



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
HCCC NO.230 OF 2015

KOFINAF COMPANY LIMITED.....1ST PLAINTIF

GALBA MINING LIMITED.....2ND PLAINTIFF

VS

NAHASHON NGIGE NYAGAH.....1ST DEFENDANT

JEREMY NYAGA NJERU.....2ND DEFENDANT

JUDY WANJIKU NGUGI.....3RD DEFENDANT

JOB PETER LENOSEURI.....4TH DEFENDANT

HENRY OGADA OBANDE.....5TH DEFENDANT

JANE MUTHONI NJANJA.....6TH DEFENDANT

MONICA MUTHONI MAGU.....7TH DEFENDANT

ERASTUS KARANJA KIBIRO.....8TH DEFENDANT

JANE WAMBUI GACOKA.....9TH DEFENDANT

SAMUEL OJORO MALAKI.....10TH DEFENDANT

JARED OMONDI OBOR.....11TH DEFENDANT

SUSAN WAIRIMU.....12TH DEFENDANT

FAITH JOAN WANJIRU.....13TH DEFENDANT

SABINA NJOKI WANYOIKE.....14TH DEFENDANT

NARA COMPANY LIMITED.....15TH DEFENDANT

SOLOMON KIOKO KIVUVA.....	16 TH DEFENDANT
NELSON HAVI	17 TH DEFENDANT
OSUNDWA SAKWA.....	18 TH DEFENDANT
PURPLE SATURN PROPERTIES LIMITED.....	19 TH DEFENDANT
THE REGISTRAR OF COMPANIES.....	20 TH DEFENDANT
LUCAS AKUNGA OMARIBA.....	21 ST DEFENDANT

RULING

1. In the main, the two Applications before Court concern the Order of Court issued on 13th May, 2015.
2. The first Application is a Notice of Motion dated 14th January 2016 in which Purple Saturn Properties ltd (Purple Saturn) seeks two substantive Orders:-

3. THAT upon hearing interparts, the exparte orders issued on 13th May, 2015 to the effect that the 9th – 16th Respondents or their agents restrained from issuing any notices convening any meetings in relation to the business of affairs of the 19th Respondent and that he 1st – 18th Respondents together with their agents, servants or employees or assigns be restrained from removing, transferring, disposing or charging or dealing in any manner in L.R No.11288 and from acting or omitting to act in a manner that will induce or cause breach of agreement between the 2nd Applicant and Daykio Plantations Limited be set aside, reviewed, varied and/or vacated and an Order be issued restraining the Plaintiffs and the Interested Party from transferring, interfering and /or dealing in any manner whatsoever with the Property L.R. No.11288 and /or the management and/or day to-day running of the 19th Defendant Company.

4. THAT upon hearing interpartes, the Notice of Appointment of Advocates dated 19th May, 2015 filed by Messrs. Mbugua, Atudo & Macharia Advocates purportedly on behalf of the 19th Defendant be struck out.

3. In the Notice of Motion of 22nd March, 2016 Kofinaf Company Limited (Kofinaf) and Galba Mining Limited (Galba) seek the following Orders:-

2.That the Honourable court be pleased to temporarily reinstate the orders dated 13th May 2015 issued pursuant to the Plaintiffs application dated 12th May 2015 and which lapsed on 15th March 2015 pending the hearing and determination of this Application interparties.

3.That the Honourable Court be pleased to reinstate and extend the orders granted on 13th May 2015.

4.That the Court do issue any other order it deems to be just and convenient in the circumstances.

4. The Order that will be discussed at length in this decision is Exparte Order made by Justice Gikonyo on 13th May 2015 in the following terms:-

a) A temporary Injunction restraining the 9th – 16th Respondents or their agents from issuing any notices convening any meetings in relation to the business or affairs of the 19th

Respondent.

b) A temporary Injunction restraining the 1st – 18th Respondents together with their agents, servants or employees or assigns from removing, transferring, disposing or charging or dealing in any manner in LR No.11285.

c) A temporary Injunction restraining the 1st – 18th Respondents from acting or omitting to act in a manner that will induce or cause breach of agreement between the 2nd Applicant and Daykio Plantations Ltd.

d) These Orders are issued exparte and shall last for only 14 days from today.

e) In view of urgency herein, the Respondents shall be served by way of advertisement in both Nation and Standard Newspaper, in conspicuous place and of such legible font.

5. The learned Judge made those Orders in answer to the Application of Kofinaf and Galba dated 12th May 2015 which was placed before the Judge as an Exparte matter in the first instance. That Application had been filed simultaneously with a Plaint of even date.

6. That Plaint and the Affidavit of Stephen Armstrong Jennings sworn on 24th February 2016 in opposition to the Application of 14th January 2016 by Purple Saturn tells the story of this fiercely contested dispute from the perspective of Kofinaf and Galba. It will do well to give a brief outline of that story.

