REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL & ADMIRALITY DIVISION

CIVIL CASE NO. 230 OF 2015

KOFINAF COMPANY LIMITED.....1ST PLAINTIFF

GALBA MINING LIMITED.....2ND PLAINTIFF

Versus

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.....16TH DEFENDANT

NELSON HAVI.....17TH DEFENDANT

OSUNDWA SAKWA.....18TH DEFENDANT

PURPLE SATURN PROPERTIES LIMITED.....19TH DEFENDANT

THE REGISTRAR OF COMPANIES.....20TH DEFENDANT

LUCAS AKUNGA OMARIBA.....21ST DEFENDANT

RULING

Striking out pleading

[1] Before the court are two applications. One is dated 22nd May 2015 and was filed by the 17thand 18th Defendants. The other application is dated 27th May 2015 and was filed by the 16th Defendant. Both applications seek for the striking out of the Plaint dated 12th May, 2015 and the dismissal of the suits in so far as it relates to the said 16th, 17th and 18th Defendants. The striking out of the plaint and dismissal of the suits are sought on the grounds that the Plaint does not disclose a reasonable cause of action; is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of this action and is otherwise an abuse of the process of the Court. I will consider the arguments in both applications. The 17th and 18th Defendants were quick to point out that that their application is directed and relate to the Amended Plaint dated 5th June, 2015- albeit the Amended Plaint was filed subsequent to the filing of this Motion- and only in so far as it relates to the 17th and 18th Defendants. The Motion by the 17th and 18th Defendants is supported by the Affidavit of the 17th Defendant, Nelson Havi which is sworn on his behalf and the 18th Defendant who has given written authority in that behalf. The one by the 16th Defendant is supported by the affidavit of Solomon Kioko Kivuva and also relates to the Amended Plaint in so far as it relates to him

The 17th and 18th Defendants' gravamen

[2] The grounds and facts upon which the Motion is made are contained in the Motion; the affidavit is support thereof; and the submissions that were filed by the Applicants. Nelson Havi averred that the 17th and 18th Defendants were the appointed Advocates of the 2nd to 15th and 19th Defendants on the changes effected in the shareholding and directorship of the 19th Defendant between 27th February, 2015 and 3rd March, 2015. They acted as agents of disclosed principals and in their capacity as Advocates of the High Court of Kenya. He also stated that the 17th Defendant's instructions to act for the 1st Plaintiff herein, in **ELC No. 561 of 2010 (OS),** were limited to the prosecution of the said case and that he was not privy to the alleged strategy claimed to have been put in place by the 1st Plaintiff in managing its properties, to avoid difficulties occasioned by claims made in **Winding Up Cause No. 30 of 2010.** He exhibited a resolution dated 12th November, 2010 by the 1st Plaintiff, at page 1 of the exhibits to his Affidavit therein, where it was resolved that he be retained on the removal of caveats lodged against the 1st Plaintiff's properties. In the conduct of the said matter, he never received any instructions from the directors of the 1st Plaintiff affiliated to the facility agent and lender, Renaissance Partners Investments Limited who are Messrs. Stephen Armstrong Jennings, Hans Jochum Horn and Ms. Frances Holliday. According to him, first and last communications with the said group were emails exchanged on 26th September, 2012 between Mr. Horn and the 17th Defendant and a letter dated 2nd October, 2012 from the

17th Defendant to Mr. Horn. The emails and letter are exhibited at pages 2 to 4 and 5 to 8 of the exhibits to the Affidavit of the 17th Defendant.

[3] The 17th Defendant further stated that the acquisition of the 19th Defendant by the 2nd to 9th Defendants and the sale and transfer of property Land Reference Number 11288 from the 1st Plaintiff to the 19th Defendant was effected by Anjarwalla & Khanna Advocates between 13th June, 2013 and 29th July, 2013 and he was not involved, consulted or retained on the transaction. He claimed not know anything about it and only first came to deal with the 2nd to 15th and 19th Defendant in February, 2015. He contended that changes which the 17th and 18th Defendants were instructed to carry out in the shareholding and directorship of the 19th Defendant were preceded by a search issued by the 20th Defendant on 26th February, 2015. The search is exhibited at page 10 of the exhibits to the Affidavit of the 17th Defendant. And, it is the 17th Defendant's testimony that the said search did not disclose the alleged trust in the shareholding of the 19th Defendant. Similarly, the register for property Land Reference Number 11288 did not disclose the alleged trust in favour of the 1st and 2nd Plaintiffs. The demands made by the 17th and 18th Defendants to Anjarwalla & Khanna Advocates in respect of the 19th Defendant and property Land Reference Number 11288 were made upon the instructions of the 19th Defendant.

[4] The Applicants said more. The 17th and 18th Defendants are convinced that they have been sued in this matter, on a transaction in which they acted as Advocates for the 2nd to 15th and 19th Defendants and that the entire claim against them is not sustainable in law, for the reason that a claim cannot lie against them as disclosed agents of principals. The Applicants found fault with the Replying Affidavit sworn on 4th June, 2015 by Mr. Stephen Armstrong Jennings, who claimed that he was authorised to swear the Affidavit on behalf of the 2nd Plaintiff although he did not exhibit any evidence of the claimed authorization.

[5] The Applicants submitted that all the relief sought against the 17th and 18th Defendants are set out at prayers VI and XI as follows:-

> **"A declaration that the 16th, 17th, 18th Defendants have no authority to act for or in relation to any of the affairs of the 19th Defendant…**
>
> **A permanent injunction be issued restraining the 17th and 18th Defendants from acting as Advocates or in any other capacity in relation to the affairs of the 19th Defendant."**

[6] According to the Applicants, they have challenged the 1st and 2nd Plaintiffs' claim in their Statement of Defence dated 22nd May, 2015 particularly the claim by the 2nd Plaintiff is challenged for want of written authority. The 17th Defendant pleaded that his instructions were limited to the prosecution of **ELC No. 561 of 2010 (OS).** He was not privy to and/or retained on the strategy by the 1st Plaintiff in which the 19th Defendant was incorporated as a subsidiary of the 1st Plaintiff, in order that the entire shareholding therein would be held wholly by the 2nd Plaintiff and property Land Reference Number 11288 transferred to the 19th Defendant to be held in trust for the 1st and 2nd Plaintiffs. They also totally denied the alleged fraud and collusion with the 1st Defendant in the changes that were made in the shareholding and directorship of the 19th Defendant and the 1st and 2nd Plaintiffs. The 17th and 18th Defendants pleaded that upon receipt of instructions from the 2nd to 15th and 19th Defendants to effect changes in the shareholding and directorship of the 19th Defendant, the 17th Defendant requisitioned a search from the 20th Defendant. The search and documents availed by the 20th Defendant on 26th February, 2015 did not indicate the 2nd Plaintiff as a shareholder of the 19th Defendant. The search and documents availed by the 20th Defendant on 26th February, 2015 did not disclose the alleged trust in the shareholding of the 19th Defendant or had any other interest in it. The register for property Land

Reference Number 11288 did not contain the alleged trust in favour of the 1st and 2nd Plaintiffs. The 17th and 18th Defendants plead that the changes in the shareholding and directorship of the 19th Defendant were effected on the said 19th Defendant's instructions. The demands made by the 17th and 18th Defendants to Anjarwalla & Khanna Advocates were made on the instructions of the 19th Defendant. It is the 17th and 18th Defendants' defence that they acted in their capacity as advocates and are not liable for breach of trust, fraud or at all.

[7] The 17th and 18th Defendants were categorical; that the 1st and 2nd Plaintiffs do not have *locus standi* to espouse any claim for alleged breach of trust, fraud or otherwise whatsoever in respect of property Land Reference Number 11288, the shareholding and directorship of the 19th Defendant for three reasons. (1) The 1st and 2nd Plaintiffs are not the registered owners of property Land Reference Number 11288. (2) The 1st and 2nd Plaintiffs do not have any overriding interests over property Land Reference Number 11288. (3) The 1st and 2nd Plaintiffs are not shareholders of the 19th Defendant.

