**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**HCCC NO.31 OF 2016**

**DAYKIO PLANTATIONS LIMITED…….PLAINTIF**

**Vs.**

**GALBA MINING LIMITED.....1ST DEFENDANT**

**PURPLE SATURN PROPERTIES LIMITED.....2ND DEFENDANT**

**KOFINAF COMPANY LIMITED.....3RD DEFENDANT**

**NAHASHON NGIGE NYAGAH.....4TH DEFENDANT**

**JEREMY NYAGA NJERU.....5TH DEFENDANT**

**JUDY WANJIKU NGUGI.....6TH DEFENDANT**

**JOB PETR LENOSEURI.....7TH DEFENDANT**

**HENRY OGADA OBANDE.....8TH DEFENDANT**

**JANE MUTHONI NJANJA.....9TH DEFENDANT**

**MONICA MUTHONI MAGU.....10TH DEFENDANT**

**ERASTUS KARANJA KIBIRO.....11TH DEFENDANT**

**JANE WAMBUI GACOKA.....12TH DEFENDANT**

**SAMUEL OJORO MALAKI.....13TH DEFENDANT**

**JARED OMONDI OBOR.....14TH DEFENDANT**

**SUSAN WAIRIMU.....15TH DEFENDANT**

**FAITH JOAN WANJIRU.....16TH DEFENDANT**

**SABINA NJOKI WANYOIKE.....17TH DEFENDANT**

**NARA COMPANY LIMITED.....18TH DEFENDANT**

**SOLOMON KIOKO KIVUVA.....19THDEFENDANT**

**NELSON HAVI.....20TH DEFENDANT**

**THE REGISTRAR OF COMPANIES.....21ST DEFENDANT**

**RULING**

1) This decision concerns the Notice of Motion dated 16th May 2017 in which Purple Saturn Properties Limited (the 2nd Defendant or Purple Saturn) seeks the following prayers;-

*1. Spent*

2. The Plaint herein dated 5th February, 2016 as amended pursuant to the Order made herein on 10th May, 2017 be and is hereby struck out and the suit as against the 2nd Defendant dismissed.

3. All pleadings and documents filed herein by Mbugwa, Atudo & Macharia Advocates on behalf of the 2nd Defendant be and are hereby struck out.

4. The entire Order made herein on 10th May, 2017 in respect to the Plaintiff's Notice of Motion dated 24th February, 2017 be and is hereby set aside.

5. The cost of this Application and of the suit against the 2nd Defendant be borne by the Plaintiff.

2) The Applicant invokes various provisions of the law in the quest for the Prayers sought. In respect to the Civil Procedure Act, Sections 1A,1B, 6 and 7 are cited. Order 2 rule 15(1) (a), (b) and (d) and Order 51 rule 16 of the Civil Procedure Rules are also referred to.

3) It helps to consider this matter against a brief background to the dispute and proceedings herein. Daykio Plantations Limited (Daykio) presents this suit to enforce the terms of a Share Purchase Agreement (SPA) dated 10thDecember 2014 said to be entered between it and Galba Mining Limited (the 1st Defendant or Galba). In it Galba is said to have sold 1000 shares in Purple Saturn Properties Limited to Daykio. The purchase price was some Kshs. 4,095,000,000/=. Without going into any detail of the transaction, it is the case of Daykio that Galba made to it the following warranties;-

a) <u>The Sale shares</u>

i. Galba is the sole beneficial owner of all the Sale Shares.

ii. Galba is the sole registered legal owner of all the Sale Shares save for the seven (7) shares which are held by Galba's nominees in trust for Galba.

iii. The Sale Shares comprise the whole of the issued share capital of the company and the Sale Shares are all fully paid up.

iv. The Sale Shares are free of encumbrances.

b) <u>Capacity of GALBA</u>

i. Galba has the requisite power and authority to enter into and perform the SPA.

c) <u>The Company</u>

i. The basic information of the Company set out in schedule 1 of the SPA is true and correct.

ii. As at the date of the SPA, the Company was free of any indebtedness save for the loan referred to at clause 1.1.17 of the SPA.

iii. On completion, the Company would be free of any indebtedness save for the loan created pursuant to the provisions of clause 4.4 of the SPA to be owed by the Company after transfer of the shares to Daykio.

d) <u>The property</u>

i. The Company was the legal and beneficial owner of the property or the remainder portion (as the case may be).

ii. The property or the remainder portion (as the case may be) would at completion, be free of all encumbrances save for the charge to be created over the property (if applicable).