7. It is said that sometime in the year 2007 Renaissance Partners Investment Limited was approached by amongst other people the 1st Defendant, one Vimal Shah and Stephen Mwagiru with a proposal to jointly acquire 100%, interest in Kofinaf which was then known as Socfinaf Company Limited. Certain differences arose, whose details will be of no value to the matter at hand and it was resolved that three different entities being Saturn, Jojoja Properties Limited and Gunga Properties Ltd would be incorporated for the purpose of holding three different parcels of land to protect Kofinaf from the hardships experienced in some ongoing litigation and also to facilitate the efficient management of potential sale transaction relating to the parcels land.

8. It is said that the three Special Purpose Companies were incorporated with the shareholding and Directorship to be held by nominees who would hold these in trust for Kofinaf. Purple Saturn was incorporated on 8th January 2013. Purple Saturn and the other two Special Purpose Vehicles were subsequently converted to Public Limited Liability Companies since the properties owned by Kofinaf and which were to be transferred thereto was Agricultural Land.

9. It is averred by the Plaintiffs that Galba was incorporated by Kofinaf as the major Shareholder in Purple Saturn and in turn holding its shares as Trustee for Kofinaf.

10. The 1st Defendant and 21st Defendant were entrusted with the task of procuring individuals who would hold offices as Shareholders on behalf of and in Trust for Galba. The individuals procured and agreed to by Kofinaf were the 2nd to 8th Defendants. The Plaintiffs state that it would turn out that the Seven (7) individuals were either relatives or employees of the 1st Defendant or members of congregation of New Covenant Church of which the 1st Defendant was Chairman.

11. Subsequently, it is alleged, the 2nd to 8th Defendants duly executed trust instruments declaring that they each held one (1) Ordinary Share in the Capital of Purple Saturn in Trust and as Nominees for Galba and undertook to transfer or deal with such Share to the direction and order of Galba.

12. Board Room wars in Tatu City Limited precipitated the crisis here. Those wars manifested themselves in litigation being Nrb. Hcc. No.46 of 2015 (**Tatu City & 2 others vs. Stephen Jennings & 6**

others). According to Mr. Jennings,

“The facts surrounding the suit in Hccc No. 46 of 2015 created bad blood, schism and rift between the 1st and 17th Defendants on the one hand and the Directors of the 6th Plaintiff...”

13. Central to the Plaintiffs case is that the 1st Defendant using his influence and control over the 2nd to 8th Defendants and with the aid of the 16th, 17th and 18th Defendants transferred the shares they held to the 9th – 11th Defendants and simultaneously, the 2nd to 8th Defendants signed letters of resignation as Directors of the Purple Saturn. Kofinaf and Galba assert that the 2nd to 8th Defendants had breached their declarations of trust.

14. In addition, and perhaps of greater concern to the Plaintiffs, is that Nara Company Ltd (the 19th Defendant and hereafter Nara) became allocated of 930 shares in Purple Saturn.

15. It is the case of Kofinaf and Galba that following a Criminal Complaint lodged by Mr. Robert James Reid and Mr. Jennings, the Directorate of Criminal Investigations conducted an examination and prepared a Forensic Document Examiners Report dated 28th August 2015 in which it was found that the signatures in the Declaration of Trust, blank Share Transfer Forms, blank Statutory Declarations Forms and Resignation Letters were made by the 2nd – 8th Defendants.

16. In the meantime Daykio Plantations Limited (the Interested Party or Daykio) had entered into a Share Purchase Agreement to purchase all issued shares of Purple Saturn and that the 1st, 17th and 21st Defendants were aware of the Transaction.

17. The Defendants and Purple Saturn have a flipside to that story. The Defendants take a similar stance in their Statements of Defence and the Affidavit of Jane Wambui Gacoka sworn on 14th January 2016 in support of the Motion by Purple Saturn.

18. The Defendants deny that Galba is a Shareholder, let alone a majority Shareholder in Galba and that its claimed Shares are held in Trust for Kofinaf. The purported Declarations of Trust by the 2nd to 8th Defendants in favour of Galba are denied and it is averred that in any event such an arrangement is prohibited by Section 119 of the Companies Act (chapter 486 of The laws of Kenya). Further that no Shares in Purple Saturn could be held in Trust for the Galba as the registered owner of LR No.11288 in view of the prohibition in Article 65 of The Constitution of Kenya, 2010.

19. The Defendants maintain that the 2nd to 8th Defendants as registered owners of Shares in Purple Saturn had the right to transact and deal with their respective Shares and did not require the authority of Galba.

20. In respect to the property being Land Reference Number 11288 now registered in the name of Purple Saturn, the Defendants state that it is not held by Purple Saturn in Trust for the Plaintiffs and that it is the absolute registered owner. Secondly that a claim for a Trust over the property would be null and void *abnatio* and unenforceable in the face of the Provisions of Section 6(2) of the Land Act Control Act, Cap 302 of the Laws of Kenya) in so far as the property is agricultural land.