[8] On the basis of the above, the Applicants submitted that the plaintiffs do not have any reasonable cause of action against the Applicants. They sought the striking out of the Amended Plaint under Order 2, rule 15 (a) of the Civil Procedure Rules, 2010. They were fully aware of the provision of Order 2, rule 15 (2) that:-

> **"No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made."**

They, therefore, limited themselves to the examination of the Plaint dated 12th May, 2015 and the Amended Plaint dated 5th June, 2015. And came to the conclusion that, the totality of the 1st and 2nd Plaintiffs' claim as set out in the Plaint dated 12th May, 2015 was to seek a declaration of trust in their favour, over property Land Reference Number 11288, the entire shareholding in the 19th Defendant and to annul the transfer of shares, allotment of shares and change of directorship in the 19th Defendant effected between 27th February, 2015 and 3rd May, 2015. The Amended Plaint dated 5th June, 2015 brings out the real claim by the 1st Plaintiff, which is the rescission of the agreement for sale dated 4th July, 2013 between it and the 19thDefendant, on the ground that the 19th Defendant has not paid the purchase price thereunder. Therefore, the strength of the 1st Plaintiff's claim lies in the request for rescission as set out in the Amended Plaint. Thus, the claim of trust over the property and the shareholding in the 19th Defendant, the breach thereof and fraud by the 17th and 18th Defendants becomes secondary- it is farfetched and malicious. Accordingly, the 17th and 18th Defendants are sought to be held liable on the malicious claims and be barred from acting as Advocates or in any other capacity in relation to the affairs of the 19th Defendant. But, it is not clear from the Plaint and Amended Plaint on what ground in law, are those relief sought. However, it appears from paragraph 79 of the Amended Plaint that the complaint against the 17th and 18th Defendants is that they aided the 2nd to 15th Defendants to defraud the 1st and 2nd Plaintiffs by effecting changes in the shareholding and directorship of the 19th Defendant in breach of trust. On those claims and reliefs, the Applicants submitted that, in law the 17th and 18th Defendants acted not only as Advocates, but also as agents of disclosed principals. Whether or not they are liable, is a pure question of law that can be determined summarily without evidence.

[9] The Applicants cited the relevant law on striking out of pleadings on the ground of plaint discloses not reasonable cause of action. The guiding principle on this ground is set out in ***Bullen and Leake and Jacob's Precedents of Pleadings***, 12th Edn., that:-

> **"A reasonable cause of action means a cause of action with some chances of success when only the allegations in the pleadings are considered…**
>
> **On the other hand, if the court is satisfied that the pleading discloses no reasonable cause of action or defence, as the case may be, and that non amendment, however ingenious, will**

correct or cure the defect, the pleading will be struck out and the action dismissed or judgement entered accordingly.

Thus, in an action on contract, if it appears clearly that there is no contract between the plaintiff and the defendant or no contract valid in law or an illegal contract, or if the action be brought to obtain relief which the court has no power to grant, or if the relief be asked on a ground which is no ground for such relief, the statement of claim will be struck out and the action dismissed…Again, where it is clear that the action must fail, or the pleading discloses a case which the court is satisfied will not succeed, or that no relief can be granted at the trial, the action will be stayed or dismissed.

A statement of claim setting out two causes of action will not be struck out because one of them may be bad.

Moreover, if a serious point of law arises on the pleading, the court may order it to be tried as a preliminary issue."

[10] Judicial authorities were also cited. See **DT Dobie & Company (Kenya) Ltd –vs- Muchina (1982) KLR 1,** where the Court of Appel said that:-

"**No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.**

On the other hand, if there is a point of law which merits a serious discussion, the court should be asked to proceed under Order XIV rule 2."

[11] The Applicants were of the view that there cannot be a reasonable cause of action against the 17th and 18th Defendants on the transactions, the subject matter of this suit, in which they acted as Advocates for the 2nd to 15th and 19th Defendants. They acted as agents of disclosed principals. Even the particulars of fraud leveled against the 17th and 18th Defendants cannot breathe life to the claim as against them. They cited the case of **Lloyd –vs- Grace, Smith & Co. (1911-13) ALL E.R. 51,** where in holding a solicitor liable for the fraud committed by his clerk, the Court held that:-

"If I may respectfully do so, I tender my entire concurrence with the opinion just delivered upon the dicta of LORD DAVEY and LORD BOWEN in these cases. But I do so subject to this-that I cannot bring myself to think that it was ever distinctly meant to be announced or suggested as law that, on the assumption that a person deals with an agent in good faith, and that the conduct of the agent is fully within the scope of his authority, then the principal of that agent is not responsible for the agent's fraud, by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself. That, in my opinion, is not the law. On the contrary, the principal is in such circumstances legally responsible for his agent's conduct."

[12] They also relied on **Meru Farmers Co-operative Union -vs- Abdul Aziz Suleiman (No. 1) (1966) EA. 436**, where the appellant filed action in the High Court against the respondent, an agent of a disclosed principal. The claim was struck out by the Court of Appeal for not disclosing a reasonable cause of action. See the holding by Sir Charles Newbold, P. at page 26 of 17th and 18th Defendants' List and Bundle of Authorities dated 25th May, 2015 that:-

"It was also averred that most of the goods were ordered by the second defendant who from time to time made payments. It is quite clear from the first paragraph of the plaint that the goods were sold and delivered to, and transport was done by the plaintiff for, the first

defendant. These averments disclose clearly that the plaintiff was dealing with the first defendant as principal and any reference to the second defendant could only be in the character of agent. Having regard to the express facts pleaded it is not, I think, possible to say that the plaint discloses any reasonable cause of action against the second defendant."

[13] A more recent decision by the Court of Appeal on the subject is in **Antony Francis Wareheim t/a Wareheim & 2 others –vs- Kenya Post Office Savings Bank, Civil Appeal No. 5 and 48 of 2002 (consolidated)** and it was held that:-

"It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued."

See also **Victor Mubachi &anor –vs- Nurtun Bates Limited (2013) eKLR**.

[14] The Applicants argued that, if successful in their primary and secondary claims as set out in the Amended Plaint, the 1st and 2nd Plaintiffs would get complete remedies to their complaints on the issue of trust of the shareholding in the 19th Defendant and the suit property, or the rescission of the agreement for sale of the suit property to the 19th Defendant. There can be no justification in law, in joining the 17th and 18th Defendants in this claim. The claim against the 17th and 18th Defendants should be struck out as it does not disclose a reasonable cause of action against them.

[15] The Applicants urged the other grounds. They asserted that the plaint herein fits a frivolous or vexatious action as is defined in **Bullen and Leake and Jacob's Precedents of Pleadings (supra),** as follows:-

"For this purpose, a pleading or action is frivolous when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus, a proceeding may be said to be frivolous when a party is trifling with the court, or when to put it forward would be wasting the time of the court or when it is not capable of reasoned argument. Again, a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defence is raised only for annoyance or to gain some fanciful advantage or when it can really lead to no possible good. So, it is vexatious and wrong to make solicitors parties to an action merely in order to obtain discovery relief from them….

For this purpose, the court is entitled to go behind the pleadings, and to inquire summarily what are the true facts and circumstances of the case, and may admit evidence."

[16] The Applicants submitted that on examination of the Plaint dated 12th May, 2015 and the Amended Plaint dated 5th June, 2015 together with the evidence filed therewith, this suit is frivolous and vexations. Consider the demand preceding the filing of this claim which is exhibited at pages 277 to 282 of the 1st and 2nd Plaintiffs' List and Bundle of Documents dated 12th May, 2015. The 17th and 18th Defendants are sued because of their refusal to succumb to the demand that:-

"There is more, but will leave it here for now. In the meantime we have instructions to demand that yourself, your Principal Client and his nominees retract and withdraw any claims over the Hijacked Companies and withdraw the documents lodged by your co-conspirator, Osundwa & Company, with the Registrar of Companies purporting to change the structure of ownership of the Hijacked Companies. If you do not comply with this demand, our clients will pursue every legal avenue available to them to reclaim control of the Hijacked Companies and their beneficial ownership of the subject properties.

Please be aware that we will join each one of the individual nominees including your Principal Client and yourself in any legal action commenced in relation to the properties and the Hijacked Companies.

We trust that the foregoing is clear and that it will not be necessary to embark on what will no doubt be a bruising legal battle which can only have the most negative of repercussions for yourself, your Principal Client, his relatives and other associates.

