over a decade or so. Fourthly, Bellhouse Mwangi, Ernest & Young Accountants had made a complaint that DEG and LTI Hotel ran the business in a secretive and fraudulent manner. This is explained by the fact no accounts whatsoever have been rendered for over 19 years. Fifthly, DEG and LTI Hotel have maintained foreign accounts in Germany belonging to LTI Kisii but which were not reflected in the hotel's local books see pages 370 – 373 P. Exh. 1 of the record. These accounts are 1374719 and 5311618, West LB Germany. According to PW 3, these accounts showed that 90% of the business of the hotel was being operated for and were allocated or reserved for German tour

operators 80% of whom were related to LTI Hotel. All proceeds therefrom were being retained in Germany and only a pittance, if any, was transferred to Kenya. The consequence of this was to distort the accounts of LTI Kisii. The existence of these secret accounts in Germany was confirmed by DEG. See page 749 (P. Exh. 2) of the record.

Despite all these damning revelations by the evidence of the appellants, the respondents did not call any material witness to testify on their behalf; and, neither did they place before the trial court any evidence to rebut the accusations leveled against them. Again, it is worthy of note that despite the 4th and the 5th respondents being the receivers, they did not give evidence and they called no witnesses. Further, DEG and LTI Hotel offered no evidence on their behalf. The natural consequences of this is that PW 3's evidence and the report filed by Messrs. Waithaka Kiarie, Mbaya & Company, Certified Public Accountants, were unchallenged and the learned trial Judge, therefore, had no legal basis to reject them.

Moreover, if a report by Messrs Cooper & Lybrand Accountants, did exist, as was alleged, that report was within the knowledge of the respondents and as they chose not to produce it and yet it had all the time available to them. It may reasonably be concluded that the said withheld report was most likely unfavourable to them.

Current Financial Status of the Company in Receivership

The record and all the documents placed before the Court show that:

i) LTI Kisii was placed under receivership on 7th July, 1994.

ii) The appointment of receivers and managers was made under a Debenture Trust Deed dated 25th July, 1991 made between LTI Kisiia nd the 3rd respondent.

iii) By a Legal Charge of the even date, the whole of the appellants' immovable properties together with the buildings and improvements standing and erected thereon known as Title Numbers Kwale/Diani Beach Blocks 810, 868, 869 and 870 were charged by the appellants to the 3rd respondent to secure the repayment of all monies then already due together with all interest costs and charges due and accruing thereon.

iv) By a latter Legal Charge Title Number Kwale/Diani Beach Block/655 was similarly charged.

v) The **total amount of the debt** allegedly due to the Debenture holders' under the Trust Deed **on 30th September, 1995** was **DM6,90, 051** and KShs.92,683,709.

vi) The debt due as of 2008 is said to be over **KShs.1.4 billion**.

vii) The receivership has been on for **over 17 years** and no proper explanation given for it.

viii) The respondents have not given any accounts on the running and management of the Hotel since the date of receivership.

ix) The respondents do not show having made any loan repayment to DEG or to anyone.

x) The respondents do not file any Annual Returns, Statements of accounts nor financial status of the hotel.

xi) The respondents have not given any sums due for redemption.

xii) The respondents have kept the appellants totally in the dark about the operation of LTI Kisii.

Was the appointment of the 4th and the 5th Respondents as Receivers arbitrary, capricious and

unreasonable?

As I have earlier on in this judgment observed, this is perhaps, in my view, a very important issue in the entire appeal. The object of appointment of a receiver is the safeguarding of property for the benefit of those entitled to it. See ***CUMMINS V PERKINS [1899] 1 CH. 16, 19***. There are two main classes of cases in which the appointment is made; first, to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realization, where ordinary legal remedies are inadequate; and secondly, to preserve property from some danger which threatens it. In the first class of cases are included those in which a receiver is appointed at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrears. see ***CROMPTON & CO LTD [1914] 1 CH. 954***. This appears to be the case here.

Under Clause 9.01 of the Debenture Trust Deed in issue herein, the security shall become enforceable and the principal amount of the stock together with interest and all other monies hereby secured shall become immediately due and payable if the company fails to observe and perform other conditions therein, the main one and which was invoked herein, if the company fails to pay in full when due any sum payable or if it fails to perform or observe any other undertaking or agreement under the said Deed.