21. The 19th Defendants Company asserts that it sanctioned all the changes affecting its shareholding and Directorship between 27th February 2015 and 3rd March 2015.

22. As to what will some day turn out to be an intriguing aspect of this dispute is that the Declarations of Trust, Return of Allotment Forms and Documents pursuant to which 2nd Plaintiff seeks to enforce the alleged Trust were found earlier on 13th June 2015 to be forgeries by the Directorate of Criminal Investigations.

23. As regards the purported Transactions with Daykio, the position of the Defendants is that as Galba has never been a Shareholder in Purple Saturn it had no capacity in contract to sell any shares in Purple Saturn to Daykio and neither was Purple Saturn privy to or notified of the alleged sale.

24. A further position taken by the Defendants is that Daykio intentionally, negligently or recklessly entered into the purported Contract with Galba.

25. Against this backdrop, I can now deal with the Application at hand. I purpose to start with Prayer 4 of the Motion of 14th January 2016 which is on legal representation of the 19th Defendant.

Of Legal Representation

26. Purple Saturn Entered Appearance to the Summons herein through the firm of Havi & Co. Advocates. The Memorandum of Appearance is dated 21st May, 2015. The conduct of the case for Purple Saturn was since been taken over by the firm of Njuguna Kahari & Kiai Advocates through a Notice of Change of Advocates.

27. The battle for representation of Purple Saturn is between the firm of Njuguna, Kahari and Kiai Advocates on the one hand and Mbugwa, Atudo & Macharia Advocates on the other. This latter firm filed a Notice of Appointment dated 19th May 2015. It is the case for Njuguna, Kahari & Kiai Advocates that their instructions and that of their predecessor (Havi& co.) was authorized by Purple Saturn.

28. On the other hand the firm of Mbugwa, Atudo & Macharia Advocates draw their instructions from Galba as the alleged beneficial owner of Purple Saturn. In an Affidavit filed herein by Mr. Kamau Wa Mbugwa, he explains that his firms' instructions were initially conveyed to him orally by a Mr. Robert James Reid to whom Galba had granted a power of Attorney to sign Court Pleadings on behalf of Galba and Purple Saturn. Those Oral instructions were subsequently followed by a written Company Resolution. The Resolution is of Galba and dated 29th May 2015.

29. The argument by Njuguna, Kahari & Kiai is that the functions of a Limited Liability Company are in the hands of its Board of Directors. And it is their firm and not Mbugwa, Atudo & Macharia Advocates that is authorized by the Board of Directors of Purple Saturn to Act on its behalf. It is further argued that two sets of Advocates cannot be allowed to act for one Client when they are acting at cross-purposes as is here.

30. The opposing argument is that the affairs and control of Purple Saturn has been unlawfully hijacked by some of the Defendants and that the Court should pierce the corporate veil to discover who the real owners of the Company are. It is alleged that Galba is the majority (infact only) Shareholder of Purple Saturn and it can appoint Advocates to act for Purple Saturn. For this proposition the Court was referred to the Decisions in **Adams vs. Cape Industries plc and another**[1991]1 ALL ER 929 and **Atlas Maritime Co SA vs. Avalon Maritime Ltd The Coral No.1** [1991] 4 ALL ER 769.

31. This Court has recently had occasion to determine a similar question in **Nrb. Hcc No.237 of 2015 KOFINAF COMPANY LTD & ANOTHER VS. NAHASHON NGIGE NYAGAH & 16 OTHERS**, and will draw heavily from that Decision.

32. The real controversy here is a dispute for the control, management and ownership of Purple Saturn and therefore its assets and in particular the highly priced parcel of Land described as LR. NO. 11288. Kofinaf and Galba, who together, claim to be the true owners of Purple Saturn have filed these proceedings so as to re-assert their avowed position and regain the control and management which is the hands of a hostile camp led by the 1st Defendant. In framing its claim, Kofinaf and Galba joined Purple Saturn as a Defendant, the 19th Defendant herein. And there may no begrudging this approach even though in the eyes of the Plaintiffs Purple Saturn is more than anything else the subject matter of this entire proceedings.

33. What is critical is that the question as to who is the true owner of Purple Saturn and LR. No.11288 is before this Court for resolution. And in determining the issue of Representation this Court falls back to its reasoning in Hcc. No. 237 of 2015 where it held:-

“30. The question of the Management, Conduct and Control of Gunga and the property registered in its name has been submitted to the Court and is the heart of these proceedings. As a substantive matter this is one of the issues this court will have to determine. It must be that, notwithstanding their dominance, Kofinaf and Zeebo, on their own, could not adequately deal with these issues hence the filing of these proceedings. Having done so, should they be permitted to control the Defence of Gunga or should they not allow the litigation to play out and the bigger issue of the overall management, conduct and control of Gunga to be decided? It would be untoward, I think, for a Plaintiff to mount a suit and then cross the floor to the other side and control the manner in which the Defence is conducted. And this would be true even where the Defendant is a notional Defendant. It would be ever so true here because by coming to court, Kofinaf and Zeebo have presented their affliction to the right forum for resolution. Confronted with not dissimilar circumstances, in Kuri Tea Factory Limited vs. Kenya Tea Development Agency Limited[2013]eKLR, Judge Mabeya remarked,