[17] The Applicants also refuted claims that; they acted for the 2nd to 15th and 19th Defendants without any letter of instructions; failed to make proper inquiries before undertaking the instructions of the 2nd to 15th and 19th Defendants; and used their professional learning, expertise and privileged position to perpetuate fraud. They argued that these issues do not warrant their joi9nder where the principal is disclosed. There is no claim whatsoever by the 2nd to 15th and 19th Defendants that they never instructed the 17th and 18th Defendants on the changes in the shareholding and directorship of the 19th Defendant. On the contrary, the said Defendants have confirmed in their pleadings and on oath, having instructed the 17th and 18th Defendants. At paragraph 39 d. of the 2nd to 8th Defendants' Statement of Defence dated 22nd May, 2015, the 2nd to 8th Defendants plead that:-

"The 16th, 17th and 18th Defendants were duly appointed as company secretary and advocates of the 19th Defendant respectively, and instructed by the said 19th Defendant to act as such."

See the case of **Burstall -vs- Beyfus(1884) Ch. D. 35,** the Court dismissed a claim for fraud in which a solicitor had been joined, and held that:-

"The only question is whether the action is on the face of the pleadings frivolous and vexatious. I have no hesitation in saying that an action against solicitors without shewing any case except by alleging that they acted as solicitors in a transaction in which the Plaintiff seeks relief against other parties is vexatious, and it was rightly dismissed them."

[18] They also urged that the plain herein will prejudice or embarrass or delay fair trial of this suit. They again referred to the literary work in ***Bullen and Leake and Jacob's Precedents of Pleadings (supra),*** that:-

"Any pleading or indorsement or writ which may prejudice, embarrass or delay the fair trial of the action may be ordered to be struck out or amended. The power is designed to prevent pleadings from being evasive or from concealing or obscuring the real questions in controversy between the parties, and to ensure, as far as the pleadings are concerned, a trial on fair terms between the parties in order to obtain a decision which is legitimate objet of the action. While parties must not be too ready to find themselves "prejudiced" or "embarrassed" by the pleadings of the opposite party, still each party may claim *ex debito justitiae* to have the opposite party's case "presented in an intelligible form so that he may not be embarrassed in meeting it…

Accordingly, a pleading is embarrassing which is ambiguous or unintelligible or which state immaterial matter and or raises irrelevant issues which may involve expense, trouble and delay and thus will prejudice the fair trial of the action, and so is a pleading which contains unnecessary or irrelevant allegations."

[19] The 17th Defendant is accused of having been privy to a strategy by the 1st Plaintiff for the protection of its properties, in view of the fact that he acted for the 1st Plaintiff in ELC No. 561 of 2010 (OS). He is further, accused of using the confidential information allegedly so acquired, in perpetuating the breach of trust and commission of fraud by the 2nd to 15th Defendants in effecting changes in the shareholding and directorship of the 19th Defendant. But he insisted that his instructions were limited to the prosecution of ELC No. 561 of 2010 (OS) and that he was not privy to and/or retained on the alleged

undisclosed strategy by the 1st Plaintiff for the protection of its properties. Indeed, the acquisition of the 19th Defendant company by the 2nd to 9th Defendants and the sale and transfer of property Land Reference Number 11288 from the 1st Plaintiff to the 19th Defendant was effected by Anjarwalla & Khanna Advocates between 13th June, 2013 and 29th July, 2013. The 17th Defendant was not involved, consulted or retained on the said transactions nor did he know anything about it. It has now emerged from the Defence filed on behalf of the 19th Defendant and the Amended Plaint that the suit property was sold and transferred to the 19th Defendant for valuable consideration. The contest is therefore between the 1st Plaintiff and the 19th Defendant over the ownership of the suit property. The intended objection to legal representation by the 17th Defendant is a calculated move to deny the 1st to 15th and 19th Defendants legal representation of their choice. The joinder of the 17th and 18th Defendants is intended to prejudice the said 1st to 15th and 19th Defendants and embarrass the 17th and 18th Defendants. That will delay the trial of this action. The claim against the said 17th and 18th Defendants should be struck out and dismissed for this reason.

[20] The final ground was argued. The Applicants stated that the suit against them is an abuse of the process of the court. They once more cited **Bullen and Leake and Jacob's Precedents of Pleadings (supra),** that:-

> **"The term "abuse of the process of the court" is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its functions as a court of law to be misused but will in a proper case, prevent its machinery from being used as means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, "although it should not be lightly done, yet it may often be required by the very essence of justice to be done".**
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> **The term "abuse of process" is often used interchangeably with the terms "frivolous" or "vexatious" either separately or more usually in conjunction. An action is an abuse of the process of the court where it is "pretenceless" or "absolutely groundless" and the court has the power to stop it summarily and prevent the time of the public and the court from being wasted."**

[21] The 17th and 18th Defendants were instructed by the shareholders and directors of the 19th Defendant to effect the transfer of shares, allotment of shares and change in directorship. The search exhibited at page 10 of the Affidavit of the 17th Defendant confirms the shareholders and directors thereto. Those individuals have not denied giving instructions to the 17th and 18th Defendants. The search does not indicate that the 2nd Plaintiff was or is a shareholder of the 19th Defendant. On that basis, the 1st and 2nd Plaintiffs are strangers to the affairs of the 19th Defendant and are, therefore, abusing the process of the Court. See the case of **Elija Sikona & others -vs- Mara Conservancy & others, (2014) eKLR,** where the Court struck out a suit for being an abuse of the process of the court and held as follows:-

> **"There are well established principles which guide the court in exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court.**
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> **A cause of action is *"a factual situation the existence of which entitles one person to obtain a remedy against another person-"* LETANG VS. COOPER [1965] Q.B. 232. If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some**

collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures."

[22] The Applicants contended that there is no relief known in law which will flow from the 17th and 18th Defendants to the 1st and 2nd Plaintiffs. They asserted that they are not proper parties to this suit. See **Kingori -vs- Chege & 3 others (2002) 2 KLR 243,** that:-

"In the premises there is nothing to show that any relief flows from the intended party to the Plaintiff. There is nothing to show that the ultimate order or final decree cannot be enforced against the defendants without the intended party's participation in the proceedings."

[23] The suit, in so far as the same is instituted by the 2nd Plaintiff is challenged as incompetent and fatally defective for want of written authority. No written authority for the 2nd Plaintiff was filed with the Plaint as required by Order 4, rule 1 (4) of the Civil Procedure Rules, 2010.The rule provides that:-

"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so.

The bare statements by Mr. Jennings in his Verifying Affidavit that he is duly authorised by the 2nd Plaintiff's Board of Directors to swear on its behalf does not suffice. Mr. Jennings is director of the 1st Plaintiff only. He has no association whatsoever, with the 2nd Plaintiff in view of the search exhibited at pages 86 to 89 of the 19th Defendant's List and Bundle of Documents indicating who the directors of the 2nd Plaintiff are. The 1st Plaintiff and Mr. Jennings can represent the 2nd Plaintiff in this matter only with the 2nd Plaintiff's written authority as required by Order 1, rule 13 (1) and (2) of the Civil Procedure Rules, 2010. The rule provides that:-

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

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

In support of the above submissions, they cited the decision by the Court of Appeal in **Chalicha F C S Ltd -vs- Odhiambo & 9 others (1987) eKLR 182,** that:-

"This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the plaintiff's witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 rule 8 or rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The appearance and defence of defendants (respondents) 1, 2 5 and 7 were prepared and filed by an advocate and if the defences were on the basis of representative action, then the advocate should have stated so. The trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. Judgment should have been entered against defendants 3 to 10. Trial should have proceeded as against defendants one and two. In the light of the findings that the plaintiffs had purchased the farm and taken possession of it, then

judgment should have been entered for the plaintiff against defendants 1 and 2. After the trial, the trial judge should have granted the prayers as prayed by the plaintiff. George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice."

See also, the decision in **Tatu City Ltd & others -vs- Stephen Jennings & others, Civil Case No. 46 of 2015 (UR)** at pages 84 to 85 the 17th and 18th Defendants' Supplementary List and Bundle of Authorities dated 15th June, 2015 where the same principle was stated. The entire claim by the 2nd Plaintiff is defective and an abuse of the process of the court for failure of compliance with mandatory rules.

