IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH, O'KUBASU & KEIWUA, JJ.A

CIVIL APPEAL NO. 63 OF 2001

BETWEEN

1. JASBIR SINGH RAI

2. IQBAL SINGH RAI

3. DALJITI KAUR HANS

4. SARJIT KAUR RAI .....APPELLANTS

AND

TARLOCHAN SINGH RAI .....1ST RESPONDENT

JASWANT SINGH RAI .....2ND RESPONDENT

SARBJIT SINGH RAI .....3RD RESPONDENT

RAI INVESTMENTS LIMITED .....4TH RESPONDENT

RAI PLYWOODS (KENYA) LIMITED .....5TH RESPONDENT

RAI PRODUCTS LIMITED .....6TH RESPONDENT

RAI HOLDINGS LIMITED .....7TH RESPONDENT

TULIP PROPERTIES LIMITED .....8TH RESPONDENT

THE RAI EXPO PARK LIMITED .....9TH RESPONDENT

TARLOCHAN SINGH RAI LIMITED .....10TH RESPONDENT

SATJIT SINGH & RAM SINGH (ESTATE OF) .....11TH RESPONDENT

PBM NOMINEES LIMITED .....12TH RESPONDENT

KABARAK LIMITED .....13TH RESPONDENT

SURESH KUMAR BECTOR .....14TH RESPONDENT

(Appeal from a Ruling and Order of the High Court at Milimani, Ransley CA, date 10th November, 2000

in

H C Winding Up Cause No 44 of 1999)

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JUDGMENT

Shah JA. This appeal, which took almost 17 days of hearing, arises out of two applications made in the superior court in its Winding Up Cause No 44 of 1999. The first of those applications lodged in that court was a notice of motion dated 25th October, 1999 whereby three parties to the Winding Up Cause sought orders to have the petition filed by the appellants struck out as being an abuse of the process of court. The second of those applications lodged in the superior court was a notice of motion dated 5th November, 1999 whereby the petitioners (the appellants here) sought orders to join five companies as additional respondents to the petition.

Those five companies are:-

(1) Rai Products Limited

(2) Rai Holdings Limited

(3) Tulip Properties Limited

(4) Rai Expo Park Limited

(5) Tarlochan Singh Rai Limited

The two applications were heard together by the superior court (Commissioner of Assize P.J Ransley Esq). He first dealt with the application dated 5th November, 1999 and declined to grant orders to join the said five companies as additional respondents. The learned Commissioner then dealt with the application dated 25th October, 1999 (in the same ruling) but fell short of making a conclusive ruling. He did not strike out the petition and ruled that the parties ought to reconsider the method whereby the valuation of shares registered in the names of appellants be agreed between the parties. I will come to this part of the ruling in due course as it is pertinent that I ought to first deal with the facts of the petition.

The company against which the petition is filed is Rai Plywoods (Kenya) Limited. The petitioners are the four (4) appellants before this Court. The petitioners indicated that they wished to serve the petition on the following:-

1. Tarlochan Sight Rai (who I will refer to as the Father henceforth in this judgment)
2. Jaswant Sigh Rai (Jaswant)
3. Sarjit Singh Rai (Sarjit)
4. Rai Investments Limited (Railnvest)
5. Ram Singh
6. Sarjit Singh
7. PBM Nominees Limited
8. Kabarak Limited
9. Rai Plywoods (Kenya) Limited (which company I will refer to as RaiPly henceforth).

Rai Ply was incorporated on 31st December, 1971 under the Companies Act of Kenya (cap 486) (the Act) as a public company limited by shares. It was established to “acquire forest concession rights and establish and carry on in the Republic of Kenya the business of saw millers manufacturers of plywoods,

veneers of all kinds, block boards, chip boards, office and household furniture, joinery, general contractors, merchants, transporters and produce dealers."

As at 11th April, 1999 Railply's register of members showed the following persons as shareholders: '

	A" Shares	"B" Shares
1.Tarlochan SinghRai (the Father)	25924	38388
2. Tarlochan Singh Rai &Sarjit Kaur Rai (Father & wife)	23325	–
3. Jasbir	10185	43164
4. Jaswant	52334	3125
5. Iqbal Singh Rai	20846	42911
6. Daljit Kaur Hans	6250	–
7. Sarjit	41178	52456
8. Rai Investments Limited	591250	12500
9. Ram Singh	4690	–
10. Sarjit Singh	6252	–
11. Suresh Kumar Bector	–	–
12. PBM Nominees Limited	25000	12500
13. Kabarak Limited	12500	–
Total	875000	150000

The petitioners are all members of Rai family. They are Jasbir, Iqbal (brothers, being sons of Tarlochan Singh Rai, the Father), Daljir Kaur Hans (sister of Jasbir and Iqbal) and Sarjit Kaur Rai who is the mother of the first three petitioners. The principal respondents (as per nomenclature given by Mr Inamdar who with Mr Amoko appears for the petitioners) are the Father, Jaswant and Sarbjit. Rai Ply is the company which is at the center of the disputes between the family members. RaiInvest being the single largest shareholders in Rai Ply is also involved in the disputes. The other respondents are shareholder in Rai Ply as already shown. The five companies sought to be enjoined in the petition are respondents to this appeal but they have not appeared in this Court through counsel or their officers.

The history of Rai Ply as a company goes back to 1969 when the Father persuaded his co-shareholders in Rai Agricultural Enterprises Limited to establish a plywood factory in Eldoret to produce tea chests for the produce of Rai family enterprise then known as Rai Brothers SZPRL in the then Zaire. This Zairean company owned tea and coffee estates there bought from Belgians who were leaving Zaire.

In or about 1963 the father and his two brothers invested the profits derived from their Zairean enterprise

in the afore-mentioned company, known as Rai Agricultural Enterprises Limited, a company incorporated in Kenya. In 1971 Rai Ply came into existence.

Although Rai Ply was incorporated as a public company the petitioners say that it was and still is structured, for all practical purposes, as a private or domestic company and is being managed as a quasi-partnership by members of Rai family. There are other shareholders who are not Rai family members but their role in Rai Ply is not active. They constitute, according to the petitioners, a very insignificant minority and since 1976 no non-family member has been a director of RaiPly save for Mr Virinder Goswami who was nominated as a director with no shareholding. Mr Goswami is an advocate of the High Court and he appeared with Mr Oraro for the principal respondents in the superior court as well as this Court. The Father does not accept that Rai Ply is run as a family company. Facts as stated in the petition are not all admitted by the Father and Jaswant and there is a great deal of variance thereon.

For the purposes of this appeal it is not necessary for me to go into the full facts as deponed to by the contesting parties but reference to certain salient facts will be useful. I keep in mind what Mr Inamdar said as regards the disputed facts. He accepted and acknowledged that the allegations and counter-allegations are merely allegations. These are not tested by a trial. The principal respondents deny the allegations of any wrong doing and also deny that Rai Ply's affairs are being conducted in a manner oppressive to the petitioners or that there is any warrant in law to make a winding up order.

The problems between the contesting parties started a long time after the father incorporated (in 1980) Rai Products Limited to market Rai Ply's products. Jaswant was one of the original subscribers in Rai Products. For a long while Rai Ply continued supplying goods to Rai Products on credit terms. In 1992 Jasbir insisted that Rai Products ought to pay for the goods in advance. Jasbir incorporated in 1993, a company known as Wood Panels Limited. Since 1993 Rai Ply goods have not been sold by Rai Products.

The petitioners claim that all profits made by Rai Products ought to belong to the family and not the Father alone. They say this on the basis that the Father had assured Jasbir, Iqbal and Sarbjit that although Rai Products shares were held by the Father and Jaswant all five of them would be deemed to be equal shareholders. That alleged assurance was made in 1977/1978. The petitioners allege that an agreement or understanding was reached between the Father, Jasbir, Jaswant and Iqbal to develop and promote the family's business as a joint family unit so that both the Father and all his sons would participate fully and exclusively in the management and profits of Rai Ply and any other family venture that they may embark upon. Thereafter, Rai Ply and other companies were at all times run as family companies. Further, the relationship between the members and shareholders of those companies was based upon mutual trust and confidence they reposed in each other as members of the family and in their management of the affairs of those companies.

What the petitioners are saying is that Rai Ply ought to belong to them in equal shares in terms of the understanding reached in 1977/78. That understanding may be a loose and morally binding agreement but has no legal consequences as a company is governed by the Act and not family arrangements. It cannot be the function of a company court to give effect (if it can be given) to a loose family arrangement, which is probably a nudum pactum. The foundation of the petitioners' claims lies in what they say about the said family arrangements. That is not the basis upon which a company court can act. If there was such an arrangement, capable of being enforced in law (and I see none) such claims could only be brought by plaint and not in a winding up petition.

The petitioners' shareholding in Rai Ply is not based on moneys brought from other sources by the petitioners. The shares were issued by the Father as happens in most Indian families when sons are brought into a business started by a father. It cannot be denied that the Father is a man of great industry and acumen. Starting from the scratch he has built for himself and his sons an enviable business empire which apparently is a success story.

At first the petitioners acquiesced in the setting up of Rai Products whose original shareholders were Rai Investments Limited, the Father, Jaswant and Mr G G Kariuki. It was understood that in compliance with the government policy the distribution of Rai Ply products should be done by a wholly Kenyan owned

company. Ten years down the line Rai Products stopped distributing Rai Ply products. That was in 1993.

Despite the petitioners' complaints as regards the Father's alleged autocratic management Jasbir and Sarbjit prospered. From the moneys they were given out of Rai Ply they incorporated other companies in Uganda and Kenya. They have shareholding in substantial companies known as Nile Plywoods (U) Limited and Polypack Limited. Sarjit has 25% shareholding in Lukenya Flowers Limited. It is important to note that the principal petitioners Jasbir and Iqbal did not raise procedural objections to the manner in which Rai Ply was run. They were content to go along and did go along with the style of management they are now complaining about. All that they have has come from Rai Ply and Rai Investments. They took exception to the Father allegedly giving a greater reign to Jaswant. That may be morally wrong but it is not unusual for a managing director or a chairman to give greater responsibility to the person he has more faith in.

The petitioners are unhappy with the Indian project started by the Father.

They say he has sunk millions of shillings in it and they suspect that the millions have come out of Rai Ply or associated companies' moneys. This project started in 1985. It must be noted that Rai Ply has suffered no detriment despite the Indian venture undertaken by the Father. Rai Ply has prospered and there is no evidence that the petitioners' moneys have been used in that project.