“It is very clear that the intention of the 5th Defendant in passing the said resolution was that the conduct of the present suit be taken over by the firm of J.K Kibicho & Company and thereupon terminate the present proceedings. Is it possible that a named Defendant in a proceeding can in any circumstances, mutate itself to be a Plaintiff for purposes of terminating those proceedings? To my mind, there is much to it that meets the eye. A court of law will tread very carefully to allow such a step more so there is a rival claim that the persons purporting to undertake such steps are doing so irregularly.

In any event, whether or not the 5th Defendant was a holding company of the Plaintiff, I hold the view that it was not open to it to circumvent the orders of the court of 22nd July, 2010. To my mind all the issues regarding the alleged majority shareholding with power to control the Plaintiff is an issue of Defence but not one to be used to take over the conduct of and terminate proceedings. While there were no records from the Registrar of Companies produced to support the allegations put forward by the 5th Defendant, the Plaintiff produced the Memorandum and Articles which supports the contention of the Plaintiff as to the original shareholding and directorship of the Plaintiff”.

31. In reaching this decision the court must also be concerned that Kofinaf and Zeebo, who are alleging a fraudulent takeover of Gunga, are not handicapped because the case of Gunga is in the hands of counsel appointed and directed by the supposed transgressors. The Court takes the view that the devise that is the Civil Procedure Act and the Rules thereunder offers sufficient tools and safeguards to enable the Plaintiffs to conduct their case effectively and to protect their interest in Gunga. What of reliefs and processes like Injunctions, Interrogatories, Discovery and Inspection? Indeed on 15th May 2015, Kofinaf and Zeebo deployed one of the tools and obtained the following Orders to protect their claim herein:-

- a) A temporary Injunction restraining the 9th -11th and 13th from issuing Notices convening any meetings, meeting or in any manner conduct any business in relation to the affairs of the 16th Respondent.*
- b) Any resolution made in contravention of this Order shall not be received by the 17th Respondent.*
- c) Any action by the 14th and 10th Respondents in relation to the business or assets of the 16th Respondent is hereby restrained.*
- d) I order also that the suit property LR NO.11285 shall not be alienated or sold, or*

disposed of or charged in any manner be dealt with by any of the Respondents or their servants or employees or agents.

e) These Orders are issued ex parte and so shall be in force for 14 days.

f) Hearing on 28.10.15.

Kofinaf and Zeebo need not control the conduct of Gunga's case to advance their own! Granted, is the majority shareholder in Gunga and is distressed by the manner in which the affairs of Gunga are being conducted. However, it has not been demonstrated, in specific terms, how the substantive and procedural law fails or is inadequate to protect its interests in the interim as its grievance is heard and determined. The circumstances that present themselves herein may not be well suited for taking the drastic step of lifting the corporate veil."

34. The same arguments would apply here although it is to be noted that unlike in Hcc. No. 237 of 2015 where Zeebo was the acknowledged majority Shareholder of Gunga, there is a contest as to whether Galba is indeed a Shareholder of Purple Saturn.

35. The inevitable outcome is that I would allow Prayer 4 of the Notice of Motion dated 14th January 2016 and strike out the Notice of Appointment of Advocates dated 19th May 2015 filed by Messrs Mbugwa, Atudo & Macharia Advocates on behalf of the 19th Defendant.

Of the Orders of 13th May, 2015

36. The Orders granted by Gikonyo J. on 13th May 2015 were extended from time to time but lapsed on 15th March 2016 when Counsel for Kofinaf and Galba failed to attend the Deputy Registrar. It is common ground that this matter was placed before the Deputy Registrar because the Hon. Justice Kariuki who was seized of the matter was not sitting on that day on account of bereavement.

37. Counsel Busaidy who was in conduct of the matter for Kofinaf and Galba on the 15th March 2016 explains why he failed to attend to the matter. In an Affidavit sworn of 22nd March 2016 he depones that he was under the impression that the matter was not cause listed. He attached a copy of a cause list for the day that showed that the matter was indeed not listed. He however further explains that he later became aware that the list he had initially perused was incomplete and that the cause list for the day did in fact include the matter for dealing before the Deputy Registrar.

38. The explanation by Counsel appears genuine enough and reasonable. And it must be said that on discovering what had transpired in his absence he brought the Application for reinstatement without delay. This inadvertence is excusable and reinstatement would have been ordered without much ado if the order sought to be reinstated was not the subject of controversy.

39. Quite apart from reasons for seeking the Setting aside, Review or variation of that Order and which the Court shall examine later, the Defendants took up at least three arguments as to why the order should not be reinstated. Let me consider them in turns.