The property is 1183 acres of land known and described as Land Reference 11288.

4) Towards part performance of the said agreement Daykio has paid some Kshs.430,500,000/= to Galba but complains that the Defendants who include Kofinaf Company Limited (Kofinaf or the 3rd Defendant) have in breach thereof refused to transfer or procure the transfer of the Shares to it notwithstanding its preparedness to complete. Daykio prays for;-

a) Special performance of the Share Purchase Agreement dated 10th December 2014.

b) A permanent injunction restraining the Defendants whether by themselves, their agents, servants, assignees, beneficiaries or otherwise howsoever from transferring, selling, mortgaging or alienating the 1000 ordinary allotted shares they hold or own in Purple Saturn Properties Company Limited to any other person other than the Plaintiff.

c) A permanent injunction restraining the Defendants whether by themselves, their agents, servants, assignees, beneficiaries or otherwise howsoever from trespassing upon, accessing upon, developing, selling, mortgaging, alienating, wasting, leasing, renting, damaging or parting with possession of any part of Land Reference No.11288.

d) A permanent injunction restraining the Defendants whether by themselves, their agents, servants, assignees, beneficiaries or otherwise howsoever from transferring, selling, mortgaging or alienating the 1000 ordinary allotted shares they hold or own in Purple Saturn Properties Company Limited to any other person other than the Plaintiff pending the hearing and determination of the Plaintiff's suit.

e) A permanent injunction restraining the Defendants whether by themselves, their agents, servants, assignees, beneficiaries or otherwise howsoever trespassing upon, accessing upon, developing, selling, mortgaging, alienating, wasting, leasing, renting, damaging or parting with possession of any part of Land Reference No.11288, pending the hearing and determination of the Plaintiff's suit.

f) In the event the Defendants decline or neglect to sign the share transfer documents, an order authorizing the Deputy Registrar of this Honourable Court to sign such documents and to do such acts and execute al documents as may be necessary to transfer the said shares to the Plaintiff.

g) All necessary and consequential accounts, directions and enquiries.

h) Costs of this suit

i) Such further orders as the Honorable Court may deem fit and necessary to give effect to its directions and orders.

5) It is common ground that on 12th May 2015, Galba and Kofinaf instituted HCC. No. 230 of 2015 against Purple Saturn seeking to enforce the SPA. Daykio joined those proceedings as an interested party on 29th June 2015 and supports the claim. There is yet another suit being HCC. No. 499 of 2016 in which Purple Saturn (jointly with Jojoga properties Limited) have interalia, sought to have the SPA declared null and void and a restrain order against interference with its shareholding, directorship and its property. That suit was filed on 14th December 2016. Worth noting is that Daykio is the 2nd Defendant in this latter suit.

6) Certain developments herein irk Purple Saturn. That without its authority and instructions, and in connivance with Daykio, Galba and Kofinaf unlawfully appointed the firm of Mbugwa, Atudo and Macharia Advocates to purportedly act for it in these proceedings. That appointment is under challenge in the current application. Also assailed is the Notice of Admission filed by the said firm supposedly on behalf of Purple Saturn admitting the claim herein.

7) Of further concern to Purple Saturn is that through an application dated 1st March 2017,Daykio, sought to have all the Defendants in civil suit 230 of 2015 joined into this matter and which was allowed on 10th May 2017 allegedly in connivance of Galba, Kofinaf and the firm of Mbugwa, Atudo and Macharia Advocates.