Whilst Jasbir accuses the Father and Jaswant of placing moneys in a Finance company there is the fact of Jasbir transferring Shs 100 million from Standard bank branch in Eldoret to Kenya Commercial Finance Company in Nairobi and although he says he did so with the Father's consent the fact remains that the Father complained about Jasbir's such action to the police. It is on record that Jasbir was paid a sum of Shs 46 million from Rai Ply's funds and that soon thereafter, Jasbir and Sarbjit moved to Uganda to start their own businesses which businesses have no connection with the Kenya business of Rai family. Polypack Limited has an investment base of US$ 3.5 Million and Jasbir and Sarbjit own 50% of the shareholding. Nile Plywoods (U) Limited has a total capital investment of US$ 2.5 million and between Jasbir & Sarbjit they hold 49% of the total shares. It is not clear what shareholding Sarbjit has now but it appears that he bought out the 51% shareholder one Karim Hirji in Nile Ply after receiving a sum of 1.8 million US$ from the Father.

The factor that has weighed on my mind is that the first petitioner did not seriously object to his holdings in Rai Ply being diluted for many years. Did he acquiesce in that as he had already set up lucrative business in Uganda without involving other members of the Rai family except Sarbjit? Iqbal and Jasbir were present at the May 1995 and 11th June, 1995 meetings of Rai Ply.

The most serious complaint the petitioners have against the principal respondents is that the Father & Jaswant have acquired shareholding in Commercial Bank of Africa Limited, Timsales Limited, MS Projects, Tulip Properties, Rai Expo and Rai Ply Malawi. It would be futile on affidavit evidence to decide which way the truth lies but it is clear that most of the transactions were within the knowledge of the petitioners. Moneys taken out by the Father and Jaswant could not have been taken out without the knowledge of some of the petitioners. It is the alleged siphoning off of the moneys into other ventures that offends the petitioners and they want the five companies to be enjoined in the winding up proceedings so that the sums in question could be traced and profits made therefrom be taken into account in arriving at a fair valuation of shares.

Be that as it may Rai Ply did become a very successful company and as is usual with such companies the person calling the shots in the running of the company was the Father who is the founder of the company. I appreciate and understand the role of a father who founds a company and brings in his sons to join in. However, I am dealing with a company as by law established and I am concerned, in this appeal, inter alia, with the law relating to purchase of shares of a minority by the majority and the law and rules relating to the winding up of the companies.

The first prayers in the petition are as follows:-

"1. For the following relief pursuant to section 211 of the Companies Act:-

(a) a declaration that the Father Jaswant are conducting the affairs of Rai Ply in a manner oppressive to the petitioners in their capacity as members of Raiply.

(b) A declaration that the Father and Jaswant hold all such shares in other companies and/or other assets as found by this Honourable Court to have been acquired by them or either of them or by any of their companies with the use of Rai Ply's monies or other assets on a constructive or resulting trust for Rai Ply.

(c) An order directing taking of all accounts and the making of all enquiries necessary for the purpose of that determination.

(d) An order that upon taking of such accounts, the Father and/or Jaswant do purchase the shares in the capital of Rai Ply and Rai Investments owned by the petitioners at a price per share as shall be determined by this Honourable Court. Alternatively, the petitioners do purchase the shares in the capital of Rai Ply and Rai Investments owned by the Father, Jaswant and Sarbjit at a price per shares as shall be determined by this Honourable Court.

(e) Such further of other relief as to this Honourable Court shall seem appropriate.

Alternatively

2. For the following relief pursuant to section 219 of the Companies Act;

(a) an order that Rai Ply be wound up by this Honourable Court under the provisions of the Companies Act;

(b) such further or other orders may be made as shall be just.

In any event

3. That the costs of the Petitioners and costs incurred by Rai Ply be paid by the Father and/or Jaswant."

The petitioners' preferred remedy is that of being bought out so that they remain no more in Rai Ply for which purpose they seek declaratory orders as set out and a fair valuation of their shares in Rai Ply which fair price they say, ought to take into account the monies allegedly siphoned out from Rai Ply and invested in the five companies named hereinbefore as well as in other commercial ventures including a project known as Maalim Juma Project and further including all profits which may have been made from siphoning off of the moneys in question. Such profits were interestingly referred to by Mr Nowrojee who appeared for the 11th respondent here as "fruits".

I must keep in mind the fact that the preferred relief sought by the petitioners is based on the provision made in section 211 of the Act. Whilst construing that section the learned Commissioner concluded that the discretion granted to a court under the said section 211 is tempered by words in sub-section 2 (b) thereof. At this stage it would be proper to set out section 211 which reads:-

"211. (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or in a case falling within subsection (2) of section 170, the Attorney General, may make an application to the Court by petition for an order under this section.

(2) if on any such petition the court is of opinion:

(a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company, would unfairly prejudice that part of the members, but otherwise the facts justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any member of the company by other members of the company or by the company and, in the case of purchase by the company, for reduction accordingly of the company's capital, or otherwise."

The learned Commissioner whilst considering the powers of a company court donated to it by section 211 of the Act looked at the 1985 English Companies Act (I will refer to that henceforth as "the English Act") which Act was heavily relied upon by Mr Inandar to urge that our section 211 is no less than sections 459 and 461 of the English Act when it comes to powers of a company court to enable it to join parties to a petition even when such parties are different entities so long as there is sufficient cause for implanting such entities in a petition brought under section 211 of the Act.

I have pointed out earlier that the learned Commissioner felt that the discretionary powers of a company court are tempered by words in subsection 2(b) of section 211 of the Act. He said:-

"It is I think significant that no case has been cited nor does there in fact appear to be any in which either in Kenya or in England third parties have been joined as parties to a petition prior to the new legislation in England.

The reason I apprehend is that the wording of section 211 refers only to a member who complains that the affairs of a company are being conducted in a manner oppressive to some part of the members including himself.

This is similar to the English section 459 save that "oppressive conduct" in the Kenya Act is "conduct which is unfairly prejudicial" in the English Act. I tend to agree with Mr Inamdar that oppressive would include unfairly prejudicial. The word oppressive denoting more draconian behaviour. The conduct alleged in the petition would in my view fall to be determined both as oppressive and unfairly prejudicial as and when proved.

I have referred earlier to the wide discretion granted to a court under section 211 however that discretion is tempered by the words in sub-section 2 (b) namely that to wind up the company would unfairly prejudice that part of the members "and in the last paragraph" that if in the opinion of the court the matters referred to in sub-section 2 (a) and 2 (b) apply the court may make such order as it thinks fit whether for

1) "regulating the company's affairs". This gives the court power to order the company to pass such resolution or to such other steps as the court may think fit with a view to bringing the matters complained of to an end or

2) "for the purchase of the shares of any members of the company by other members".

These last powers in section 461 of the English Act are still there but two other powers have been given the relevant one being sub-section 2 (c) which authorised civil proceedings to be brought in the name and on behalf of the company by such person or persons and in such terms as the court may direct.

This last power is missing from the Kenya Act and in my view is the provision under which the English Courts have joined third parties to the petition."

The learned Commissioner gave ample attention to the English Act as Mr Inamdar based the application for joinder of the five companies on the interpretation of the English Act and English authorities adding of course that our section 211 gave similar powers to a court as read with rule 203 of The Companies

(Winding up) Rules (the rules) which rule reads:-

> "203. In all proceedings in or before the court, or any judge, registrar or officer thereof, or over which the court has jurisdiction under the Act or these Rules, where no other provisions is made by the Act or these Rules, the practice, procedure and regulations in such proceedings shall, unless the court otherwise directs, be in accordance with the rules and practice of the court."

By virtue of rule 203, just reproduced by me, Mr Inamdar placed reliance or Order 1 rule 10 and O VIA rules 3 & 4 of the Civil Procedure Rules to buttress his application for joinder, in the petition, of the said five companies. Rule 7 of the Rules is not in issue as it simply provides for procedure for any application in a company court. In support of his arguments Mr Inamdar took this Court through section 75 of 1980 Companies Act in England which eventually came to be reproduced in sections 459 and 465 of the English Act. I consider it proper at this stage to reproduce these two sections for eventual better elucidation of the powers donated by these sections to a company court. These read:

> "459. Order on application of company member:-
>
> (1) A member of a company may apply to the court by petition for an order under this part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudiced. (2) The provisions of this part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provision apply to a members of the company; and references to a member or members are to be construed according. (3) (not relevant).
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> 461. Provisions as to petitions and orders under this part:-
>
> (1) if the court is satisfied that a petition under this part is well founded, it may make such order as it thinks fit for giving relief of the matters complained of
>
> (2) Without prejudice to the generality of sub section (1), the court's order may:-
>
> (a) regulate the conduct of the company's affairs in the future,
>
> (b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it omitted to do;
>
> (c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct,
>
> (d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."
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> (3)]
>
> (4)] not relevant here.
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> (5)]
>
> (6)]

It appears that the English Act, by section 461 extended the scope of remedies given by section 210 of the 1948 English Companies Act. Our section 211 is a reproduction of section 210 of the 1948 English Act.

The learned Commissioner, as pointed out, held that the English Act (sections 459 & 461) gave wider powers to a company court then does our section 211. Mr Inamdar was in arguing this appeal, which he did extremely articulately and most ably, criticized the learned Commissioner for not following the reasoning of the English Courts in:-

(a) Re a Company (1986) BCLC 362

(b) BSB Holding Limited (1993) BCLC 246 and

(c) North Holdings Limited vs. Southern Tropics Limited (1999) 2 BCLC 625.

and in failing to appreciate that the said decisions were in no way based on the provisions of section 461 (2)(c) of the (English) Companies Act 1985. Mr Inamdar is of the view that under section 211 of our Act the powers of the courts in Kenya are as extensive as the powers of the English Court under section 461 of the English Act. In the case of Re a Company (1986) BCLC 68 Hoffman J (as he then was) held that the court has an extremely wide jurisdiction to grant relief under section 461 (1) of the Companies Act 1985 and there was no reason why the words should not be given their full effect so as to enable the court to grant relief against a respondent who was no longer a member and this possibly could extend to requiring such a respondent to purchase the petitioners' shares and that the fact that the petitioners could also have brought a derivative action with respect to the conduct which was alleged to contribute to the unfairly prejudicial behaviour did not preclude them from seeking relief under section 459 of the Companies Act 1985. Hoffman J said at page70:-

"Sections 459 and 461 reproduce provisions which were first introduced into company law by s 75 of the Companies Act 1980, by way of replacement of much narrower powers which were previously embodied in section 210 of the Companies Act 1948." (emphasis mine).