40. The Court of Appeal Decision in **OMEGA ENTERPRISES (KENYA) LIMITED VS. KENYA TOURIST DEVELOPMENT CORPORATION LIMITED & 2 OTHERS** [1998] eKLR made this significant holding:-

"Clearly, from the foregoing provisions, the hearing of an Application for Injunction ex parte can only be legitimate where the Court is satisfied that the object of granting the Injunction would be defeated by delay and that satisfaction must be manifested by the recorded reason of the Court".

The Court of Appeal which was discussing the provisions of Order xxxix Rule 3(1) of the past version of

the Civil Procedure Rules (the equivalent to the current Order 40 Rule 4(1)) went on to hold that an order made in defiance of those provisions would be illegal, invalid and of no effect. Order 40 Rule 4(1) provides:-

“Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte.”

41. This Court is told by the Defendants that Judge Gikonyo defied these provisions and the ex parte Order of 13th May 2015 is therefore null and void. I must observe however that for this Court to discuss that Order with a view to impeaching it would be to sit on Appeal against a decision of a Court with concurrent jurisdiction, something I am not prepared to do.

42. That said I do think that the Judge gave reasons when he remarked,

“1) I have read the Certificate of Urgency and the application dated 12.10.2015. The Application raises matters of urgent nature. Accordingly, I certify the said application to be urgent and shall be heard on 28.10.2015.

2) In the meantime, a careful consideration of the matters complained of, I am persuaded to grant the following orders”.

43. It is not suggested that Order 40 Rule 4(1) requires that the Court gives detailed reasons and it would often be impractical for a Court to do so in the exigency that an Application brought under a certificate of urgency by its very nature presents. And when one compares the order of Judge Gikonyo with that was under consideration in **Omega**(*supra*) then one appreciates that Judge Gikonyo indeed gave reasons. In the **Omega** case Akiwumi J. (as he then was) simply ordered,

Order: “The 2nd Prayer of the Chamber Summons of the 18.12.1992 is hereby granted until 4.1.93 when the case will be heard inter partes. Respondents to be served. Cost in the cause. Photocopy may be served”.

44. The **Omega** decision was also relied on for the argument that the Ex parte Order of injunction was void for purporting to be in force for a period in excess of 14 days. Order 40 Rule 4(2) provides:-

“An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.”

45. Without doubt, those provisions are clear enough. However, the Court record shows that the ex parte Order was extended from time to time and in the presence of Counsel for the Defendants until their lapse on 15th March 2016 when Counsel for the Plaintiffs failed to attend Court. The Orders were extended in the discretion of the Court and it cannot be in my place to comment on how that discretion was exercised by my colleague Judge.

46. The observation I make however is that while the provisions of Order 40 Rule 4(2) are clear and the rationale for their making laudable (e.g. to void abuse of an ex parte injunction), the consequence of their non-observance must be examined in the unique circumstances of each case. And it must be borne in mind that the Relief of Temporary Injunctions has been given Statutory salutation in Section 63 of The Civil Procedure Act so as to prevent the ends of Justice from being defeated. Section 63 provides,

“In order to prevent the ends of justice from being defeated the Court may, if it so prescribed:-

(a).....

(b)....

(c) grant a temporary Injunction and in case of disobedience commit the person guilty thereof to Prison and order that his property be attached and sold”

47. The circumstance of this case is that the *ex parte* Orders were extended from time to time in the discretion of the Court and since it has not being argued that the discretion was not exercised judiciously it would be reluctant to say that the orders are void simply because they went beyond 28 days.

48. And I have to say that the observation made by Munyao J. in **Wilson Tanui Barno & 2 others Vs. Jennifer Kositany**[2015] eKLR in respect to Order 40 Rule 6 would be just as valid for Order 40 Rule 4(2). The Judge observed,

“I have my own problems with the practicality of Order 40 Rule 7, and I think it needs to be modified to take into account the reality that we have serious backlog of cases. It is not realistic, that all cases will be determined within one year of issuance of an injunction. In my view, where the court has issued an order of injunction pending hearing and determination of the suit, then that position should ensue, and if any party is aggrieved by the continued existence of the order of injunction, or wishes to have it set aside, whether on the basis of Order 40 Rule 6 or Rule 7, then such party is at liberty to apply to the court for the order of injunction to be set aside or to be varied. It is not proper for any party to take it upon himself that an order of injunction has lapsed pursuant to the provisions of Order 40 Rule 6 and proceed to disobey it. That can be recipe for anarchy. Litigation should not be seen or taken to be a game of cat and mouse, where one party lies in wait to pounce on the other, by some technicality of law. There needs to be decorum for at the end of the day, what is required of the court is to make a final determination of the rights of the parties in a matter.”

49. Another argument advanced by the Defendants was that the Order of 13th May 2015 lapsed on its first anniversary by dint of the provisions of Order 40 rule 6:-

“Where a suit in respect of which an interlocutory injunction has been granted is notdetermined within a period of twelve months from the date of the grant, the injunctionshall lapse unless for any sufficient reason the court orders otherwise.”