[24] The Applicants concluded that the suit the Plaint as Amended on 5th June, 2015 does not disclose a reasonable cause of action, for setting up a claim against agents of disclosed principals contrary to the law. The claim is also, scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of this action and is otherwise an abuse of the process of the court, for the reason that the claim as against the 17th and 18th Defendants is instituted for an ulterior purposes. It is not intended to advance the course of justice. The claim by the 2nd Plaintiff is further, defective for want of written authority and want of locus standi, as the 2nd Plaintiff is not in the register of members of the 19th Defendant. Therefore, the Notice of Motion dated 22nd May, 2015 should be allowed and the suit struck out and dismissed as against the 17th and 18th Defendants.

The 16th Defendant's gravamen

[25] The application by the 16th Defendant was based on similar grounds as the one by the 17th and 18th Defendant. The 16th Defendant argued that he was an advocate who merely witnessed the documents in issue as the Commissioner for oaths. And therefore, it was not proper for him to have been joined in the suit as a party. The said documents were presented to him by professional colleagues; they were properly attested; and the signatures on or proper signing of the documents have not been disputed. He did not wrong in undertaking his said professional duty. See the case of **Burstall vs. Beyfud (1883 b. 3520)** where it was held that;

''If the statement of claim did not disclose any cause of action against the solicitors, it would have to do with the case against the other defendants''.

He specifically cited the opinion by Lord Earl of Selborne L.C. that;

''I repeat what I said during the argument, that I have been under the impression, and I hope this expression will go abroad, that of late years the court has set its face against making solicitors or others, who are properly witnesses, and who are not chargeable with any part of the relief prayed, parties suits…it is obvious that if solicitors cannot be made parties to pay costs, a fortiori they cannot be made parties for the mere purpose of making discovery. …The only question is whether the action in the face of the pleadings is frivolous and vexatious. I have no hesitation in saying that an action against solicitors without shewing any case except by alleging that they acted as solicitors in a transaction in which the plaintiff seeks relief against other parties is vexatious and it was rightfully dismissed against them. The appeal will be dismissed with costs''.

[26] The 16th Defendant did not stop there. He submitted that Lord Cotton, L.J reinforced the said position when he stated that;

''…to make a solicitor a party to an action without seeking any relief against him except to make him pay costs or give discovery is vexatious. If a solicitor is guilty of negligence, he can be attacked in an action for negligence. If guilty of worse conduct there are other steps that can be taken against him''.

The 16th Defendant opine that he cannot therefore be joined as a witness or to make discovery as he acted on instructions from Havi & Co Advocates in the matter. He insisted that his joinder will be tantamount to identifying him with his client's cause contrary to article 18 of ***The Basic Principles on the Role of Lawyerss, Eighth United Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August to 7 September 1990*** which provides that;

> **''…lawyers shall not be identified with their clients or clients' causes as a result of discharging their functions''.**

[27] The 16th Defendant also submitted that the plaintiffs do not have locus standi to institute these proceedings against him as they do not disclose sufficient interest in the 19th Defendant. He argued that only the company which can sue to enforce its rights. They cited the case of **Salomon vs. Salomon [1897] AC 22** and **Omondi & another vs. National Bank of Kenya & 2 others [2001] KLR 57** to support this submission. He added that appointment of a company secretary is an internal affair of the company and a matter of law. Under section 178(1) of the Companies Act every company should have a company secretary and such secretary is appointed under section 110 of the Companies Act by the directors of the company. He claimed that he was appointed under article 116 of the Memorandum and Articles of the Company and notified of the appointment vide letter dated 28th February 2015. Such acts by directors are protected by section 181 of the Companies Act and are valid despite defects in the appointment. He exuded confidence that his credibility as a Certified Public Secretary is not in question, and averred that as company secretary he acted in good faith in all the transactions herein. He even went beyond the normal duties of a company secretary and perused the company register before acting on the documents herein; he stated that the register did not disclose any trust. Even such trust would still be illegal by virtue of section 119 of the Companies Act, and section 6(2) of the Land Control Act because it was a controlled transaction and did not have the required consent of the Land Control Board. See cases of **Anar Singh vs. Serwano Wofunira Kalubya (1963) EA. 408** and **Heptulla vs. Noormohammed (1984) eKLR.** He submitted that his duty was that of mere servant, to do what he is told and without authority to represent anything at all. See Lord Denning in Panorama Developments (Guildford) Ltd vs. Fidelis Furnishing Fabrics (1971) 2 qb 711 where he referred to Barnett vs. South London Tramways Co that:

> **''…a company secretary fulfils a very humble role; and that he has no authority to make any contracts or representations on behalf of the company''.**

[28] The 16th Defendant claimed that the court does not even have jurisdiction to question internal affairs of a company. He relied on the indoor or internal management rule promulgated in case of **Royal British Bank vs. Turquand (1856) 6E & B 327** which was applied in the case of **Sultan Hasham Lalji & 3 others v Ahmed Hasham Lalji & 4 others [2000] eKLR** where the court in striking out the plaint relied on the case of **Burle v. Eagle (1902) 71 LJPC** and stated that;

> **''It is an elementary principle of law relating to joint-stock companies that the court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so. Again it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself''**

[29] The 16th Defendant submitted that there has been no fraud that has been disclosed against him. Indeed he said that he had no prior knowledge of the dealings alluded to and he never met the 11st or 21st Defendant. He cited several cases on fraud and the standard of proof required. The cases are part of record. Therefore, according to the 16th Defendant, the plaint herein discloses no cause of action against him, it is frivolous, vexatious and an abuse of court process and should be struck out. The plaint merely makes unsubstantiated claims without showing the specific representation or intent to defraud as required under the Penal Code under section 312, 320 and 348. He cited judicial decisions on cause of action and are part of record. On the basis of the above, the 16th Defendant urged the court to remove his name from these proceedings.

The Plaintiffs/Respondents opposed both Motions

[30] The Plaintiffs/Respondents opposed the Motion dated 22nd May 2015 and that by the 16th Defendant dated 27th May 2015. They filed replying affidavit and submissions in support of their position on the applications. They emphasized that each case turns on its own peculiar circumstances and the applications herein failed to take account of the particular circumstances of this case. They stated that the present suit and the cause of action is that of a fraudulent design where the 16th, 17th and 18th Defendants are central in the conceptualization and implementation of the fraudulent design. To this extent therefore, it is the Plaintiffs' case that the Defendants in question ceased to act as mere agents of alleged disclosed principals but in fact facilitated the putting into effect of the fraudulent design of which the primary actors in terms of the Amended Plaint are the 1st and the 17th Defendants. It is the Plaintiffs' case as pleaded that the 16th and the 18th Defendants did not act as agents for any of the parties to this suit save at the behest and direction of the 17th Defendant. The principle of law enunciated by the House of Lords and which has stood the test of time is as set out in the speech of Lord Westbury in **Cullen v. Thomson's Trustees and Kerr [1861-73] All E R Rep 640** as follows:

> **"All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another, and the reason is plain - for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud."** (emphasis added)

[31] According to the Plaintiffs, their case as pleaded show that the 2nd - 15th Defendants were mere pawns in the design conceived and put into effect by the 17th Defendant acting in concert with the 1st Defendant and that the 16th and 18th Defendants joined with the 17th Defendant in bringing into effect the scheme. The 17th Defendant was to this extent the principal of the 16th and 18th Defendants. See the Affidavits filed by the 16th and 17th Defendants in support of the respective applications and also the witness statement of the 1st Defendant. In addition, they argued that the 17th Defendant had an obligation of loyalty and fidelity and was in fact an agent of the 1st Plaintiff to the extent that he was instructed by the 1st Plaintiff to act as its advocate in **High Court (ELC) Civil Case No. 561 of 2010 (OS) ('the Caveats case')** and **High Court (Commercial Division) Civil Case No. 46 of 2015** ('**the derivative action'**) being the suits pleaded at paragraphs 39 and 55 of the Amended Plaint. It is instructive that these suits were in relation to the protection of various properties including the property L R. No. 11288, which is the subject of the present suit ('**the suit property**').