Hoffman J, in regard to the duplication of issues in a winding up action and proceedings commenced by a writ said:

> "I would be reluctant to come to the conclusion that this form of duplication was necessary unless it was clear that the jurisdiction under ss 459 and 461 did not permit the whole matter to be dealt with on the petition. It seems to me that although it is true that section 461 (2) shows that the normal order under section 461 will be an order against the company or another member, there is no reason why the words of s 461 (1) should not be given their full effect and allow the court to give relief in respect of a complaint that the company's affairs have been conducted in a manner unfairly prejudicial to the interests of members, even when this would involve giving relief against a respondent who is no longer a member. For that reason I am not willing to strike out H as a party to the petition."

In the case of Re BSB Holdings Ltd (1993) BCLC 246 Vinelott J, said at page 253:-

> "It is important to bear in mind that section 459 sets out the grounds on which the court's jurisdiction to make an order under section 461 can be invoked. To answer the question who is a necessary party to a petition under section 459 requires consideration to be given not only to the persons whom were responsible for the unfair conduct complained of but those who might be affected by relief under section 461 rectifying that unfair conduct. But, as I pointed out, a member against who no allegation is made and against whom no relief is sought need not take an active part in the proceedings unless it is sought to amend the petition to raise an allegation against that person or to seek relief which might affect him."

The case of North Holding Limited vs Southern Tropics Limited [1999] 2 BCLC 625 was heavily relied upon by Mr Inamdar to support his argument that nothing barred a company court from implanting in the petition parties who might be affected by the conduct of the alleged recalcitrant members of the Company and that the decision as to whether the business of the five companies was such as to lead to a belief that their assets were held on trust for Rai Ply so as to join them in the petition in order to arrive at a fair

valuation of the shares held by the petitioners. This case which is commonly referred to as the Kasmare case has turned out to be locus classicus in England on the use of remedies available to members of a company in the event of unfair prejudice suffered by them. I am putting this factor as generally as possible. Mr Inamdar pointed out that the use of the new Civil Procedure represented a new way of conducting company litigation under sections 459 and 461 of the English Act and that despite such use being made available to English litigants by the new rules the situation in Kenya was such as to allow a Kenyan litigant in a section 211 application to rely on the principles laid down by the Kasmare case. The High Court in England (Ratee J) had struck out the petition of North Holding Limited which sought relief under section 461 (2) (d) of the English Act. In essence the judge held that to proceed by way of petition was an abuse of the process of court because there was no realistic chance of a court making the order sought in the light of an offer made by Mr & Mrs Clarke (the respondents there) to buy the shares in the company and the rights given by a shareholders' agreement.

What was decided in the Kasmare case is a live issue. Whilst Mr Inamdar insisted that the new procedural aspects introduced in England do not affect the powers of our court under section 211 of the Act Mr Oraro insisted that the new English procedure as introduced in England was for effective case management and that there being no such procedure available in Kenya, Kenyan courts were bound to go by the law and procedure available to us here and that therefore the Kasmare case was not an authority for the proposition that only the courts were proper for a for determination of a fair value of shares. Mr Oraro also argued that that case did not call for limitless remedies to be given to members of a company. The question that therefore arises is: what is the ratio decidendi of the Kasmare case? I bear in mind the fact that case was decided under the new English provisions and that in any event even if applicable, it is only persuasive and not binding on me.

Mr Inamdar's contention is based on what was said by Aldous LJ at page 632 of the Kasmare case report. He said:-

> "The judge went on to consider and reject as grounds for relief claimed the remaining complaints which were that Mr & Mrs Clarke had taken from the company salary and other benefits in excess of those provided for by their respective service agreements and that they had caused the company to break its obligations under a loan agreement and to make loans to themselves in breach of section 330 of the 1985 Act.
>
> Against that background the judge came to consider whether the petition should be struck out. The petitioners had submitted that they had been unfairly prejudiced by the actions of Mr & Mrs Clarke and that the appropriate remedy was an order requiring purchase of B shares at a price to be fixed by the court as that was the only way that a proper price could be arrived at. The respondents had submitted that, whether or not there had been unfair prejudice, the petitioners could not succeed in obtaining relief as they had two alternative and satisfactory means of realizing their investment in Southern Tropics at a price which took account of claims made in the petition, in so far as they had not been rejected by the judge as unarguable."

I keep in mind the fact that in the Kasmare case Mr & Mrs Clarke did not dispute that they had used certain assets of Southern Tropics to build up the business of Kasmare and that they had submitted that auditors or other accountants could assess the value of any misuse if there had been misuse and take that into account when arriving at fair value of the B shares. In this case the principal respondents do not admit such misuse. I have referred to the allegations and counter allegations, in brief, earlier.

My own reading of the judgment of Aldous LJ in the Kasmare case leads me to believe that the learned Lord Justice did not bring in the use of new English Civil Procedure Rules by a side wind or as obiter or per incuriam. He dealt with these rules at length and concluded that the new and cheaper remedy provided by rule 1.4 (2) need be followed. He said what follows:-

"The rationale for striking out petitions was explained by Hoffmann J in Re a company (No 006834 of 1988), exp Kremer [1989] BCLC 365. That was a case in which the petitioner complained that the price that he would obtain under a pre-emption clause in the articles of association could not give him a fair

price having regard to the way that the company had been run. Hoffman J said (at 367):-

"The principle to be arrived from those cases is that when it is plain that the appropriate solution to a breakdown of relations is for the petitioner to be able to sell his shares at a fair price and the articles contain provision for determining a price which the respondent is willing to pay or the respondent has offered to submit to an independent determination of a fair price, the presentation or maintenance of petition under ss 459 of the 1985 Act will ordinarily be an abuse of the process: see Re a Company (No 003096 of 1987) [1988] 4 BCC 80, and the earlier cases therein referred to:

He continued (at 368):

'This is an ordinary case of breakdown of confidence between the parties. In such circumstances, fairness requires that the minority shareholder should not have to maintain his investment in a company managed by the majority with whom he has fallen out. But the unfairness disappears if the minority shareholder is offered a fair price for his shares. In such a case, section 459 was not intended to enable the court to preside over a protracted and expensive contest of virtue between the shareholders and to award the company to the winner.'

Having dealt with the specific matters and having set out the law he concluded, (at 370):

'The valuation has a rough and ready aspect to it, and will not be nearly as fine-toothed as a valuation carried out before the court. It will, however, as I have pointed out on earlier occasions, be far quicker and cheaper. The question is whether it is unfair for a petitioner who has brought into a company with an article in form of art 7 to have to accept those aspects of valuation.'

That statement was made against the background of the rules of procedure as they were at that time (emphasis mine). Since then, the new Civil Procedure Rules 1998, S1 1998/3132, have been introduced which represent a new way of conducting litigation. At the heart of these rules is the requirement of the courts to manage cases actively. That will require a new approach by the registrar to proceedings such as this one. He will need to give directions to enable petitions to come on for trial efficiently, quickly and as inexpensively as possible. The approach, to be adopted is set out in rule 1.4 (2). Ample use should be made of the power to require a joint expert or the appointment of an assessor. If that be done, I anticipate that the number of cases in which applications are made to strike out will be substantially reduced as the parties will realize that in most cases the court imposed directions will result in a procedure which would be so quick and cheap as to make it unwise to insert a legal step which might not succeed, and even if it did, would not save much expense."

Both Mr Inamdar and Mr Oraro as well as Mr Nowrojee and Mr Gautama stated that prior to the changes in the company law in England in 1985 there were no decisions (under section 210 of the 1948 English Act our equivalent section being section 211) which effectively allowed joinder of affected companies to a petition under that section. That appears not to be quite the case. My own researches have led me to an English case, namely, Re A. Singer & Co (Hat Manufacturers), Ltd [1943) 1 All E.R 225 in which case it was held that third-party procedure is not applicable in winding-up matters. The judgment of Lord Greene M.R makes an interesting reading; he said (at 227)

> "It seems to me, therefore, to be clear that the only jurisdiction which can be exercised in winding up under the Companies Act and the winding up rules is jurisdiction relating to winding up of companies. What is the jurisdiction which the company judge would be exercising if leave to serve a third-party notice could be granted? In deciding the issues raised by such a notice he would not be deciding anything relevant to the winding up. The only matter in the winding up is the controversy between the liquidor and the bank. The question whether as a result of the decision of that controversy the bank has a right over against the sureties (the third-parties) is a matter which has nothing to do with the winding up. What would be the position of the judge sitting and dealing with the issue and adjudicating upon it? Would he be exercising the winding-up jurisdiction conferred upon him as the judge nominated for the purpose by the Lord chancellor? It seems to me to be quite clear that he would not . He would be exercising a jurisdiction conferred upon him on the judge

having nothing to do with winding up and would, therefore, not be doing the only thing that he is there to do; in other words, if this argument were correct, it would have the effect of bringing a third person before a winding up court and forcing him to submit to the jurisdiction of the winding up court, whose jurisdiction is ex hypothesi limited to winding up matters. It seems to me, therefore, that when this matter is examined, having regard to its fundamental basis, it is quite impossible to find any jurisdiction in the court to apply the third-party procedure and take into its consideration disputes which have nothing to do with the winding up.

Reference was then made to rule 224 of the winding up rules, which provides that:-

> ...Where no other provision is made by the Act or rules, the practice, procedure and regulations shall, unless the court otherwise in any special case directs, in the High Court be in accordance with the Rules of Supreme Court and practice of the High Court. It was said that, so long as the rules are silent on third-party matters, by that rule the provisions of the Rules of the Supreme Court with regard to third-party procedure are imported. R. 224 cannot therefore possibly be read as importing procedure from the Rules of the Supreme Court which would have the effect of conferring or purporting to confer on the companies court a jurisdiction which by statute it does not and cannot possess. Therefore no assistance is to be gained from that argument."

Although what Lord Greene M.R. said was in relation to provision in the English Companies Act of 1929 it would apply equally to the English Act of 1948 and hence to our own Act. To my mind it is quite clear that the 1985 English Act provisions give a much wider jurisdiction to English company courts than does our Act. If, as Mr Inamdar would want us to believe, section 210 of the 1948 English Act gives as wide powers to courts as do sections 459 and 461 of the 1985 Act there would have been no need to alter the 1948 English Act. With the greatest of respect to Mr Inamdar I cannot accept his argument that section 459 and 461 of the English Act are almost in pari materia with section 210 of the 1948 Act.