Clause 10 thereof, provided for Trustees powers of entry and sale. Clause 11.01 mandated for the appointment of the receiver at any time after the security shall have become enforceable. Further, the Trustee may appoint any person or persons whether an officer of the Trustee or not to be a receiver of the company.

It is alleged by the appellants that there was neither basis nor justification whatsoever for the respondents to put LTI Kisi, under receivership. It is further contended that the respondents have collectively kept the appellants and even the trial court and also this Court in darkness as to how much loan is still due and owing. However, the respondents have vehemently countered these accusations and averred that the receivership was properly occasioned under the Debenture and according to the agreements entered into by the respective parties.

The learned Judge held that:

"In such circumstances it is only just and fair that Price Waterhouse do make available all the audit reports from the last one todate. In fact it is no for this court to make such an order. It comes by the way. But it is fair so that its employer, the 1st plaintiff even as it was shunted aside with receivership, is kept posted. Another direction, again not sought or arising from the case as argued here is that those audited accounts show clearly how the loans from the lender (DEG, Barclays Bank, DFCK) have been serviced because the business has continued to run since the receivership. If the DEG loan has not been serviced by remitting funds to Germany, yet business has been running, and again it has been in public domain that tourism picked up over the time, money has been set aside awaiting the remittance to Germany when the situation gets right. All these directions, the court thinks, must be put in place so that with any residual powers the board of directors may have after receivership, a way be found by which the receivership is ended or liquidating the business is put in place. Receivership cannot last forever and it is this court's observation that thirteen years has been quite a long time."

The gist of this holding is that the appointment of the receivers did not absolve them from giving financial statements and further that it was mandatory in such a commercial transaction like this one to file as audited report. The learned Judge, also held that the receivership had "shunted aside" and kept in the dark the Otaras about the state of affairs relating to their property. Again, he observed that despite good business being carried out by the hotel, the loans had not been serviced. Finally, that the receivership had lasted for a long time – thirteen (13) years in 2007 and is still on four (4) years later.

It is regrettable that despite these lamentations, the learned Judge did not render justice between the parties according to law. It is not enough for a court of law to tell a victim of injustice that a wrong had been perpetrated against him without offering a remedy. It is a maxim of equity that **Equity will not suffer a wrong to be without a remedy**. The idea expressed in this maxim is that no wrong should be

allowed to go unredressed if it is capable of being remedied by courts of justice. ***See Snell's Equity 23rd Edn page 28***.

An example of bad faith and fraudulent attempt to deprive the appellants of their property came out in the open when the 3rd, the 4th and the 5th respondents endeavoured to sell LTI Kisii Hotel to the 2nd respondent by private treaty. The abortive attempt was thwarted by an injunction issued by the High Court. Further, it was obviously improper for the receivers to appoint the 2nd respondent to continue managing the hotel even after the 2nd respondent had completely run down the hotel through mismanagement. No doubt and I so find that it was the 2nd respondent's mismanagement which occasioned the receivership.

Further, there is ample and credible evidence on record to establish that the respondents have managed the hotel in utmost secrecy; the 2nd respondent instructing the associates of the 3rd respondent to prepare an Investigation Report that recommended the receivership of the Hotel; the 3rd respondent appointing its own directors, associates and or partners in Cooper & Lybrand Auditors, the 4th and the 5th respondents, to be the receiver managers; and, failing to give accounts on the running and management of the hotel to date. In ***SMITH LTD V MIDDLETON [1979] 3 ALL ER 842*** the House of Lords held in a case with similar facts that a receiver appointed under a debenture providing for him to be the agent of the debtor company, in practice ran the company on behalf of its directors and was, therefore, answerable to the company for the conduct of its affairs. That being so, the receiver was under a duty to keep full accounts, that is, fuller than the abstracts of receipts and payments and to produce those accounts to the company when required to do so. In order to enforce that right the company required a remedy beyond that provided by ***S 375 of the 1948 Act***. The receiver would, therefore, be treated as the accounting party.

It is my view, therefore, based on the above findings, that the respondents had not shown or justified the basis under which they put LTI Kisii under receivership. The appointment of the receivers was to say, the least, malicious, arbitrary, capricious and unreasonable. It was, indeed, a crude attempt to "grab" the property on the basis of Agreements which were largely unconscionable and obtained fraudulently under duress.