[32] The Applicants are denying liability on account of the existence of an agency relationship. But, see the House of Lords in **Standard Chartered Bank v Pakistan National Shipping Corportion [2003] 1 All E R 173; [2002] UKHL 43**, per Lord Hoffman:

> **'As Lord Devlin said in Hedley Byrne & Co Ltd v Heller & Partners [1964] AC 465, 530, the basis of liability is analogous to contract. And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not.... This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.'** (Emphasis plaintiffs')

[33] The Plaintiffs asserted that the above decision has been affirmed and applied by this Honorable Court in **National Social Security Fund Board of Trustees v Ankan Holding Ltd & Others (2006) eKLR** where Mr. Justice F Ochieng cited the **Standard Chartered** (supra) with approval and declined to strike out the suit against agents of a disclosed principal. As specifically pleaded at paragraph 59 of the Amended Plaint, the 17th Defendant drew the pleadings on behalf of, *inter alia* the 1st Plaintiff herein in the derivative action in which he specifically identified the property which is the subject of the fraudulent

design as belonging to the 1st Plaintiff herein. Further, in identifying the properties that had been sold, it is clear that the subject property was not one of the sold properties which meant that there was an acknowledgement that the said property continued to belong to the 1st Plaintiff herein, whether beneficially or otherwise. To that extent therefore, there is attributable to the 17th Defendant, specific and actual knowledge as to the ownership, whether proprietary or beneficial of the subject property, which ownership from the pleadings drawn by the 17th Defendant clearly vested in the 1st Plaintiff in the present suit. In **Agip (Africa) Ltd v Jackson [1992] 4 All ER 385** at 405 Millett J considered the difference between the various states of mind to be taken into consideration in the context of the liability of a stranger to a trust to account as a constructive trustee if he knowingly assists in the furtherance of a fraudulent and dishonest breach of trust. He said in that context ([1992] 4 All ER 385 at 405, [1990] Ch 265 at 293):

> **'Knowledge may be proved affirmatively or inferred from circumstances. The various mental states which may be involved were analysed by Peter Gibson J in [*Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* (1982) [1992] 4 All ER 161 at 235, [1993] 1 WLR 509 at 576–577] as comprising: "(i) actual knowledge; (ii) willfully shutting one's eyes to the obvious; (iii) willfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest and reasonable man on inquiry." According to Peter Gibson J, a person in category (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only…I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) and (v) are necessarily cases of constructive notice only. <u>The true distinction is between honesty and dishonesty</u>. It is essentially a jury question. <u>If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not?</u> If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because "he did not want to know" (category (ii)) or because he regarded it as "none of his business" (category (iii)), that is quite another. <u>Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge.</u>'** (emphasis added)

[34] The Plaintiff urged that feigning a lack of knowledge is of no assistance in the circumstances of this case. As the English Court of Appeal held in **Agip (Africa) (supra) [1992] 4 All E R 451**:

> **<u>A stranger to a trust relationship could be made liable in equity where he knowingly assisted in a fraudulent design, the necessary degree of knowledge being knowledge of circumstances which would indicate to an honest and reasonable man that a fraudulent design was being committed or would put him on inquiry as to whether it was being committed</u>. On the facts, it was clear that the first and third defendants had knowingly assisted in the fraud perpetrated by the plaintiff's chief accountant, since they must have known they were laundering money and were consequently helping their clients to make arrangements to conceal certain dispositions of money which had such a degree of impropriety that neither they nor their clients could afford to have them disclosed. In the circumstances the first and third defendants were liable to account in equity as constructive trustees. The second defendant was also liable for the acts of the first defendant, who was his partner, and the third defendant, who was employed by his firm. Accordingly, all three defendants were liable to the plaintiff in equity.**

[35] According to the Plaintiffs. the primary question that the 17th Defendant ought to have asked himself is the source of funds with which the 2nd – 8th Defendants or the 9th -15th Defendants acquired the subject property. See the Tanzanian case of **<u>Bin Fija Industries ltd v Tanzania Electric Supply Co. Ltd</u>** [2008] 1 EA (HCT) that:

'Where fraud is alleged in a civil suit, the principles of criminal law must apply.'

At paragraph 13 of the Replying Affidavit of Stephen Armstrong Jennings sworn on 4th June 2015, the provisions of the **Penal Code** in which criminal culpability may be established against the 17th and 18th Defendants have been set out. Therefore, they can be joined as parties to answer to their fraud. In any event, the 17th Defendant was an agent of the 1st Plaintiff herein by virtue of the retainers in the caveats case and the derivate action. See **Muthoka v Insurance Co of East Africa Ltd [2001] 1 EA 143 (CAK)**, where a bench of the Court of Appeal consisting of Kwach, Shah and Bosire JJA made the following statement of principle at page 146:

'**We wish to observe that an Advocate's position *vis a vis* his client is fiduciary in nature. Consequently, he is obliged to act in the client's best interest.'**

And in **Kinluc Holdings Ltd v Mint Holdings and Macharia** [1999] 26 E A 135, a bench of the Court of Appeal consisting of Tunoi, Shah and Owour JJA, stated at 137-138:

'If an Advocate whilst acting for a client, is in breach of some duty he owes to the client, professionally, he may become personally liable to the client who has therefore a cause of action against the Advocate.'

Later in the same case, the Judges stated at page 138:

'The learned Judge appreciated that as a general rule, an advocate who is retained to complete a transaction, may become liable to the client in an action against him for breach of trust.'

After quoting from **Halsbury's Laws of England** in relation to the meaning of a retainer, the Learned Judges then stated as follows at page 138E:

'The law implies clearly that an Advocate will protect the interests of his client… A retainer binds an Advocate to act for his client in such manner as to protect the interests of his clients and not to jeopardize his interest.'

[36] The Court upheld an appeal against the decision of the High Court which had struck out the suit as against the Advocate on the basis that no reasonable cause of action had been disclosed against him. The position taken in **Kinluc Holdings Ltd (supra)** is in consonance with the statement of principle set out by the learned authors of ***Bowstead & Reynold's on Agency***, 16th Edition, at pages 191-200 in which they discuss an agent's fiduciary duties. These include a duty of loyalty. The Plaintiffs opined that, the fallacy in the application herein is therefore exposed when the Court appreciates that the Amended Plaint clearly demonstrates that the 17th Defendant was duly retained by and was an agent of the 1st Plaintiff. The extent of the knowledge gained from that Advocate and Client relationship and the impact of that knowledge on the present case is a matter for evidence which will emerge from the examination and cross examination of the 17th Defendant and it is premature for the 17th Defendant to seek to limit, as he does in his application, the extent of knowledge gained from the said relationship. In any event, as already stated, paragraph 59 of the Amended Plaint is incontrovertible with respect to the extent of knowledge of the ownership of the subject property that could be attributable to the 17th Defendant. The nexus between the 17th Defendant and the 1st Defendant and the 17th Defendant's pivotal role in the fraudulent design is evident from paragraphs 21-24 of the Witness Statement of the 1st Defendant sworn on 22nd May 2015. It will be the Plaintiffs' case at the hearing that these depositions by the 1st Defendant support the averment in the Amended Plaint at paragraph 48 that the 2nd -8th Defendants acted under the influence and control of the 1st Defendant. Subsequently, as evidenced from paragraph 24 of the Witness Statement of the 1st Defendant, he introduced them to the 17th Defendant and whilst it is conceded that he does not disclose whether or not he gave any directions to the 17th Defendant with respect to the position of the 2nd –8th Defendants, it will be clear that the 17th Defendant thereafter retained the 16th and 18th Defendants to act

in collusion with him for the purpose of effecting the fraudulent design.