50. Cited to this Court was the Decision in **Erick Kimingichi & Another Vs. Equity Bank Ltd & another** [2015] in which the Court of Appeal held,

“Rule 6 or Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless”, as the Rule further provides, “for any sufficient reason the court orders otherwise”

51. I take a view that as the Order under discussion was an *Ex parte* Injunction, its duration ought to be examined against the provisions of Order 40 Rule 4(2) and not Order 40 Rule 6. But if I am wrong, I would say that under the provisio to Rule 6 the Court may for sufficientreason extend the period beyond twelve months. For the reason that the Order of 25th May 2015 lapsed on 15th March 2016 due to non-extension and not by operation of Order 40 Rule 6, the rival positions taken of reinstatement versus setting aside is an opportunityfor this Court to consider whether there is sufficient reason for the Orders to be reinstated even after 12 months is long past. It is now to this substantive question that I turn my attention.

52. The Defendants take the position the Plaintiffs obtained the *ex parte* Orders through concealment of material facts and fraudulent misrepresentation. These are cited as :-

i. The Plaintiffs misrepresented that there existed a trust in their favour over the property and the entire shareholding of the 19th Defendant Company.

ii. The 2nd Plaintiff purported to be the legal and beneficial owner of the entire shareholding in the 19th Defendant pursuant to declarations of trust and other documents allegedly executed by the 2nd to 8th Defendants together with a return of allotment allegedly executed by the 2nd and 3rd Defendants in favour of the 2nd Plaintiff.

iii. The Plaintiffs failed, refused and/or neglected to disclose the fact that the property was sold and transferred to the 19th Defendant for valuable consideration.

iv. The Plaintiffs further misrepresented that there was a fraudulent attempt by the 1st to 18th Defendants to breach the claimed trust in favour of the Plaintiffs and steal the property from the 1st Plaintiff together with the shareholding in the 19th Defendant from the 2nd Plaintiff.

53. I have studied the Notice of Motion of 12th May 2015 and the Affidavit in Support. The position taken by Kofinaf and Galba then is what they take today. The case for the Plaintiffs is that there is a trust relationship between them and 2nd – 8th Defendants over the ownership of Purple Saturn and LR. NO. 11288. In the Application before Court the Plaintiffs state that there has been unlawful transfer of Shares which has upset them. In paragraph 44 and 45 of the Affidavit of Mr. Jennings of 12th May 2015 he disclosed as follows:-

“44. Simultaneously with the transfer of shares, the 2nd to 8th Respondent purported to sign letters of resignation as directors of the 19th Respondent. I refer to pages 171 and 172 of the Plaintiffs/applicants bundle of documents.

45. The 12th, 13th and 14th Respondents also purported to become shareholders holding one (1) share each in the 19th Respondent while the 15th Respondent purported to become the allottee of 930 shares. I refer to page 121 and 123 of the Plaintiffs/Applicants bundle of documents”.

54. The Plaintiffs further disclose that LR.NO.11288 was transferred to Purple Saturn. This is in paragraph 31 of the said Affidavit. The transfer document which disclosed a consideration of Ksh.748,839,000/= was shown to Court. It is pages 98-104 of the Plaintiffs Documents.

55. The consistent stand of the Plaintiffs is that Purple Saturn was to hold that property in trust for them. In my view the Plaintiffs fully disclosed their case to Court and what they perceive to be the nature of their relationship with the Defendants. This Court is unable to agree that this amounted to a misrepresentation or concealment of facts.

56. The manner in which the merits or otherwise of the ex parte orders were discussed by counsel was an invitation to this Court to consider the matter from the lens of **GIELLA VS. CASSMAN BROWN**[1973] EA 358 which sets out the conditions for the grant of an Interlocutory Injunction as being:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenient.

57. The Defendants make a strong argument that even if the Court was to accept the facts as presented by the Plaintiffs, the case is a non-starter. Section 6 of The Land Control Act provides:-

“(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to—

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.”(my emphasis)

58. Admittedly LR. NO.11288 is agricultural land. If there was to be a trust over the property then a Consent from the relevant Land Control Board would have been necessary. None has been shown to Court. The futility of a Trust created over Agricultural Land without the sanction of a Consent from the relevant Land Control Board is obvious and if this needed to be clarified, the Court of Appeal in **DAVID SIRONGA OLE TUKAI VS. FRANCIS ARAP MUGE & 2 OTHERS** [2014] eKLR held,

“In MUCHERU V. MUCHERU [2001] 2 EA 455 this Court held that a declaration of trust in agricultural land is a dealing in the land requiring consent of the land control board and hence any such trust declared without the relevant consent is void for all purposes. That Position was affirmed in DANIEL NG’ANG’A KIRATU Vs. SAMUEL MBURU, CA NO.58 OF 2005 (NAKURU), which involved application of section 6(2) of the Land Control Act. As noted above, that section provides that declaration of trusts of agricultural land in a land control area is a controlled transaction. This Court concluded that declaration of trust over agricultural land also requires consent of the land control board”.