Notice of Ground for Affirming the Decision

The respondents have averred in the notice of grounds for affirming the decision that the suit before the superior court was time barred as regards the alleged cause of action for conspiracy between the 1st and the 2nd respondents; that the suit disclosed no reasonable cause of action; and that, the suit was ***res judicata*** as the issues therein had been the subject of ***HCCC No. 1579 of 1994 Dr Christa Marriane Otara v LTI Kisii Inns & 4 Others*** which had been instituted by the 3rd appellant and ***HCCC No. 2409 of 1996 Dr Charles Gekonde Otara vs LTI Safari Inns & Others*** which had been instituted by the 2nd appellant, the matters in question in the two suits having been the same as the matters in question in the suit the subject matter of the appeal now before us.

It is plain from perusal of the three suits that the issues in the suit the subject matter of the appeal were never tried nor conclusively determined on merit in the earlier suits. Moreover, the latter suit is based on various causes of action that were never pleaded in the previous suits. These novel issues were fraud, conspiracy, economic duress and undue influence, amongst others. Further, the parties to the suits were different as the present 1st appellant was never a party nor did it participate in the previous suits. The latter suits having been heard and determined, the issues of it being time barred is spent. Moreover, it is my view that that issue is, indeed, misconceived on consideration of the pleadings, especially, in that the wayward activities of the respondents which concern the mismanagement of the business, the fraudulent accounting and the receivership are still on going even during the conclusion of the appeal. I reject these submissions.

Having reached these firm conclusions on the main and substantive grounds of appeal advanced and canvassed by both parties before the Court, I need not decide on the other minor grounds of appeal. The

grounds I have tried to answer are sufficient to dispose of the appeal and the Notices of Grounds Affirming the Decision.

Conclusion
I finally find and hold as follows:

1. The appellants had proved on the balance of probabilities that the contracts between them and the respondents were executed through economic duress. These agreements compelled the appellants to hand over the hotel business to the 2nd respondent; amend the Memorandum and Articles of Association of the 1st appellant; and to forfeit the right to manage LTI Kisii.

2. The 1st appellant was denied a right to obtain independent legal advice the result of which is that he signed a one sided Debenture Trust Deed which sought to clog the equity of redemption.

3. There is sufficient evidence on record to show that the insolvency of LTI Kisii was fraudulently induced by the respondents through malice and mismanagement.

4. The receivership was fraudulently placed upon the LTI Kisii and it had no justification whatsoever.

5. The respondents did not address the issues raised by the appellants in the trial, for example, economic duress, the contention that the respondents purported to oust the majority shareholders by manipulating the amendments to the Memorandum and Articles of Association of the 1st appellant.

6. The financial statements and accounts of the hotel business have not been published since receivership.

7. Mismanagement of the business still persists since 1994.

8. The appellants have been kept in the dark about the operations of the hotel business since receivership.

9. The loan is not being serviced nor repaid and **now stands at over KShs.1.4 billion** despite the business running.

10. The receivership has been in existence for over 17 years, the longest receivership in the country.

11. I would therefore allow the appeal and set aside the judgment of the superior court delivered by Mwera, J on 26th October, 2007.

12. I would substitute it with an order that judgment be and is hereby entered for the appellants as prayed in the Amended Plaint dated 1st July 2002.

13. The appellants shall have the costs of this appeal and of the suit in the superior court.

14. The appellants are also awarded the costs of the Grounds for Affirming the Decision.

ORDERS OF THE COURT

As Onyango Otieno JA agrees the orders of the Court shall be as follows:

1. The appeal is allowed in the following terms:

(a) The receivership and the management by the 4th and 5th respondents over the appellants' hotel is hereby removed forthwith.

(b) The respondents shall hand over full ownership and the management of the hotel and the business to the appellants within 14 days hereof.

(c) The respondents shall supply to the appellants full account relating to the entire business within 180 days hereof.

(d)The Notice of Grounds for Affirming the decision is dismissed with costs.

(e) The appellants shall have half (½) the costs of the appeal and of the Notice for Affirming the decision.

Dated and delivered at Nairobi this 18th day of November, 2011

P.K. TUNOI
…….

JUDGE OF APPEAL (as he then was)