What then is the position under the Act. I have earlier in this judgment set out section 211 of the Act. It is plainly worded and in my view it brooks of no conflicting interpretations. The courts' wide powers are clearly restricted to two matters.

1. For regulating the company's affairs in future, or

2. For the purchase of the shares of any members of the company.

In the manner this section is worded I cannot import into it any factor that enables a company court to bring as parties to the petition other companies even if those companies may have benefited from the Rai Ply's operations. To allow that would mean, effectively, that the other companies could come under the jurisdiction of a winding up court. I say so despite the urgings by Mr Inamdar to the effect the only purpose in bringing those companies on record is to seek a fair valuation of the petitioner's shares which they wish to sell. If the section does not allow such a step no Civil Procedure Rules can bridge the gap as indeed was pointed out by Lord Greene M.R. in the case of Re A. Singer & Company (supra).

Substantial time was taken up by Mr Inamdar in arguing the principles relating to fiduciary duties owed by the Father and Jaswant to Rai Ply and to the petitioners. I have no quarrel with the principles. Such duties are clearly owed and if there is breach thereof where does the remedy lie? The allegations of breach of such duties are such that only equity court could deal with them. In my view this is not within the province of a company court in a winding up petition. If a company court starts taking cognisance of equitable principles it would go beyond its jurisdiction. At the stage when it comes to dealing with breaches of fiduciary duties and remedies sought therefore the company court should down tools and say: please go to a regular civil court by way of a plaint. What I just said is borne out by the case of Aberdeen Rail Company v Blaikie Brothers [1843-60] All ER 249. It was a normal suit and not a winding up petition. Of course I have no quarrel with the proposition that a director ought not to enter into a contract on behalf of the company with himself unless he brings himself within the ambit of section 200 of the Act. The issue of the fiduciary duties of a director was the subject-matter of the action in Deeks & Others [1916] 85 L J PC 161. The action there was not in a company court but was brought in a suit in Canada.

In the case of Regal (Hastings Limited v Gulliver [1942] 1 All E.R 378 the action was in a company court, under section 211 of the 1948 English Act. It was brought by the company against the infringing directors. It was not a shareholder's action. Royal Brunei Airlines Ltd vs Tan [1995] 3 All ER was a case where the company brought a suit against the respondent to recover some unpaid moneys alleging that the respondent was liable as constructive trustee because he had knowingly assisted in a fraudulent and dishonest design on the part of the company a trustee for the airline. Mr Inamdar relied on this case to urge that breach of fiduciary duties can be fastened on to the five companies for knowingly assisting the Father and Jaswant in committing breaches. This case could assist in a civil action but to apply the principles enunciated in this case in a winding up suit would not serve the purpose. That kind of remedy is in the province of an equity court and a back door remedy is sought here, that is to say, the five companies are sought to be brought in when there is no provision in the Act to enable such joinder. The way in which the petition is framed makes it obvious that remedies are sought against directors rather than Rai Ply.

In fact, as pointed out very succinctly by Mr Gautama who appeared for Rai Ply, there are no allegations of misdeeds against the company. Mr Gautama pointed out, quite properly in my view, that a company court is being used to ventilate the grievances of feuding shareholders who are members of the Rai family. It is also clear to me that the petition is based on sections 459 and 461 of the English Act albeit by an ingenuous argument to the effect that those sections are mostly in pari materia with section 211 of our Act.

Mr Inamdar relied on the case of Scottish Co-operative Wholesale Society Ltd v Meyer & Another [1958] 3 All E.R 66 in support of his submissions to the effect that section 210 of the 1948 English Companies Act gives wide powers to a court to do justice to the injured shareholder. This is correct to the extent that the "oppressor" could be ordered to buy out the shares of the "oppressed" at a fair price. This case goes further to decide that once the oppressor had bought the shares the company can survive. This case however, does not decide the issue of implanting other parties to the petition. In other words it does not talk of tracing which can only be by a suit as opposed to a petition. An important factor to be borne in mind when dealing with a section 211 petition is that the court is enjoined to consider the conduct of the respondents at the time of the filing of the petition and not past conduct which may well be water under the bridge. In the case of Re Jermyn Street Turkish Baths [1973] 3 All ER 184 the Court of Appeal in England said (at 199 c):

> "We are not concerned in this case whether the minority shareholders could succeed either in misfeasance proceedings against the directors in a minority shareholders' action in the name of the company. We are concerned only to consider whether the affairs of the company were, when the petition was presented being conducted in a manner oppressive to some part of the members of the company."

It is not necessary really for the purpose of this appeal to decide if the conduct of the principal respondents is oppressive to the minority shareholders as the principal respondents have agreed to buy out the shares of the petitioners. If the company has been wronged the remedy lies in the hands of the company and if the company does not act shareholders have a very limited right to bring a derivative action as was discussed in the case of Prudential Assurance Company Limited vs Newman Industries Limited and Others [1982] 1 All E.R 364. A derivative action is different from a petition under section 211 of the Act. It is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C, C is the proper plaintiff because C is the party injured and therefore the person in whom the cause of action is vested. This is sometimes referred to as the rule in Foss v Harbottle (1843) 2 Hare 461, 67 E.R 189 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence.

Cumming – Bruce, Templeman & Brightman L.JJ) said in the case of *Prudential Assurance Company* (supra) (at 357):

> "The classic definition of the rule in Foss v Harbottle is stated in the judgment of Jenkins LJ in

Edwards vs Halliwell [1950] 2 All E.R 1064 at 1066-067 as follows.

(1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation

(2) where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter, because, if the majority confirms the transaction, cadit question; or, if the simple majority challenges the transaction, there is no valid reason why the company should not sue,

(3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot confirm the transaction

(4) There is also no room for the operation of the rule if the transaction complained of could be validly sanctioned only by a special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority

(5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

The rule in Foss v Harbottle still stands good in Kenya. The exception to the rule referred to above may be taken advantage of by minority shareholders if they can show fraud but they cannot do so by way of a petition. They can only do so as plaintiffs in a derivative action. What the petitioners are attempting to do is to convert a section 211 petition into a derivative action. They cannot do so. Their remedies, if any, lie elsewhere but not in a company court. It could be argued that under the new regime introduced by new rules in England a section 459 petition could be converted into a derivative action. I make no pronouncement thereon. All I will say is that before one can proceed further with such a derivative action he has to establish a prima facie case of fraud the burden whereof is higher than a balance of probability burden. A petition and a derivative action are mutually exclusive. If one opts for one of the remedies the other one is out as it would open the respondents to vexation.

As substantial arguments were advanced on the powers of the court under section 210 of the old English Act (our section 211) being almost at par with the powers of the court under sections 459 and 461 of the English Act it would not be remiss here to look at what was stated by the Court of Appeal in England in the case of Re Saul D Morrison & Sons plc [1995] 1 BCLC 14. Hoffman L J said, (at 17 a):

"unfairly prejudicial" is deliberately imprecise language which was chosen by Parliament because its earlier attempt in section 210 of the Companies Act 1948 to provide a similar remedy had been too restrictively construed. The earlier section had used the word 'oppressive' which the House of Lords in Scottish Coop Wholesale Society Limited vs Meyer [1998] 3 All ER 66, [1959] AC 324, [1958] 3 WLR 404 said meant 'burdensome harsh and wrongful'. This gave rise to some uncertainty as to whether 'wrongful' required actual illegality or invasion of legal rights. The Jenkins Committee on Company Law, which reported in 1962, thought that it should not. To make this clear it recommended that use of the term 'unfairly prejudicial' which Parliament somewhat tardily adopted in s 75 of the Companies Act, 1980. This section is reproduced (with minor amendment) in the present section 459 of the Companies Act 1985."

It becomes clear therefore that section 459 and 461 remedies were brought in to ameliorate the "harshness" of the restrictive remedy given by section 210. Our Act still remains the same and I do not see how a court can grant the wider remedies now available in England even to the extent that the exception to the rule in Foss v Harbottle is now part of the new company law regime without the need for

taking out of a derivative action.

Very many cases were cited by Mr Inamdar and Mr Oraro in support of their respective contentions as regards whether or not the five companies cannot be made respondents to the petition. By now, from what I have said so far it must be clear to counsel that I am of the view that the five companies cannot be made respondents to the petition as the remedies under section 211 of the Act are restricted to the two mentioned therein and there is no warrant in law to widen the scope thereof. I hope I will be excused if I do not refer to all the cases cited by counsel on this issue. I do not see the need for it. I am entirely in agreement with the learned Commissioner when he held that section 211 of our Act does not donate to the Court such powers as are donated by sections 459 and 461 of the English Act. Speaking for myself I must say that I often got the feeling, during the course of the hearing of this appeal, that the Court being addressed by Mr Inamdar was the English Court of Appeal and that the Court was being asked to follow, regardless of our section 211, the English Act.

At one stage Mr Nowrojee asked this Court to rise up to the occasion and give a "landmark decision." I ask myself this question: would departing from our law and giving a decision based on the English Act (sections 459 and 461) constitute a "landmark decision". If I did so I would be legislating; I would be usurping the functions of the Parliament; I would be infringing on the separation of powers. However, tempting Mr Nowrojee's challenge is I cannot re-write the law. This would be a matter for our Law Reform Commission and our Parliament.

What I have said so far takes cognisance of grounds 1 to 7 (both inclusive) of the appeal. I see no reason to disagree with the learned Commissioner. Grounds 8 and 9 of the petition attempt to say that as the five companies are created by the majority shareholders probably out of Rai Ply's moneys they are inextricably connected with Rai Ply and therefore are necessary parties to the petition. I have already stated why I would not allow such a joinder. The law does not permit such joinder. It has in any event been satisfactorily explained that moneys taken out of Rai Ply with the acquiescence of the principal petitioners have been accounted for and it is possibly too late in the day to raise complaints on that score. The appeal on the issue of joinder is dismissed.