8) It is against this backdrop that Purple Saturn has brought these three way application. Two prayers are easily dealt with. In an affidavit sworn on 16th May 2017 in support of the Motion, Jane Wambui Gacoka deposes as follows in regard to the conduct of the firm of Mbugwa, Atudo and Macharia Advocates in this matter;-

> "*6. On 20th May, 2015, the 1st and 3rd Defendants herein, who were the Plaintiffs in H.C.C.C NO. 230 of 2015, unlawfully appointed Mbugwa, Atudo & Macharia Advocates to act for the 2nd Defendant herein who was the 19th Defendant in the said suit, to act in parallel to its duly appointed Advocates. Exhibited herewith at pages 36 to 37 and marked as "JWG-2" is a true copy of the Notice of Appointment of Advocates"*.

9) That rather damning allegation has not been rebutted by the said firm. Indeed at the hearing of the application, Mr. Omuganda appearing for the firm told the Court that his instructions were to withdraw all documents filed by the said firm on behalf of Purple Saturn. This Court takes the silence in respect to the accusations and the withdrawal of the documents as a concession by the said firm of advocates that it entered this matter and purported to act for Purple Saturn without instructions. Prayer 2 of the Motion which seeks to have pleadings and documents filed by that firm struck out must therefore be allowed without much ado.

10) Yet there are further ramifications of the unlawful participation of the firm of Mbugwa, Atudo & Macharia Advocates in these proceedings. On 10th May 2017, this Court allowed the application of Daykio for joinder of certain parties and amendment of the Plaint. In the Court session in which the application was granted, Counsel Ondego indicated to Court that Mr. Macharia, then said to act for Purple

Saturn, was not opposed to the pleas by Daykio. It has now turned out that the said firm did not have instructions to act for the said party and could therefore not properly concede to the application. For the reason that the Court allowed the application partly on the basis that it was not opposed, this Court will not permit the orders granted on that day to stand. Daykio will have to reargue its application of 24th February 2017, if it is so minded.

11) The Court turns to the next issue. It is submitted by Purple Saturn that this suit has abated in terms of the provisions of Order 5 Rule 1(6) Civil Procedure Rules which reads;-

> "(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate".

12) It is contended that the following positive averment by Jane Gacoka has not been rebutted;-

> "*The Plaint and Summons to Enter Appearance were never served upon the 2nd Defendant within the time set out in law or at all, the Summons to Enter Appearance having been signed and sealed by the Court on 24th February, 2016. In the circumstances, I am advised by the 2nd Defendant's Advocate, which advise I verily believe to be correct, that the suit had abated by 10th May, 2017 and could not therefore, have been the basis for an amendment*".

13) It is argued that not even this response by Mr Muya who swore an affidavit in reply helps;-

> "*The Plaintiff filed its suit on 5th February, 2016 and the same served upon the 2nd Defendant. The 2nd Defendant through its advocates then Mbugua, Atudo & Macharia Advocates came on record and filed its Memorandum of Appearance on 16th February, 2016 and Notice of Admission on 9th June, 2016, which are in the Court's record. The Plaintiff had not and has not at any one time directed who will represent the 2nd Defendant simply because it is none of its business. Further, it cannot appoint an advocate for any litigant since it has no mandate to do so. Our responsibility was to serve the summons which we did and wait for the response if any and if none seek judgment against the party*".

14) The punch of the argument is that the Summons to enter appearance were sealed by Court on 24th February 2016 and the last day of service would have to be 24th March 2016. That since no service was effected on Purple Saturn within that period or at all, then the suit abated with effect from 25th March 2016.

15) In countering this argument Daykio asserts that it collected the Summons and duly served the Defendants who subsequently entered appearance. In addition the Court is asked to note that Order 5 Rule 1(6) is in respect of collection of Summons and not its life span or validity.

16) This is the Courts view of the matter. As I understand it, the argument of Purple Saturn is that it has not been served with Summons within time or at all. And I have to agree with Mr. Havi that this specific disposition by his clients has not been sufficiently challenged. This Court takes that to be the factual position. That said, in so far as the Applicant seeks to use it as a basis for pressing the argument that the suit has abated is not without difficulty.