[37] The Plaintiffs made further submissions that the 18th Defendant has subordinated and delegated to the 17th Defendant the authority to swear the Affidavit in support of the application. Be that as it may, paragraph 18 of the Supporting Affidavit of Nelson Havi, sworn on 22nd may 2015, is instructive and states as follows:

> **'Due to pressure of work, I instructed and delegated the instructions to the 16th and 18th Defendants who effected them.'**

The Plaintiffs challenged such re-delegation by agents to others which they stated, according to **Halsbury's Laws of England**, 4th Edition, Vol. 1(2) at 63, is in general prohibited, under the maxim *delegatus non potest delegare.* Where there is personal confidence reposed in or skill required from an agent there normally may be no delegation, however general the nature of the duties unless urgent necessity compels the handing over of the responsibility to another. Despite this principle, it is clear that the 16th and 18th Defendants were appointees and therefore agents of Nelson Havi, the 17th Defendant. This position is further confirmed by the Supporting Affidavit of Solomon Kioko Kivuva, the 16th Defendant sworn on 27th May 2015 in which states as follows:

> **Paragraph 3: In the normal course of business, I was presented with… statutory declarations and letters of resignation of the 2nd to 8th Defendants drawn by the firm of Osundwa and Company Advocates for witnessing upon inspection.**
>
> **Paragraph 4: The said documents were brought to me from the firm of Nelson Havi Advocates vide a letter dated 28.2.2015.**
>
> **Paragraph 6: that my instructions were limited to witnessing the already drawn documents emanating from and confirmed by fellow colleagues who assured me that the documents were genuine and belonged to their clients**
>
> **Paragraph 7: That after making the enquiry from the said counsel, whose other documents I had previously witnessed, I witnessed the documents and released them to the clerk who had presented them to me for filing.**
>
> **Paragraph 11: I have never met the 1st Defendant nor sat in any forum with the other Defendants…**
>
> **Paragraph 13: That I witnessed the said documents in good faith,**
>
> **upon carrying out due diligence on the 16th Defendant**
>
> **and upon reliance to instructions by a reputed counsel.'**
>
> (emphasis added)

[38] Further, the 16th Defendant's Written Submissions disclose further that this Defendant was acting under the instruction and direction of the 17th Defendant. Paragraph 4.7 of the said submissions state as follows:

> **'In the case before this Court, the 16th Defendant was acting on instructions from Havi & Company Advocates and only witnessed documents that had already been drawn by the firm of Osundwa and Company Advocates.'**

Then at paragraph 7.8 he states:

The 16th defendant's instructions were limited to witnessing the <u>already drawn documents</u> emanating from, and confirmed by fellow advocates…

And at paragraph 10.10:

…The plaintiffs have not demonstrated how the 16th defendant has made any false document <u>considering that the documents were drawn by the 17th defendant.</u>

And at paragraph 10.12:

…The suit against the 16th defendant is a suit against a witness of <u>events that had already taken place</u>…

[39] The Plaintiffs see these as peculiar circumstances, as the 17th Defendant claims to be the agent of a disclosed principal when he is in fact himself the instructing principal of the 16th and 18th Defendants. The Plaintiffs submitted that it is clear that the 16th Defendant did not meet, interact with, or take instructions from the 2nd - 15th Defendants and by extension the 19th Defendant. Article 116 of the 19th Defendant's Articles of Association, which appear at page 59 of the Plaintiffs' Bundle of Documents dated 12th May 2015 state as follows:

'The Secretary shall be appointed by the Directors for such term, at such remuneration and upon such conditions as they may think fit; and any Secretary so appointed may be removed by them.'

According to the Plaintiffs, the 16th Defendant, by his own admission, was clearly not appointed as Company Secretary in accordance with the Articles of Association of the 19th Defendant. It is instructive to note that the 16th Defendant in his supporting affidavit at paragraph 4 deposes that he was furnished with relevant documents by the 17th Defendant. However, he has conveniently failed to annex the resolutions by the Companies appointing him as such as alluded to in annexure marked as 'SKK 1' of his affidavit. Further, Section 24 (2) (e) of **The Certified Public Secretaries Act,** Chapter 534 of the Laws of Kenya provides that:

'A member of the Institute shall be guilty of professional misconduct if –

(e) he certifies or submits in his name or in the name of his firm, a report of statutory returns and completion of such statutory returns and the related records have not been made by him or a partner or an employee in his firm;

(h) he is guilty of gross negligence in the conduct of his professional duties.'

The Plaintiffs urged that they will seek to establish by cross examination, that the clear lapses in judgment and proper conduct on the part of the 16th Defendant were the result of the speed and urgency with which the fraudulent scheme was required to be in place. The 16th Defendant could therefore not have been appointed as the Company Secretary of the 19th Defendant in the manner contemplated by the law and did not in fact witness any of the statutory declarations, which purport to have been witnessed and commissioned by him. In this regard, Rule 7 of the Oaths and Statutory Declarations Rules, Rules of Court under Section 6 of the **Oaths and Statutory Declarations Act,** Chapter 15 of the Laws of Kenya expressly provide:

'A commissioner of oaths before administering an oath must satisfy himself that the person named as the deponent and the person appearing before him are the same, and that such person is outwardly in a fit state to understand what he is doing.'

[40] It was the Plaintiffs' contention that the 16th Defendant was duly instructed by and acted at all times under the direction of the 17th Defendant and the question whether he acted in good faith or not is not one that can be determined on the basis of an application seeking to strike out the suit as against him. *Prima facie,* the 16th Defendant joined himself in the scheme that was put into effect by the 17th Defendant and it is the Plaintiffs' submission that the suit as framed against the 16th Defendant is not frivolous or vexatious, embarrassing or otherwise an abuse of the Court process. Indeed the Plaintiffs would go so far as to state that it is the Statement of Defence put forward by the 16th Defendant which is embarrassing when one considers that the said Defendant is an Advocate of the High Court of Kenya and holds himself out as a Certified Public Secretary. The 16th Defendant's reliance on the established principle of law known as 'internal management rule' is misconceived and irrelevant in view of the circumstances of this case as already articulated above.

[41] The Plaintiffs stated that the 18th Defendant is in the same position as the 16th Defendant in the sense that he clearly acted on the instructions of the 17th Defendant. The Amended Plaint specifically pleads at paragraph 77 that whilst the 18th Defendant purported to present documents under the cover of Osundwa & Company Advocates, the public records available and published by the Law Society of Kenya specifically reveal that he in fact practices in the firm of Havi & Company where the 17th Defendant is the principal partner. This position is confirmed by paragraphs 3 and 4 of the Supporting Affidavit of the Solomon Kioko Kivuva, the 16th Defendant sworn on 27th May 2015 which have already been set out in extenso at paragraph 28 above but are set out again for clarity:

> **'I was presented with… statutory declarations and letters of resignation of the 2nd to 8th Defendants <u>drawn by the firm of Osundwa & Company Advocates</u> for witnessing upon inspection…<u>the said documents were brought to me from the firm of Nelson Havi Advocates</u> vide a letter dated 28.2.2015. (Emphasis added)**