The second limb of the appeal the learned Commissioner had before him was the application by the principal respondents whereby they were seeking an order to strike out the petition as being as abuse of the court process on the following grounds:-

> (a) The Petitioners in their Petition have asked for an order that the Applicants do purchase the petitioners' shares in the capital of Rai Plywoods (K) Limited and Rai Investments Limited at a price per share as shall be determined by this Honourable Court.
>
> (b) By a letter dated 23rd September, 1999 the Applicants through their advocates have offered to buy the shares in Rai Plywoods (K) Limited at a price to be agreed and in default of such agreement that the valuation be done by reference to arbitration taking into account all issues put forward by the Petitioners in their Petition.
>
> (c) In their reply dated 7th October, 1999 the Petitioners' advocates have imposed as a pre-condition to their considering Arbitration that, Messrs Gregory and Sheikh be re-instated as Interim Liquidators pending the hearing and determination of the reference and that they be given access to the accounts of companies which are not parties to the petition.
>
> (d) By an exparte order obtained by the Petitioners on 1st September, 1999 M/s Gregory and Sheikh were appointed Interim Liquidators and acted as Interim Liquidators for 8 days at a colossal sum of Kshs 5,867,762/- as their fees from the company.
>
> (e) The Petitioners' insistence on imposing the said preconditions is unreasonable and tantamount to a refusal to accept the offer.
>
> (f) In the premises although the Petitioners by their petition prayed for an alternative remedy, they

are using the winding up proceedings to exert pressure on the majority shareholders to coerce the majority shareholder to settle all the family disputes on terms dictated by the Petitioners.

I have pointed out earlier that the petitioners' preferred remedy was that their shares in Rai Ply and Rai Investments be brought out by the principal respondents. The principal respondents made an offer to buy out the shares by their advocates' letter of 23rd September, 1999 which letter is couched in the following terms:-

"Re Winding Up Proceedings No 44 of 1999 – Rai Plywoods (Kenya) Limited.

"We refer to the above matter in which we are acting for Mr Tarlochan Singh Rai, Mr Jaswant Singh Rai and Mr Sarbjit Singh Rai inter alia.

In the Petition, you have requested for an order that our clients do purchase your client's shares in both Rai Plywoods Kenya Limited (the Company) and Rai Investments Limited at a price per share as shall be determined by the Honourable Court. We do not think that your clients are entitled to the relief requested in respect of Rai Investments Limited because the company is not a party to the petition. Nevertheless our clients are ready, willing and able to purchase your client's shares in Rai Plywoods Kenya Limited and to consider the acquisition of your client's shares at a fair market value to be agreed and in default of an agreement such value may be determined by arbitration on the following basis:-

1. The arbitration to be before a single arbitrator who shall be a chartered accountant practising in Nairobi acceptable to both parties or any other suitable person. Alternatively, each party may appoint one arbitrator and the two arbitrators so appointed would then choose an umpire who should preferably be a senior advocate or chartered accountant registered to practise in Kenya. If the second alternative is adopted, a party who has duly appointed an arbitrator will be entitled to appoint that arbitrator to act as sole arbitrator on default by the other party in appointing an arbitrator within fourteen (14) days of such appointment.

2. The Arbitrator(s) would determine a fair market value of your Client's shares at the date of submission to arbitration.

3. For the purpose of such fair market valuation of your client's shares, all the parties and the arbitrator(s) would have full access to the accounts and financial records of the company up to the date of such valuation.

4. The arbitrator(s) would have authority to investigate and carry and or call for information so far may be necessary for the purposes of such valuation.

5. The arbitrator(s) would have specific authority to investigate and enquire into the allegations of fraud and/ or misfeasance made in petition or in the affidavit in opposition in so far as any such allegations affect the net asset value of the company and subsequently the fair market value of your client's shares.

6. Your clients will also be at liberty in such arbitration in the company to bring before the arbitrator(s) any facts that may affect your client's claim and the arbitrator(s) may also have access to the accounts and financial records of the company as well as the authority to investigate and enquire into the affairs of the company for the purpose of ascertaining validity of your client's claim.

7. The arbitrator(s) shall have the power to make any order as regards costs.

Kindly confirm if the above offer is acceptable to your clients within the next seven (7) days failing which we shall proceed to apply to the Honourable Court for appropriate orders..

Yours faithfully,

ORARO & COMPANYADVO1CATES".

Before I come to the petitioner's response to this letter I must point out some aspects of the petition that have perturbed my mind. The petition, it is clear from the record, came like a bolt from the blue. There was no previous request made by the petitioners to the principal respondents asking them to buy out the petitioners. As if that was not enough the petitioners obtained an ex parte order to appoint interim liquidators when their preferred remedy was not for winding up of Rai Ply. It cannot be gainsaid that such appointment (ex-parte interim) could well destroy a company. What advantage the petitioners hoped to gain out of such an order is not clear and the only conclusion I can draw is that they must have wished to exert pressure upon the principal respondents to accept their terms.

Be that as it may the superior court lifted the order for appointment of interim liquidators eight days after the date of appointment. The learned Commissioner considered the striking out application keeping in mind the fact that he could not order joinder of other companies in the petition. He concluded that he considered the respondents' offer to be a reasonable one in all the circumstances but fell short of so declaring and directed that the parties ought to reconsider the method whereby the moneys paid to third parties are dealt with and hence left to court a residual power to determine any matter of law or fact which might arise during the course of an arbitration process to determine a fair value of the shares.

Before I came to Mr Inamdar's arguments in support of this second limb of the appeal I consider it prudent to set out the contents of the letter written in response to the offer in the letter of 23rd September, 1999. It reads:-

7th October, 1999

Oraro & Company.

Advocates,

Finance House,

11th Floor,

Nairobi.

Dear Sirs,

Re: Winding- Up Proceedings 44/99

Rai Plywood (K) Ltd

Further to a letter of the 27th September, 1999, we now have had an opportunity to consider the proposals contained in your letter of 23rd September, 1999 in consultation with our clients.

Our clients' view is that by reason of the existence of complicated issues of mixed fact and law in the above proceedings, this is not simply a case of valuation of shares but for determination by an arbitration tribunal consisting either of an accountant or three persons as suggested by you.

Notwithstanding this, our clients would be prepared to consider a reference to arbitration provided three preconditions are satisfied. These are:-

(i) That Messrs Gregory and Sheikh are re-instated as Interim Liquidators or be appointed as Receivers pending the hearing and determination of the reference:

(ii) That Iqbal is accorded full rights of access to the statutory books and books of account and financial records of Rai Ply, Rai Investments, Rai Products and Rai Holdings;

(iii) That nothing is done to alter in any way the *status quo* existing on 30th August, 1999 in any of the family companies.

These conditions need to be met with a view to ensure justice and fair play between all the parties to this dispute.

At this stage, our clients' primary concern is the preservation of the state of the accounting records of the various family companies as at 30th August, 1999 so that the integrity and usefulness of the process of arbitration suggested by you is not undermined. If you agree to these pre-conditions, we will be happy to have an immediate meeting with you to discuss the actual terms of the reference in an endeavour to reach agreement with you.

Yours faithfully.

INAMDAR & INAMDAR

IT INAMDAR"

I have set out the petitioners' response in full as Mr Inamdar complained that the learned Commissioner referred only to the three conditions and thereby did not consider the reasons on the part of the petitioners for saying that this was not a case fit for arbitration. In the second paragraph of the said response the petitioners say that on account of the existence of complicated issues of mixed fact and law the issue was not one simply of valuation of shares. In support of this argument Mr Inamdar relied on the Kasmare case. I revisit that case. The Court of Appeal in England going by the new sections in the English Act held that whether or not any part of the business of K Ltd was held on trust for S Ltd was a decision that should be taken by the Court and not by an accountant and that therefore the offer to purchase shares and the option in the shareholders' agreement were not sufficient to remove any potential unfair prejudice. The petition was remitted to the registrar for directions on how the petition should proceed. I keep in mind the fact that the Rai Ply articles of association do not contain rights of pre-emption under which the petitioners are required to offer them to other shareholders at a price to be certified by the auditors of the company. The learned Judge (Rattee J) who heard the Kasmare case said this:-

"In my judgment the question I have to determine on this application to strike out the whole of the petition is whether there is any realistic prospect of the Court making orders such as those sought by the Petitioner at trial of the petition. In my judgment there is no such prospect. In all the circumstances of the case disclosed by the evidence before me, even assuming the Petitioner's allegations are made good at the trial, I do not consider the court would property think it necessary, in order to do justice to the parties, to make any order under section 461 of the Companies Act 1985, given the two alternative routes that have been open to the Petitioner to realize its investment in the Company and given that these routes are, in substance, the two alternatives expressly agreed to between these parties as a framework for the petitioner's investment in the company."

The two alternatives available in the Kasmare case are not available in this case. In such case what is the remedy available? I must take a practical approach. Function of a court is to decide matters before it. What was before the learned Commissioner was an application to strike out the petition on the grounds I have already set out. Rattee J in the Kasmare case rightly or wrongly determined the dispute only to be overruled by the Court of Appeal. The learned Commissioner did not rule on the application. He said:-

"I consider that in most respects the Respondents' letter of offer is reasonable but I am of the view that the parties should reconsider the method whereby the monies paid to the third parties are dealt with. It is a matter for the parties but it might be of assistance if the court is left with residual powers to determine any matter of law or fact which might arise during the course of arbitration."

Having ruled that there was no jurisdiction to implant the five companies in the petition the learned Commissioner went off at a tangent and by a side wind purported to bring in the five companies by reference to "money paid to the third parties." In my view it was then not open to him to so rule. When the learned Commissioner said that the first two conditions demanded by the petitioners can be met by the arbitrator proposed having powers to investigate the companies affairs including the tracing of money and profits (if any) arising therefrom he went against the grain of his ruling whereby he declined to join the five companies to the petition. I think both the feuding sides have a genuine complaint against the learned Commissioner's indecision.

The petitioners want to be bought out but only after the five companies are brought in the petition and after their assets and profits are taken into account in arriving at a fair value of shares. The principal respondents are agreeable to buy out their shares but on terms as offered by them. I have already found that there is no jurisdiction in a company court under section 211 of the Act to join other companies. In view of this finding I would say that it is unreasonable for the petitioners to continue to want to prosecute the petition when what they want and what can lawfully be given to them is offered to them. Obviously the petitioners hoped to gain advantages by the proposed joinder. These are (1) look for evidence to buttress their position and (2) the principal respondents may cave in and give them what they want. The attitude of the petitioners leaves much to be desired. First they rush to court like a bolt out of the blue as I pointed out earlier, then obtain an ex parte order to appoint an interim liquidator and (3) then want five more companies to be brought in. The only conclusion I can draw and do draw is that they are using a court process as a means of coercion and I cannot allow that, sitting in the shoes of a company court. I am surprised that the learned Commissioner made no comment on the attitude of the petitioners. I think Vinelott J was right when he said in In re a company (No 002567 of 1982) [1983] WLR 927 at page 933:-

"First, I do not think that it is necessary for the respondent to a petition to show that the petitioner has some other statutory remedy available to him; that is, that he has a remedy under section 210, or now section 75. What section 225 (2) of the Companies Act 1948 contemplates is, I think, a situation in which the continuance of the company would be unjust to the petitioner and when that injustice cannot be remedied by any step reasonably open to the petitioner. If an offer is made to purchase his shares he is thereby provided with an alternative course; the question is whether he is acting unreasonably in rejecting it.