59. The prospects of an argument for trust is also not helped by the Provisions of Section 119 and 120 of the now Repealed Companies Act which was operational at the time Purple Saturn was created. The provisions are:-

“119. No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar”.

“120. The register of members shall be prima facie evidence of any matters by this Act directed or authorized to be inserted therein”.

This prohibition has consistently been being upheld by our Courts. (See for example **Surco Limited Vs. Prabha Makesh Gudka** [2006] eKLR).

60. If that was all to this matter then the Plaintiffs position would be tenuous.

61. However if it is true that the 2nd to 8th Defendants indeed signed instruments purporting to hold shares in Purple Saturn on behalf of Galba, then it must be asked whether they can set up an argument of illegality and benefit from it.

62. There is evidence that is acknowledged by both sides of the divide that the alleged Trust Instruments have been subjected to Document Examination with startling and shocking outcomes. In the space of a month or two the same documents examined by Document Examiners from the same Directorate (eg. one Alex Mwongera) were found on one occasion to be forgeries and on another to be genuine. In their reports of 13th June 2015 and 28th July 2015 they say that the signatures on the instruments were forgeries and then on 28th August 2015 reach a diametrically opposite finding that they are genuine. In fullness of time this issue will be resolved. But without hearing witnesses this Court may not be able to tell which version is true.

63. However as things stand I am unable to say that the tale by Kofinaf and Galba is a complete phantom. From the documents available to Court LR.No.11288 was transferred to Purple Saturn on 29th July 2013. Yet the title to the land is still with Kofinaf or/and Galba or at least in their control. Why was it left in their hands for so long after the transfer? Why would it not be with Purple Saturn and I must wonder whether the claim by Kofinaf and Galba should be dismissed off hand.

64. There is another reason why I think that the allegation by Kofinaf and Galba deserve further interrogation through evidence. An allegation of Kofinaf and Galba is that the relationship between the 1st Defendant herein and the 13th Defendant on the one hand deteriorated fast and quickly after the meeting of the Board of Directors of the 1st Plaintiff and Tatu City on 5th February 2015. And that *“it is this resolution that turned the hit on the Defendants, causing them to engage in Criminal activities, including but not limited to, forgeries, bribery and irregular transfer of property”*. In paragraph 5 of the Affidavit of Jane Wambui Gacoka sworn on 14th January 2016 she depones as follows:-

“5. THAT the 2nd and 3rd Directors and the 2nd to 8th Defendants are former Directors and Shareholders respectively of the 19th Defendant Company prior to the transfer by 2nd to 8th Defendants of their shares to the 9th to 11th Defendants, the allotment of shares to the 12th to 15th Defendants and the appointment of the 9th to 11th Defendants as directors of the 19th Defendant Company between 27th February 2015 and 3rd March, 2015. (Annexed hereto and marked “JWG-4” is a copy of Form CR 12 dated 26th February attesting to the same).

Evidently the change in Directorship and shareholding complained of by Kofinaf and Galba happened after 27th February 2015 which is a date after the meeting of 5th February 2015 alleged by the Plaintiffs to have precipitated the changes they intend to discredit. One wonders whether the timing is merely coincidental or corroborates the story by the Plaintiffs. Obviously, the answer will have to await a full hearing.

65. The Defendants make a strong argument that the 1st Plaintiff has the right to the purchase price from the 19th Defendant. That the claim is therefore a monetary claim. That may be so but should it turn out that what the Kofinaf and Galba are saying is true then an argument can be made that to allow the Defendants to have their way would be to unjustly enrich them at the expense of the Plaintiffs. There is no inflexible rule that where damages may be an appropriate remedy then an interlocutory Injunction should never be granted (see for instance **Kanorero River Farm Limited & 3 others Vs. National Bank of Kenya** [2002] 2 KLR 207).

66. If after a hearing, evidence reveals that the 2nd to 8th Defendants indeed signed the Trust Documents and therefore participated in transactions that transgressed the law then it could be contra Public Policy to allow them to benefit from their own conduct or wrong doing. The Court of Appeal in **Kenya Pipeline Company Limited vs. Glencore Energy (U.K) Limited** 2015 eKLR recently stated as follows:-

“There is a consistent line of decisions of this Court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The Court has refused to lend aid or succor and has refused to be an instrument of validation for such persons. We still refuse. See MISTRY AMAR SINGH vs. KULUBYA [1963] EA 408, HEPTULA Vs. NOOR MOHAMMED [1984] KLR and content to merely restate it as good law, that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.”