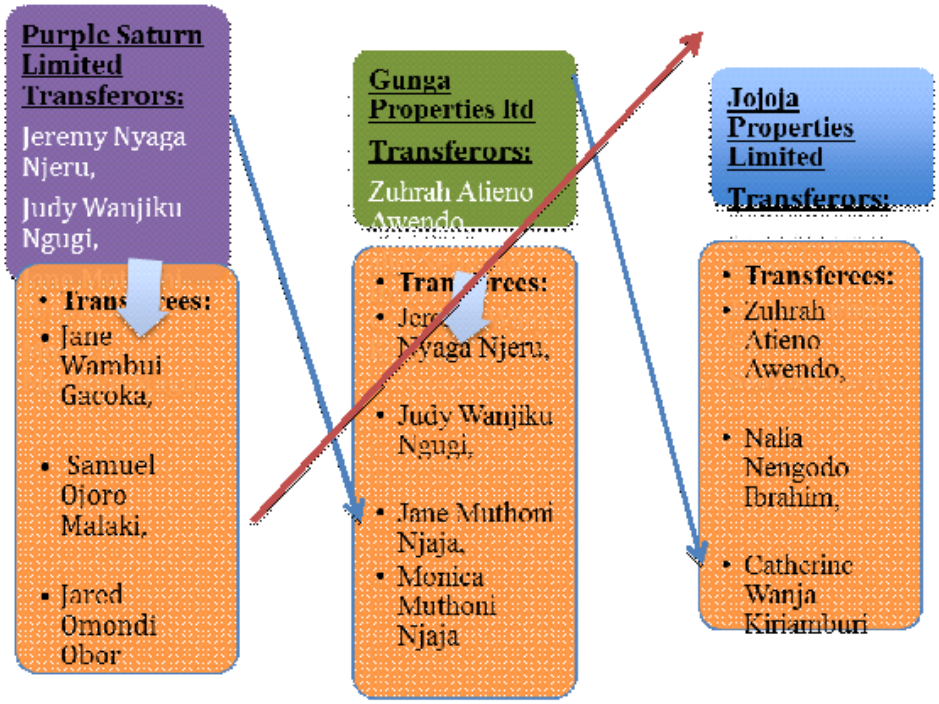
[42] See Paragraph 20 of the Amended Plaint that specifically pleads that the 18th Defendant is an advocate practicing in the name and style of Havi & Company. At paragraph 5 of the Statement of Defence of the 17th and 18th Defendants, this description of the 18th Defendant is expressly acknowledged. Parties are bound by their pleadings and no authority need be cited for this proposition. Further, the 18th Defendant has not sought by affidavit or otherwise to deny or controvert the matters pleaded at paragraphs 20 and 77 of the Amended Plaint and neither has Nelson Havi in the Affidavit sworn on 22nd May 2015 in support of the application sought to deny that the 18th Defendant, Osundwa Michael Sakwa is actually his employee. The Plaintiffs quipped: why were the various documents altering the composition of the 19th Defendant prepared and filed in the name of Osundwa & Company Advocates when in fact it is an admitted fact that Osundwa Sakwa, the 18th Defendant is an employee of Nelson Havi, the 16th Defendant? The Plaintiffs suggested that the only conclusion in these circumstances is that the 17th Defendant sought to distance himself from the purported changes in the composition of the 19th Defendant, the changes obviously being for a fraudulent purpose. They called this kind of acts as a demonstration of the saying that, secrecy is the badge of fraud. That the factual matrix is that neither the 16th nor the 17th Defendants had any retainer from the 2nd to 15th Defendants but and were actually acting under the direction and control of the 17th Defendant. See paragraph 5 of the Replying Affidavit of Stephen Armstrong Jennings sworn on 4th June 2015.

[43] The Plaintiffs were convinced that that the 17th Defendant was in fact instructing himself. See the Statement of Defence, the Replying Affidavit and the Supporting Affidavit of Solomon Kioko Kivuva which, read together, leads to the inescapable conclusion that the documents that the 16th Defendant purported to submit as Company Secretary are fatally defective and could not properly result in the transfer of shareholding or alteration of directorship of the 19th Defendant. This conclusion, in turn leads to the conclusion by deduction of law that any resolution of the 19th Defendant instructing the 17th Defendant was illegitimate because the persons purporting to instruct him as directors of the 19th

Defendants could only draw their legitimacy from the documents prepared by the 18th Defendant (Osundwa & Company) and purportedly witnessed by the 16th Defendant (Solomon Kioko Kivuva) which documents are a nullity in view of the express provisions of The Certified Public Secretaries Act as read with the Oaths and Statutory Declarations Act and the Articles of Association of the 19th Defendant. They relied on the Privy Council case of **Mcfoy –vs- United Africa Co. Ltd (1961) 3 All E R 1169**- the celebrated quotation of Lord Denning that:

> **The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was *void* and not merely *voidable*. The distinction between the two has been repeatedly drawn. If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.**

[44] The Plaintiffs stated that they have specifically pleaded particulars of fraud against the 16th, 17th and 18th Defendants at paragraph 79 of the Amended Plaint. These particulars of fraud, viewed against the extensive pleadings placed before the Court, are not idle or speculative and will require further investigation by the Court through the trial where witnesses will be examined and cross-examined and their motives and intentions laid bare. Further, none of the authorities cited by the 17th and 18th Defendants acknowledge the position of the 17th Defendant as an agent of the 1st Plaintiff in this suit. The Court will be required to delve into the question of conflict of interest, the 18th Defendants fiduciary duties and the question who the 18th Defendant's true client is. When these suits are brought together; i.e. **High Court Civil Case No 230 of 2015, High Court Civil Case No 237 of 2015, and High Court Civil Case No 238 of 2015** the conspiracy comes sharply into focus and the Court is able to appreciate the net effect of the movement of the transferors and transferees of shares undertaken by the 16th and 18th Defendants under the direction of the 17th Defendant resulting in the common shareholding and directorship as brought out clearly in the letter to which the Court's attention has been drawn. The Plaintiffs demonstrated the interplay between the transferors and transferees/nominees in the subject companies and that these parties were mere pawns, moved around the chess board by the 16th and 18th Defendant under the direction of the 17th Defendant. See the table below:



[45] The Plaintiffs submitted that the applications herein are premised on Order 2 Rule 15 (1) (a), (b), (c) and (d) of the Civil Procedure Rules, 2010 which succinctly set out the grounds for striking out pleading in the following manner;

> **At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**
>
> **(a) it discloses no reasonable cause of action or defence in law; or**
>
> **(b) it is scandalous, frivolous or vexatious; or**
>
> **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
>
> **(d) it is otherwise an abuse of the process of the court ,and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be**.(Emphasis ours)

[46] They also cited the case of **D T Dobie & Company (Kenya) Ltd vs. Muchina Civil Appeal No. 37 of 1978,** specifically that;

As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.

And what Madan JA said in the same that;

> **The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.**

They submitted that, from the matters enumerated above, it cannot be said that this suit is so weak that it is beyond redemption. See also the case of **The Co-operative Merchant Bank Ltd vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999,** the Court of Appeal stated as follows:

> **The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did**"(Emphasis ours).

[47] As per the Plaintiffs, the suit herein raises fundamental issues *inter alia* of fraud and breach of trust. These issues cannot be determined at in the stage of an application for striking out pleadings. See the duty of the Court on an application for striking out as was aptly summarized by Mr. Justice A Ringera (as he then was) in the case of **Lynette B. Oyier & Another vs. Savings & Loan Kenya Limited LLR 8312 (HCK)** as follows:

The function of the Court in its jurisdiction of striking out pleadings under Order VI, rule 13 of the Civil Procedure Rules is not to determine whether the action or defence as framed will or will not succeed, which is the duty of the trial court, but to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose appropriate sanctions if they have not been so formulated. It is the soundness of the pleading itself, which is the concern of the Court at that stage in the litigation process.

The Court went further to state thus:

> **The power is designed to prevent a pleading from being evasive or from concealing or obscuring the real questions in controversy, between the parties and to ensure, as far as the pleadings are concerned, fair terms between the parties in order to obtain a decision which is the legitimate object of the action.**

Whilst the above decision was in respect of Order 6 Rule 13 of the old Civil Procedure Rules, the said order is in *pari materia* with Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010.

[48] See also the decision by Justice G.V. Odunga in **Kiama Wangai vs. John N. Mugambi & Another (2012) eKLR.** Firstly, the judge considered the meaning of a scandalous pleading and stated thus:

> **A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by**

unnecessary details.

However, the word "scandalous" for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous.

Secondly, the Judge stated that a matter is frivolous if:

(i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument.

Thirdly, a matter is said to be vexatious when

(i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v) where it can really lead to no possible good.

Fourthly, the Judge held that a pleading tend to prejudice, embarrass or delay fair trial when:

(i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. (Emphasis Ours)

[49] In light of the foregoing, the Plaintiffs were of the view that the Applicants have failed to establish a clear case that will warrant striking out of the suit against them. They submitted that the question of authority to swear affidavit for the 2nd Plaintiff is the sort of procedural technical point contemplated by Article 159 (2)(d) of the Constitution of Kenya 2010. See the decision by the English Court of Appeal in **Danish Mercantile Co Ltd & Others vs. Beaumont & Another (1951) 1 All ER 925** that when an action is commenced by a Solicitor without authority of the Company, it is open to such Plaintiff at any time to ratify the act of the solicitor, to adopt the proceedings and to instruct him to continue them. The effect of such ratification was also discussed in **Chitty on Contracts**, 27th Edition Vol 2 para. 31-029 as follows:

'…thus if an action is commenced without authority and is not properly constituted, the Plaintiff can ratify his Solicitor's act, so that it is not open to the defendant to object that the action is not properly brought.'

See also **Chitalay & Rao on the Indian Code of Civil Procedure**, 6th Edition (1956) Vol. 2 at page 2098 where the following guidance is set put that:

It has been held that even where there is no authority originally to do an act, it could be given subsequently by the principal ratifying the unauthorised act.