The second is that jurisdiction of the court under section 225 is discretionary. The court would be at least entitled to refuse to make an order if satisfied that the petitioner is persisting in asking for a winding up order and that it would be unfair to the other shareholders to make that order, having regard to any offer that they have made to the petitioner to meet his grievance in another way .... It is as much an abuse of the process of the court to persist in a petition, which, because of a subsequent offer is bound to fail as it would be to present a petition which on the facts existing at time of the petition is bound to fail."

In view of the findings I have made, namely, that the petitioners are not in law entitled to join the five companies the petitioners cannot now, in my view, insist on the conditions that they are imposing in their counteroffer. The first condition is that of reinstatement of Messrs Gregory and Sheikh as receivers pending the hearing and determination of the reference. This condition is onerous and ruinous to Rai Ply. The second condition the petitioners wished to impose was that Iqbal be accorded full rights of access to records of Rai Ply, Rai Investments, Rai Products and Rai Holdings. This condition does not help the petitioners with valuation of Rai Ply's shares. The third condition is that nothing should be done to alter in any way the status quo existing at August, 1999 in any of the family companies. This condition presupposes that the five companies would be joined in the petition. I have already ruled on that issue. This condition, in my view, would create a situation stymieing the five companies which are in law, separate entities. If this was allowed to happen this litigation would open floodgates of allegations and counter-allegations which would never end. This condition also presupposes that these companies are family companies which come under the so called 1978 family arrangements which I have already pointed out are not legally binding arrangements. In bringing in the said family arrangements the issues would become clouded. A company in which family members are shareholders/directors still remains a company however small or large.

If I discount three conditions which the petitioners have put I am left with the offer made by the principal respondents. They are, and it is not suggested otherwise, in a position to buy out the petitioners' shares in Rai Ply. In all the circumstances, after taking into account the law and the fact that the petition cannot be converted to a derivative action, I find that the respondents' offer as amended in the letter addressed by M/s Oraro & Company to M/s Inamdar & Inamdar and dated 23rd November, 2000 is a reasonable one. It is as reasonable as it could be because no dissatisfied party would say, normally, that the other side's offer is reasonable one. It is the function of the court to decide if the offer is reasonable. Whilst the learned Commissioner felt that the offer was reasonable in most respects I say that it is as reasonable as it could be in the circumstances now prevailing. Any further litigation on that issue would only serve to increase costs and therefore a burden on Rai Ply which is only a nominal respondent here. The bone of contention in reality is between the Father, Jaswant and Sarbjit on one hand and Jasbir, Iqbal, Daljit Kaur Hans and the mother on the other hand. As I pointed out earlier no allegations are made against Rai Ply. I am convinced in my own mind that a company court is being used to ventilate grievances of a feuding family and I cannot allow that to happen, whilst sitting in the shoes of a company court on appeal.

Having found that the principal respondents' offer as amended is a reasonable one it now matters not whether the allegations contained in the petition were found in the end to be true. I would prefer to look at authorities of our own court rather than English Courts in deciding this matter. Omolo J.A in the case of Vadag Establishment v Y. Shretta & 10 Others (Civil Appeal No 83 of 2000) said what I have just stated. He said:-

"It is not the duty of this Court in this appeal to examine the correctness or otherwise of the allegations contained in the petition. As we have seen Mr Justice Ole Keiwua had examined the matter and come to the conclusion, as I understand it, that even if the allegations contained in the 1st Respondent's petition were in the end found to be true, they would not entitle the 1st Respondent to a winding up order because there is an alternative remedy, other than a winding up order, which would effectively address the complaints raised in the petition. The alternative remedy found by the learned Judge was that the majority shareholder who is now the appellant was to buy out the shares held by the 1st Respondent in the Company whose winding up he sought. If his shares in the company were to be bought out at their market price, then the 1st Respondent would no longer be a member of the Company and the oppression upon him by the majority shareholder or any other person in the Company would cease. There would, accordingly, be no need to wind up the company so as to get rid of the oppression upon the appellant. (This is an error should be the 1st Respondent). Upon that conclusion by the learned Judge, the only issue left outstanding was the price at which the shares of the 1st Respondent were to be bought and to determine that issue, the learned Judge had given the parties themselves the chance to set up a machinery for the determination of the value to be placed on the shares. If the parties failed to agree on the appropriate machinery he himself would set up one."

The principle that emerges out of cases like Vadag Establishment case (supra), In Re Kenwheat Industries Limited (No 2) (H.C Winding up Cause No 37 of 1984) and Winding up Cause No 28 of 1998 – In the matter of Leisure Lodges Limited (Ruling of Ole Keiwua J – as he then was) is that if a reasonable offer is made for purchase of minority's shareholding by the majority the company ought not to be wound up and that a proper formula be provided for valuation of such shares so that the dissident shareholders go out of the company leaving it to other shareholders to run. This particular principle, in my view, is well established in Kenya and I must follow it. Prior to making my final orders I must consider the cross-appeal by the first three respondents, that is the Father, Jaswant and Sarbjit. They ask for orders that the decision of the learned Commissioner dated 10th November, 2000 to the extent that it applies to the application to strike out the petition dated 25th October, 1999 be remitted to the superior court on the grounds that in the circumstances of the petition, the Father, Jaswant and Sarbjit being the majority contributories and having agreed to purchase the appellants' shares as prayed in the petition in the superior court and the court having determined that the offer by the respondents is reasonable in the circumstances, the petitioners are not entitled to an order for winding up and consequently this Honourable Court do direct that the superior court do stand over the petition to enable the parties to agree on the terms on which the matters of price of the petitioners' shares in the company maybe referred to arbitration and that all further proceedings be stayed. They also seek orders for mention of the petition if an agreement is reached for further appropriate order to be made in the petition and in the event of

disagreement on the terms on which arbitration may be heard, the matter be listed for argument on any such question of disagreement.

I have already held that the offer by the Father, Jaswant and Sarbjit is a reasonable one and that the counter-offer by the petitioners is not tenable in law. Having so found I must, keeping in mind what Ole Keiwua, J (as he then was) said in Leisure Lodge winding up cause and as indeed confirmed by this Court, allow the cross-appeal by the first three respondents. No further discourse thereon in necessary.

I come now to the Notice of Cross-Appeal lodged by Sarjit Singh on behalf of himself and as administrator of the estate of late Ram Singh (deceased): By that cross-appeal they seek variation or reversal of the decision of the learned Commissioner on the same grounds as are specified in the appellants' memorandum of appeal. It is needless to state that having decided to dismiss the appeal and allow the cross-appeal I cannot accede to that cross-appeal and I say that no further discourse thereon is necessary.

I come now to the position taken by Mr Gautama for Rai Ply. I agree with Mr Gautama that Rai Ply is merely a spectator in this saga but that it has been dragged in the proceedings. Mr Inamdar suggested that Rai Ply should not get any costs as its role herein is a passive one. That may be so but once it is brought in the proceedings it has to take part even if passively.

To sum it all up I would make the following orders:-

1. That this appeal be and is hereby dismissed with costs certified for two counsel.

2. That the cross-appeal by Sarjit Singh be and is hereby dismissed with costs.

3. That the petition prayers in regard to the alternative remedy sought for namely winding up of Rai Ply be struck out.

4. That the cross-appeal by T.S. Rai, J.S. Rai and S.S Rai (first respondents) is allowed with costs certified for two counsel.

5. That Sarjit Singh do pay to the first three respondents such costs as are incurred by the first three respondents an account of his participation in these proceedings.

6. That the appellants do pay to Rai Ply costs incurred by Rai Plywoods (Kenya) Limited in defending the proceedings in the High Court as well as this Court.

7. That all further proceedings in the superior court are hereby stayed pending the conclusion of arbitration proceedings between the parties (T.S. Rai, J.S Rai and S.S Rai on one hand and the petitioners on the other hand) as to valuation of the petitioners' shares in terms of the offer made by the principal respondents and as amended in the said letter of 23rd November, 2000. As the matter goes to arbitration it goes out of court and hence the appellants are ordered to pay the costs of the petition to the first three respondents

8. That there be no order as to costs in regard to 4th, 6th, 7th, 8th, 9th, 10th, 12th, 13th and 14th respondents

As O'Kubasu and Ole Keiwua, JJA agree these then are the orders of the Court.

O'Kubasu JA. I have had the advantage of reading in draft judgments prepared by Shah J.A and Keiwua J.A with which I wholly agree and have nothing useful to add.

Ole Keiwua JA. This appeal arises out of two orders made by the Commissioner of Assize (Mr Ransley) on November 20, 2000 in which he declined to allow the appellants' application of joinder of some limited liability companies in the Petition to wind up Rai Ply woods (Kenya) Limited (Rai Ply) and his

order in which he struck out the winding up Petition.

The appellants are also aggrieved by the order the Commissioner made to refer the dispute to arbitration on terms to be agreed by the parties. Rai Ply is in practice run as a private or domestic company and owned by the Rai family with the 1st respondent as the father being the head of that family and the other respondents are the two sons whose conduct as shareholders in Rai Ply is being complained of in the Petition.

The 1st and 2nd appellants are the other sons while the 3rd appellant is the daughter and 4th appellant is the wife of the 1st respondent. In addition to the family members there are also some non-family members who are shareholders of Rai Ply.

The officers of Rai Ply at the time when the Petition was filed in court were Tarlochan Singh Rai, Jaswant Singh Rai, Iqbal Singh Rai, Sarbjit Singh Rai and Virinder Goswami.

In about 1977 an agreement was reached between the father, Jasbir Jaswant and Iqbal to develop and promote the family's business interests as a joint family unit so that both the father and all his sons would participate fully and exclusively in the management and profits of Rai Ply and any other family venture that they may embark upon.

Thereafter Rai Ply and the other companies were at all times run as family companies and the relationship between the members and shareholders of those companies was based upon the mutual trust and confidence which they reposed in each other as members of the family and in their management of the affairs of those companies.

At the time when Rai Investment was formed the father declared that all his sons would be equal shareholders with him in the new company. This new company was initially allotted and registered as owner of 107,500 shares in Rai Ply and its shareholding increased substantially thereafter. Rai Products was set up to open a marketing depot in Nairobi to distribute Rai Ply products.