Again in Beijing Industrial Designing & Researching Institute Vs. Lagoon Development Limited [2015]eKLR, the Court of Appeal held,

“...the law will not countenance a person benefiting from his wrongdoing or alleged wrongdoing. Lord Finlay expressed the principle as follows in NEW ZEALAND SHIPPING V. SOCIETE DES ATELIERS ET CHANTIERS DE FRANCE [1919]

AC 1, which we agree with:

“the decisions on the point are really illustrations of the very old principles laid down by Lord Coke (Co Litt.206b) that a man shall not be allowed to take advantage of a condition which he himself brought about”

67. After an assessment of the allegations and counter allegations on the basis of affidavit evidence and the rival positions of law taken herein I reach an ultimate decision that the ends of justice are best met if the subject matter herein is preserved until evidence is received herein and subjected to cross-examination and a determination of all matters of fact and law is made. There is therefore good reason to reinstate the orders of 13th May 2015 whose effect is to preserve the subject matter. In the course of making this decision I have had to proceed as though I was considering the merit of the application of 12th May 2015 in interparte proceedings. This was inevitable given the nature of the application before me and the arguments made. It seems to me that unless for some good reason that may be advanced by parties my decision herein is, substantially, the outcome of that Application.

68. Let me now make a comment on the last limb of Prayer 3 of the Motion of 14th January 2016. In it Purple Saturn seeks the following prayer:-

- **.....an Order be issued restraining the Plaintiffs and the Interested Party from transferring, interfering and /or dealing in any manner whatsoever with the Property L.R. No.11288 and /or the management and/or day to-day running of the 19th Defendant Company.**

Under the provisions of Order 40 Rule 1(2) a Defendant may be granted an order of Injunction to check the possible wastage, damage or alienation of a Disputed Property.

69. As this ruling was pending Purple Saturn together with Jojoja Properties Ltd filed suit against Daykio Plantations Limited and 8 others (being Civil Suit No.499 of 2016) in which Purple Saturn seeks to impeach the legality of the Share Purchase Agreement dated 10th December 2014 between Galba and Daykio. One of the Prayers therein is a Declaration that the Agreement is unlawful, fraudulent, null and void *abinitio*.

70. This Court is aware about the existence of that suit because four days ago on 16th December 2016 the Court was asked to consider a Notice of Motion dated 14th December 2016 for the following Orders:-

2.Pending the inter-partes hearing of this Application, this suit and /or further Orders of the Court, the 1st, 3rd to 6th and 8th Defendants be and are hereby restrained from holding themselves as advocates or agents (in so far as it relates of the 1st Defendant), and all of them

as agents, directors or officers of the Plaintiffs, from giving any instructions, taking any decisions and signing any notices, deeds and/or any other documents on behalf of or in the names of the Plaintiffs and from acting in any way whatsoever on behalf of or in the names of the Plaintiffs.

3. Pending the inter-partes hearing of this Application, this suit and/or further Orders of the Court, the 7th Defendant be and is hereby restrained from remitting to the 1st and 2nd Defendants or to the order of the said 1st and 2nd Defendants, the sum of Kshs.3,874,500,000.00 secured by the charge registered on the 8th day of April, 2015 against the register of the Plaintiffs kept with the Registrar of Companies and on the 9th day of November 2016 against the title for the property land Reference Number 11288 (original Number 6772/3) and property Land Reference Number 11289 (Original Number 6772/4).

And some Interim Protective Measures were granted.

71. Because of this development I shall invite Counsel herein to address me on whether it is still necessary for me to decide on the last limb of Prayer 3 set out in paragraph 68 above.

72. On another issue this Court is told that the Orders of 13th May 2015 have curtailed the day to day operations of Purple Saturn and have crippled it. While the Court will be reinstating the Orders of 13th May 2015 so as to preserve the subject matter it will vary the Orders so that they are not unnecessarily intrusive and stifling to operations of the Company. The Order I shall finally grant will take this into account.

73. Here now are my final Orders:-

- 1) Prayer 4 of the Notice of Motion dated 14th January 2016 is hereby allowed.
- 2) Prayer 3 of the Notice of Motion dated 14th January 2016 seeking to set aside, review and/or vacate the orders issued on 13th May 2015 is dismissed.
- 3) A decision on that part of Prayer 3 seeking to restrain the Plaintiffs and the Interested Party from transferring, interfering and/or dealing in any manner whatsoever with the Property LR. No.11288 and/or the management and/or day to day running of the 19th Defendant Company is stayed pending further address from Counsel.
- 4) As the 19th Defendant has only partly succeeded in the Application of 14th January 2016 each party shall bear its cost of that Application.
- 5) The Application of 22nd March 2016 is hereby allowed and the Orders of 13th May 2015 are hereby reinstated with a variation that although the 9th – 16th Defendants shall be at liberty to conduct the affairs of the 19th Defendant they shall not do anything that touches on or in any manner whatsoever infringes on the Orders hereby reinstated.
- 6) The Orders of 13th May, 2015 that have been reinstated by Order 5 above shall subsist pending the hearing and determination of this matter. Any Party is at liberty to apply.
- 7) Costs of the Application of 22nd March, 2016 shall be in the cause.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

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Alex - Court clerk