To the Plaintiffs, there is no prejudice suffered by the Defendants by the failure to exhibit the authority and that this is an omission which can be rectified by leave of the Court without injustice to the Defendants. They concluded that the joinder of the 16th, 17th and 18th Defendants as parties to this suit is proper. These Defendants do not occupy a special place immunizing them from potential liability by reason of their positions as Advocates of the Court and no proper case has been made out for the striking out of the suit against them. They urged the court to dismiss both applications.

DETERMINATION

[50] The single important decision that this court must make is:

(a) Whether the plaint herein should be struck out in so far as it relates to the 16th, 17th and 18th Defendants.

The test

[51] The act of striking out a plaint has been described by courts to be most draconian judicial act comparable to drawing of the sword of the Damocles. Such power should, therefore, be exercised sparingly and only in most clear and obvious cases of a demurrer. Therefore, the duty of the Court on an application for striking out is as was set out by Mr. Justice A Ringera (as he then was) in the case of **Lynette B. Oyier & Another vs. Savings & Loan Kenya Limited LLR 8312 (HCK)** as follows:

> **The function of the Court in its jurisdiction of striking out pleadings under Order VI, rule 13 of the Civil Procedure Rules is not to determine whether the action or defence as framed will or will not succeed, which is the duty of the trial court, but to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose appropriate sanctions if they have not been so formulated. It is the soundness of the pleading itself, which is the concern of the Court at that stage in the litigation process.**
>
> And that:
>
> **The power is designed to prevent a pleading from being evasive or from concealing or obscuring the real questions in controversy, between the parties and to ensure, as far as the pleadings are concerned, fair terms between the parties in order to obtain a decision which is the legitimate object of the action.**

[52] I can do no better. The applicants strongly believe that the plaint herein discloses no reasonable cause of action against the 16th, 17th and 18th Defendants and should be struck out in so far as it relates to these Defendants. Here, the court has to ask itself hard questions as guided by the statutory provisions in Order 2 rule 15(2) and the ample judicial decisions on this ground; I need not multiply those decisions. Except I should refer to the famous case of **DT Dobie** (supra) as well as the literary work, ***Bullen and Leake and Jacob's Precedents of Pleadings***, 12th Edition. In **DT Dobie & Company (Kenya) Ltd –vs- Muchina (1982) KLR 1,** the Court of Appel said that:-

> "**No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.**

[53] On consideration of the pleadings as couched and without probing for any extrinsic evidence, does the Amended Plaint disclose a cause of action with some chances of success? Or can the Amended Plaint herein be said to be one which is beyond redemption such that it cannot even be cured by any amount of amendments? The 16th, 17th and 18th Defendants argued that they acted as advocates and agents of disclosed principal and so they cannot be joined in a suit against the disclosed principal. They have stated the true position of the law except in each case the facts must support the said inference of the law. One thing that is coming out clearly is that, this action is based on alleged fraud and collusion among the 16th, 17th and 18th Defendants to defraud the plaintiffs from beneficial ownership of the 19th Defendant through alleged fraudulent scheme or design hatched by the 17th Defendant and executed by him, and through the 16th and 18th Defendants; wherein they registered transfer of shares thereby altering the register of members of the company to the detriment of the plaintiffs. The particulates of the fraud have been specifically stated in the amended plaint at paragraph 79 showing the basis of those allegations and the nexus among the parties herein. The way I understand the law is that an agent may be sued personally for fraud he has committed. Fraud bears a criminal characteristic and will result into personal

liability once it is proved. I do not therefore think it would be astute move to lay as law that an agent will go unpunished for fraud he has committed because he did so on instructions by the principal. There is no such thing as instructions to commit fraud lest we should catapult ourselves back to the dark days of ‘’instruction from above’’. There is yet another argument; that the 17th Defendant was in fact the agent of the 2nd Plaintiff as their advocate in two cases and in the course of the said retainer he received confidential information on the strategy by the 1st Plaintiff in which the 19th Defendant was incorporated as a subsidiary of the 1st Plaintiff, in order that the entire shareholding therein would be held wholly by the 2nd Plaintiff and property Land Reference Number 11288 transferred to the 19th Defendant to be held in trust for the 1st and 2nd Plaintiffs. The allegations are that the 17th Defendant used this information inappropriately to hasten and effectuate the alleged fraudulent scheme of change of shareholding herein to the detriment of the plaintiffs. It is not in dispute the 17th Defendant acted as the advocates for the 2nd Plaintiff. In this context, the allegation that the 16th and the 18th Defendants were appointed by the 17th Defendant who was an agent himself makes sense as to deserve evaluation in a trial. The latter arguments are the opposite of the arguments made by the applicants and will need full evaluation. Therefore, given the disclosed facts, it cannot be said at this stage that there cannot be any relief that can be claimed against or sought from the 16th, 17th and 18th Defendants.

[54] I am, however, abundantly warned that, in making an overall impression of the fact disclosed, care should be taken for the court not to embark on the merits of the case itself- which is solely reserved for the trial judge-, or express opinions that would prejudice fair trial and restrict the freedom of the trial judge in disposing the case. Upon considering all facts as disclosed in the pleadings, in my estimation of the pleading in question, the averments in the Amended Plaint are not leisurely, merely lofty or idle arguments which should be denied an opportunity to be canvassed in a full trial. I note, however, and I stated this earlier, the duty of the court at the moment is not whether this case will succeed or not; that is a different thing altogether and shall be determined by the trial court upon hearing evidence of the parties and their witnesses. Accordingly, I will lean towards sustaining rather than terminating the suit against the 16th, 17th and 18th Defendants in a summary manner. This is not really a case that is so weak as to be beyond redemption or incurable even by amendment. It is not a case where advocates or agents are sued to only pay costs or be embarrassed as such advocates or agents. Intricate issues of law and fact have been raised; they constitute bona fide cause of action that will require to be disentangled in the trial.

[55] In light of the forgoing, the answers to the other grounds are in the negative. The suit is not frivolous or vexatious or scandalous or otherwise and abuse of the process of the court. See the decision by G.V. Odunga J in **Kiama Wangai vs. John N. Mugambi & Another (2012) eKLR.** The Amended plaint does not state (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. It does not deny a well-known fact and this has been sufficiently discussed above. Therefore, it is not scandalous. Again, the suit is not an inflation of trivial matters; it has substance which warrants evaluation at the trial. It is not a waste of court’s time or one which is intended to annoy. It is therefore not frivolous or vexatious. From the above, the plaint has not concealed anything; it is populated with necessary averments; it clear and has been formulated in a reasonable fashion. It is not therefore aimed at prejudicing, embarrassing or delaying fair trial of the suit.

[56] But before I close, I wish to state that I think matters of authority to sue and those on *locus standi* should be determined at the trial upon consideration of all circumstances of the case. I wish also to state that the law allows a person to sue for rectification of company register on a number of reasons and where the issues are so convoluted; a normal suit should be filed as opposed to the summary procedure in section 118 of the Companies Act. This is such suit. On further enunciation on this I am content to refer to the following literary work in ***Halsbury’s Laws of England*, (4th Edn.), Vol. 7(1) para 372**:

> **“372. General jurisdiction to rectify company's register of members**. **The jurisdiction to rectify a company's register of members is discretionary; and it is not limited by the**

provisions of the Companies Act 2006. Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights.

When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition and the purpose for which relief is sought.

The power to rectify has been exercised where there has been misrepresentation in the prospectus; where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors; where shares have been illegally allotted at a discount; where the application for shares has been made in the name of a person, as, for example, an underwriter, without his authority; where there is no valid allotment of shares; or the allotment is not made within a reasonable time, or is irregular; where a transfer of shares has been improperly registered or registration has been refused; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register in respect of each part in a different order; where the company puts on its register matters which are not required by the statute; in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed; and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required."

[57] The upshot is that I dismiss the applications dated 22nd May 2015 and 27th May 2015 with costs to the Plaintiffs. It is so ordered.

Written, dated and signed at Nairobi this 14th day of September 2015.

F. GIKONYO

JUDGE

Dated, signed and delivered in court at Nairobi this 17th day of September 2015.

C. KARIUKI

JUDGE