In spite of the agreement that all the sons in the family should participate in the management of the family businesses, the father from the very inception of Rai Ply controlled and dominated its management taking all major decisions without reference to the sons and has never treated them as directors or shareholders of the family companies.

The father is accused of favouring Jaswant by entrusting greater management and decision-making powers in preference to his other sons. Consequently Jaswant began to act in breach of the fiduciary duties owed by him as director to Rai Ply. The father is also accused of attempts to reduce Jasbir and Sarbit's roles in the family businesses.

The Petition also details steps taken by Jasbir and Sarbit to protect the business of Rai Ply and their exclusion from its management with steps taken by the father at reconciliation.

The Petition has it that the father and Jaswant were involved in secret investments and secret loans. The Petition has it that there were falsifications of Rai Ply books of accounts together with misappropriation of its assets by the father and Jaswant. The Petition also deals with denial of information to Iqbal and payment of dividend and its application to cover up the father and Jaswant's misappropriations.

The appellants, in view of all the foregoing which reveal that some part of the members including themselves, are being oppressed, say they are unlikely to get any relief at any general meeting of Rai Ply and contend that in winding up Rai Ply, and after paying up all its debts, there will be a surplus to distribute amongst its contributories and it is therefore just and equitable to wind up the company.

In that event the Petition makes these prayers under section 211 of the Companies Act:

(a) A declaration that the father and Jaswant are conducting the affairs of Rai Ply in a manner

oppressive to the Petitioners in their capacity as members.

(b) A declaration that the father and Jaswant hold all such shares in other companies and or other assets as are found by the court to have been acquired by them or either of them or by any other of their companies with the use of Rai Ply monies or other assets.

(c) An order directing the taking of all accounts and the making all enquiries necessary for the purpose of that determination.

(d) An order that upon taking of such accounts, the father and or Jaswant do purchase the shares in the capital of Rai Ply and Rai Investments owned by the Petitioners at a price per share as shall be determined by the court.

(e) Alternatively the Petitioners do purchase the shares in the capital of Rai Ply and Rai Investments owned by the father, Jaswant and Sarbjit at a price per share as shall be determined by the court.

Alternatively.

For the following relief under section 219 of the Companies Act:

(a) An order that Rai Ply be wound up by the court under the Companies Act.

A declaration that the father and Jaswant hold all such shares in Rai Products Ltd, Rai Holding Ltd, Tulip Properties Ltd, The Rai Expo Park Ltd and Tarlochan Singh Rai Ltd and other assets that are found by the court to have been acquired with the use of Rai Ply's monies or other assets on constructive or resulting trust for Rai Ply.

The respondents had questioned these prayers but the appellants submitted before us that that was an important part of their case. They rely in that respect on the decision of this Court in Mungai vs Mungai, Civil Appeal No 191 of 1995.

So much for the Petition and the relief sought. The sequence of events after the Petition was filed in the superior court was as noted elsewhere in this judgment; the appeal arises out of two interlocutory orders made by the superior court on November 20, 2000. In addition to declining to join the companies in the Petition, the Commissioner acceded to the prayer to have and struck out the Petition.

The appellants made it quite clear that they prefer their shares to be bought out by the respondents at a fair value. In which case the principal respondent would avail accounts on the basis of a constructive trust resulting from the use of Rai Ply's funds in the acquisition of private assets and investment.

The liquidator would step in and trace and call in all the assets of Rai Ply and distribute among all the shareholders. In that behalf the appellants applied to have, five companies owned by the principal respondent and which he and Jaswant established to be joined as parties in the Petition. The joinder will make it possible to ascertain the value of the appellants' stake in Rai Ply.

The appellants resisted the application to strike out the Petition made on the basis that they had refused an offer from the father to purchase those shares in Rai Ply. That refusal was viewed by the respondents as unreasonable and amounted to an abuse of the process of the court.

The respondents declined the offer on the ground that the offer will not result in the determination of a fair value of their shares and were not in those circumstances obliged to accept it and made their application to join the said companies in the Petition to enable the court deal with the matters in dispute relating to the fair value of their shares in Rai Ply.

That application had been brought under Rule 7 of Companies (Winding Up) Rules and Order 1 rule 10

and Order VI A rules 3 and 4 of the Civil Procedure Rules and as a result leave was sought and was granted to amend the Petition to crystallize its prayers.

The other purpose of joinder is to ensure that all parties are before the court to enable it determines matters in controversy and would avoid multiplicity of proceedings.

The court ruled that it had no jurisdiction to allow the jonder of the five companies sought to be joined to boost the value of the appellant's shares as the companies were not shareholders in Rai Ply.

The background on which leave was sought to join the five companies was that the father and Jaswant in their affidavits in reply revealed that monies and assets otherwise belonging to Rai Ply had been diverted and loans and dividends had been made to some of the appellants while not in the directorship of Rai Ply.

According to the appellants the making of the loans to them did not create a fiduciary relation between the recipients and Rai Ply and were not unlike the directors, liable on a winding up, to account and rely on the decision of the House of Lords in Regal (Hastings), Ltd v Gulliver and Others [1942] 1 ALL ER 378 which decided that a person who is not in such relationship to the company is not liable to account for profit made for sale of any assets acquired thereby.

The application for joinder was made on the basis that section 211 of the Companies Act did not bar such joinder nor do Company (Winding Up) Rules which in Rule 3(1) thereof applies to proceedings under section 211 of the Companies Act.

It has been submitted that recourse can be had to the Civil Procedure Act and Rules to authorize any such joinder and for that submission reliance is placed on a passage in Atkin's Encyclopaedia of Court Forms in Civil Proceedings 2nd Edition:

"76. Proceedings generally. In all proceedings in or before the court or any judge of the court, or over which the court has jurisdiction under the Companies Act 1948 and the Companies (Winding-up) Rules 1949, where no other provision is made by the Act or Rules the practice, procedure and regulations must, unless the court otherwise in any special case directs, in the High Court, ... in accordance as far as practicable with the existing rules and practice of the court in proceedings for the administration of assets by the court."

We were urged in argument that section 210 of the English Companies Act 1948 and amendments thereto have the same objective as has section 211 of the Kenya Companies Act 1948 which are to safeguard and protect the rights of minority shareholders against majority's terror and that section 210 of the English Companies Act has been too restrictive. Hence the amendment, which introduced sections 459 and 461 thereof.

The appellants claim that the applicable law and practice on the matter of joinder is no different from that applying in England. The Commissioner's views were:

> "The law in England has been amended by the Companies Act 1985 and two new sections have been enacted which are in substitution for the remedies under sections 210 and 220 of the Companies Act 1948. They were, however, first enacted by section 75 of the English Companies Act of 1980. Both these English sections are in substance the same as the Kenyan sections 211 and 219.

It has also been submitted that the English sections introduced by amendment contain no prohibition which would preclude joinder of nonmembers in a winding-up Petition and that the procedure is the same for petitions under the old as well as the amended Act. That procedure, it is submitted applies to Petitions under the Kenya Companies Act.

The Companies Act and Winding-up Rules, according to Rule 203 thereof have no other procedure of their own save to have recourse to the procedure set out under the Civil Procedure Rules. In which event,

Mr Inamdar submitted, the procedure for joinder of parties to a Winding up Petition is that set out in Order 1 rule 10 of the Civil Procedure Rules.

The respondents on their part had recognized the applicability of the Civil Procedure Rules as they applied under Order VI rule 13 (1) (d) of the Civil Procedure Rules for the Petition to be struck out as being an abuse of the process of the court.

This was because the appellants had asked for the respondents to purchase their shares and consequent thereto the respondents on September 23, 1999 offered so to purchase at a price to be agreed and in default of agreement the differences to be resolved by arbitration, which would take into account all issues put forward in the Petition.

The appellants had imposed conditions before consideration of the offer from the respondents. Those preconditions were thought by the respondents to be unreasonable and tantamount to a refusal to accept the offer. In that event the appellants were using the winding-up process to exert pressure on the majority to settle all family disputes on terms the appellants dictated.

That stalemate gave rise to the application to strike out the Petition for being an abuse of the process of the court and the respondents prayed that they be at liberty to apply for further orders and or directions as the court may deem fit and just to grant.

The application recites the fact that the appellants in the Petition had asked for an order that the respondents do purchase the appellants' shares in Rai Ply and Rai Investments Limited at a price per share as shall be determined by the court and that the respondents on September 23, 1999 offered to purchase the said shares at a price to be agreed and in default the evaluation to be undertaken by an arbitration.

The application also alluded to the fact that the appellants had in response imposed as a precondition to considering arbitration the reinstatement of the interim liquidator of Rai Ply and that they be given access to the books of accounts of companies that are not parties to the Petition. The appellants fixed the price for such an appointment at an exorbitant sum of Kshs 5,867,762.

The respondents therefore contend that the appellants' insistence on all the preconditions is unreasonable and was tantamount to a refusal to accept the offer and although the appellants in the petition, had prayed for an alternative remedy, they in the circumstances, are using the winding-up proceedings to exert pressure on the majority shareholders to coerce them to settle all family disputes on terms dictated by the appellants.

It was deponed that the appellants had never offered their shares for sale as Rai Ply being a public company there was no restriction in the sale of shares and the Petition was also presented without notice. It is also a Petition for alternative remedy not one for winding-up the company.

The other conditions attached by the appellants to the sale of their shares are that Mr Iqbal Singh Rai, a Petitioner be accorded full rights of access to the books of account and financial records of the company but also Rai Investments Limited, Rai Products Limited and Rai Holdings Limited.

In that attitude the appellants had unreasonably rejected a fair offer in order to use the threat of winding-up as a means of achieving of perceived disputes relating to family companies and therefore the Petition had been launched not with a genuine object of obtaining relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose, and is an abuse of the process of the court.

The appellants are acting unreasonably in refusing to suggest any price for the acquisition of their shares taking into account all their claims and by placing the said pre-conditions before considering an arbitration as an alternative means for determining the value of the appellants' shares in Rai Ply.

The application to have the Petition struck out was opposed on the grounds that the disputes between the

parties raise serious and complicated issues of fact and law not suitable for determination by arbitration in the manner proposed by the respondents.

In the circumstances of this case and having regard, in particular, to the respondent's breach of the undertaking they gave to the court, the appellants' insistence on the preconditions is not unreasonable and the Petition is not an abuse of the process of the court.

The application to strike out the Petition is in two limbs, which is the application had been launched for ulterior purpose and that the Petition having prayed for the majority shareholder to purchase the shares had unreasonably rejected an offer to purchase those shares.

It was submitted on behalf of the appellants that the Commissioner ignored the first limb of the application and merely set out the conditions of the appellants' letter to the respondents and failed to set out the reason why arbitration was inappropriate. The Petition does not only involve valuation of shares but it involves other controversial matters, which warranted a determination by a court of law.

The Commissioner erred in his decision on the two principles, which apply to applications of this nature. Firstly facts alleged have to be taken as founded and correct and secondly the court must dismiss the application to strike out the Petition unless it is obvious and clear that the Petition is bound to fail at the trial.

In *Re Stewarts (Brixton)* Ltd (1985) BCLC 4 at page 6 Vinellot J said:

> "The Petition has now been restored again. No formal summons or notice of motion seeking an order for the Petition to be struck out or a declaration that the allegations in the Petition, if established, would not found a claim for relief under section 210 had been served on Mr Hickey, but counsel for the petitioner (Mr Asprey) has not raised any procedural objection. He is concerned that I should decide the preliminary issue now.

It is common ground that in deciding this question I must assume that all the facts alleged in the Petition are true and that the parties are not entitled to travel outside the allegations in the Petition, and cannot rely on any matter, which is not alleged in the Petition though raised in evidence in support of it."

The Commissioner had misdirected himself in that he did not allow the Petition to proceed to hearing on its merits and had also misdirected himself on the refusal by the appellants of the respondents' offer to purchase their shares.

He did not consider whether the appellants' response to the offer to have their shares purchased was reasonable. The Commissioner should not have compelled the parties to go to arbitration because the respondents were not prepared to purchase the shares at a fair price as the offer does not provide for equality of arms between the parties.

The offer has no bearing on the shares to be valued. The respondents have not offered access to vital information to the appellants, which would make the wrongdoers to account for their actions and those steps would enhance the appellants' shares.

The offer as made was not a reasonable offer and the appellants say they cannot be faulted for refusing to accept it, as the Commissioner should have ruled that unless they were prepared to offer information, the offer was not a reasonable one and ought to have dismissed the respondents' as unreasonable one.

The Commissioner had also misdirected himself in that he referred the matter to arbitration without the determination of complicated questions of facts. The arbitration is not appropriate because everything was disputed. The arbitration would be protracted and expensive.

There followed the submissions by Mr Nowrojee on behalf of the respondents Ram Singh, Satjit Singh and Suresh Kumar Bector whose interest in Rai Ply represents about 1 percent of the shareholding and

they support the appeal. They have urged that they are shareholders in a public company which fact appears to have escaped the other parties to the Petition.

These respondents' concern is not the family dispute but misfeasance by the directors. The Commissioner should have looked for the correct way to deal with errant managers of a public company. These respondents are interested in being bought out and in the winding up of the company and an interest in the fair valuation of their shares.

The only real issue in the appeal is that the directors of the company must return what they took with the fruits of that use. That issue requires the hearing by the court to resolve it and it does not matter whether parties are joined in the Petition or not.

This is not a derivative action where money is being claimed on behalf of the company. This is a Petition under section 211 of the Companies Act and the orders sought must bring to end matters in dispute.

There is no power either under section 211 or under section 222 of the Companies Act to strike out a Petition in limine for the reason that the petitioners have been unreasonable. Rule 203 brings in the Civil Procedure Rules under which a Petition may be struck out under Order 6 rule 13 (1) (d) of the Civil Procedure Rules.

In joining the other companies in the winding up petition that does not mean that those other companies are to be wound up because they are being joined to achieve tracing of money squandered. In view of the claims that the fiduciary duty has been breached or whether constructive trusts have arisen, the matter is not suitable for arbitration.

In view of what happened in the case of Leisure Lodge this court has power to stay the Petition to enable the parties agree on terms to go to arbitration to determine a fair value.

The stand of Mr Gautama for the company was that a company exists independently of shareholders and it was only right that no single allegation has been made against the company. But he was quick to point out that it was wrong to present a Petition against a public company by shareholders who are complaining about domestic squabbles not to do with the company.

He agrees with the submissions of Mr Oraro regarding the law in England, which was changed, and his view is that the Petition had been inspired by those inapplicable changes. He says in the circumstances of the matter a suit would have been more suitable than a Peition. He submits and I accept that submission that authority for dismissing or striking out Petitions is also to be found in section 222 of the Companies Act Chapter 486.

On the other hand Mr Oraro counsel for some of the respondents submitted that the strength of the appellants' case is founded on English law, which does not apply, to Kenya. He submitted that section 211 of the Kenya Companies Act could not be interpreted or applied in light of the amendments to the English Companies Act 1948 or case law in relation to that amended law.

The inapplicable amendments are those of section 459 and 461 of the English Act some of the cases such as North Holdings Ltd vs Southern Tropics [1999] 2 BCLC 626 is quite a good example particularly in relation to the reference to the new English Rules of Civil Procedure with regard to rule 1.4 (2) of the 1998 Civil Procedure Rules in relation to the power to require a joint expert or an assessor which seems to suggest the number of cases in which the applications to strike out would be drastically reduced.

This power is lacking from the Kenya Rules of Civil Procedure and hence the inapplicability of the English case law arising from amendments to their Act and Civil Procedure Rules which make it possible for the shares to be valued by the court which is not the case in Kenya.

It was also Mr Oraro's submission that a valuation of shares by the court in that case was possible because a power was contained in the companies Articles. He also pointed out that in that case misuse of

funds had been shown while the respondents in the present case do not admit that there is misuse of funds.

Whatever misuse is alleged is a misconception on the part of the appellants because all the directors or shareholders had at one time or another borrowed money from Rai Ply. In Kenya he submitted, a petitioner would only be entitled to have the misappropriated funds taken into account when assessing the value of his shares and not to have that amount accounted to the company.

The other matter Mr Oraro submitted on is the fact that the appellants, before filing their Petition, must have been aware that money had been advanced to the related companies and in the application they deliberately chose to join companies in which they had no interest. He gave an example of such omitted company, which he said is Falcon. He also submitted that you could not mount a Petition based on alleged theft or on further inquiries.

I agree with that submission because these are two completely different things as it is the company, which in the first will be entitled to claim and that has been circumscribed in England to allow petitioners to claim on behalf of the company. The Kenya Act has not been amended to permit that to happen.

I see the appellants are wrong in thinking the courts in this country would follow blindly the English provision, which before the change in the law in that country, was similar to section 211 of the Kenya Companies Act. Hence the relevance in Kenya of the decision in Re A Company [1983] decided before the amendments to the English Company Act of 1948 and has been recognized by courts in this country.

True section 210 of the English Companies Act 1948 and amendments thereto have had same objectives as has section 211 of the Kenya Companies Act which are to safeguard the rights of minority shareholders.

The powers and extent in operation of the two provisions changed when the English provision was replaced with provisions with wider powers to permit petitioners claim on behalf of the company. This difference in the law is shown by a passage in the judgment of Hoffmann J, in Re a company [1986] BCLC 68 said at page 70:

> "Sections 459 and 461 reproduce provisions which were first introduced into company law by section 75 of the Companies Act 1980, by way of replacement of much narrower powers which were previously embodied in section 210 of the Companies Act 1948"

In Palmer's Company Law at page 506 there is this statement

> "Section 210 does not give the court unlimited jurisdiction to intervene in the affairs of the company. The court can exercise its jurisdiction only if the requirements of the section are satisfied."

It is therefore clear to me that joining other companies in a Petition to wind up one company for the purposes of tracing monies squandered is not one of the objectives of section 211 of our Companies Act and the court only has jurisdiction in a matter, if the requirements of the section have been met. In my judgment no other company or companies may be joined in the Petition to wind up Rai Ply.

The amendments to the English Companies Act introduced for the first time the concept of unfair prejudice to the interest of the members and do not apply as the restrictive provisions of section 211 govern the Kenya position.

The appellants have premised their Petition, appeal, grounds thereto and argument in support, on the inapplicable English Company law provisions and their decisions under which joinder is permitted.

Under sections 211 and 219 of the Companies Act there is no scope for the family as the only jurisdiction is the conduct of the company business. A Petition must prove oppression and other sufficient grounds to

wind up the company or to regulate affairs in the future and the issue of derivative action cannot be brought under sections 211 or 219.

The appeal as it relates to the application to strike out the Petition is based on a wrong premise, which is an assumption that the Commissioner made a determination that the dispute should be referred to arbitration. The proper findings are:

> "In the present Petition the parties are much nearer to agreement and it seems to be that the only matter which is necessary to address in order to ally the Petitioners' fears is the question of the method to get to the value arising from the money siphoned off.

I consider that in most respects the Respondents' letter of offer is reasonable but I am of the view that the parties should reconsider the method whereby the monies paid to third parties are dealt with. It is a matter for the parties but it might be of assistance if the court is left with residual powers to determine any matter of law or fact which might arise during the course of the arbitration."

The respondents had made an offer, which addressed the appellants' legitimate concerns. The appellants in refusing that offer were unreasonable thereby abusing the process of the court and hence the application to strike out the Petition.

The appellants were unreasonable in insisting on the joinder of irrelevant parties in the Petition and valuation, only after such joinder and using the failure to agree as a threat to carry on a fishing expedition. This was in the hope that it might extract a higher amount on the sale of the shares at the pain of destroying the company by winding up.

I find that the offer to the appellants to have their shares purchased by the respondents was reasonable in the circumstances of this Petition and I am of the view that in the face of that offer, the Petition is now bound to fail. The appellants cannot bring other parties into the Petition in order to dispute the offer as made to them.

Since the Commissioner did not make any findings as to arbitration we have been urged by Mr Oraro so to do because when a finding has been made that there is an alternative remedy the Petition is at an end.

In Vadag Establishment v Yashvin Shretta Civil Appeal No 83 of 2000 Gicheru JA said:

> "Mr Inamdar for the company generally agreed with the submissions made by Mr Oraro but added that once the terms of reference were incorporated into the consent order, the reference to arbitration of the dispute between the parties to that order became complete. Nothing of the 1st Respondent's winding up Petition remained thereafter. It ceased to exist and once that factor was acknowledged then, it was obvious that the existence of the company's interim liquidators was at an end."

In view of this statement of the law that the winding up Petition is at an end, I would make an order that the matter of the value of the shares to be purchased be referred to arbitration in the manner proposed in the judgment of my brother Shah J.A. I agree with all the eight (8) orders he makes regarding the appeal, cross appeals and the prayer for winding up in the Petition.

Dated and delivered at Nairobi on this 30th day of September, 2002.

A.B. SHAH

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JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

M. Ole KEIWUA

.....

JUDGE OF APPEAL