17) In this regard the provisions of Order 5 Rule 1 (6) must be reproduced;-

> "(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate".

The law here is straightforward. A suit will abate if, in respect to Summons whose service has to be effected by the parties, the Summons have not been collected for service within 30 days of issue or notification to the parties that they are ready for collection. In those circumstances abatement would be a matter of law and does not require any positive endorsement by Court. The abatement happens at the expiry of the period prescribed by the rule.

18) Trite it is that a party who asserts must prove. While Purple Saturn has successfully asserted that it has not been served with Summons, it does not make any assertions in respect to when the Summons herein which ought to have been served on it were collected. This is not information that has been availed to the Court and for that reason the Court is unable to find an abatement of the suit on the basis of Order 5 Rule 1(6).

19) Order 5 Rule 2 is on duration and renewal of Summons and reads;-

> "(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.
>
> (2)Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so
>
> (3)Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

(5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons".

20) The original summons herein were issued on 24th February 2016 and since they have not been served upon Purple Saturn, the summons in respect to Purple Saturn expired on or about 25th February 2017. However unlike abatement the permissive provisions of Rule 2(7) gives the Court discretion to dismiss the suit at the expiry of the summons. But since this Court was not moved under these provisions, I say no more on the matter.

21) Purple Saturn also seeks the striking out of the suit against it on two broad grounds. One is that the Plaint does not disclose a reasonable cause of action because Purple Saturn was not privy to the SPA. Second that it is vexatious and frivolous as it pursues the remedies in HCC. No.230 of 2015 in which Galba and Kofinaf are Plaintiffs.

22) Expanding on these grounds Purple Saturn argues that a stranger to a contract cannot be sued upon it. In support of this proposition the decision in Agricultural Finance Corporation Vs. Lengetia & Jack Mwangi [1985] eKLR is cited. There the Court of Appeal had this to say;-

"It is true that they were the agency statutorily responsible for paying the guaranteed minimum return advance to the farmer, and it may well be that before the first respondent would perform the agricultural services sought it would ensure payment direct to itself from a responsible body such as the AFC. But that is a wholly different thing from binding themselves contractually, the one to the other, to pay for services for another party. To put it another way, what was the consideration moving from the first respondent to the AFC in return for its promise to pay" As it stated in *Halsbury's Laws of England*, 3rd Edition, Volume 8 at paragraph 110:

"*As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."*

23) It is emphasised for Purple Saturn that not being privy to the Contract upon which the cause of action is founded, then the remedy of specific performance cannot be directed at it.

24) Further that Daykio is a party and beneficiary of the remedies in HCC. No.230 of 2015. In that event it is submitted that pursuit of the current proceedings is frivolous, vexatious and an abuse of Court process. The Court was urged to find that the suit contravenes Section 6 of Civil Procedure Act, cap 21 Laws of Kenya. So as to elaborate the issue, it was asserted that the common denominator in both suits was the SPA and a claim of trust over shares of Purple Saturn and its property. It was contended that as this is the subsequent suit then it should be struck out.

25) The applicant relies on the following authorities:-

- Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance v. Mara Conservancy & 5 others[2014]eKLR.

- William Koross (Legal Personal Representative of Elijah C.A Koross) v. Hezekiah Kiptoo Komen & 4 others [2015] eKLR.

- Republic v. Chairman District Alcoholic Drinks Regulation Committee & 4 others Ex-parte Detlef Heifer & Another [2013] eKLR.

- John Silas Puleiy v. Jackson Karanja Muhia [2016] eKLR.

- Peter Kamau Ikugu v. Westlands Residential Resort & Another [2018] eKLR.

26) For Daykio it was submitted that Purple Saturn was and had at the material time been aware of the SPA and was bound by its terms. Clause 5.4 of the agreement was said to require Purple Saturn to hold a board meeting and pass a resolution at which the transfer of sale of shares would be approved for registration. This obligation, it was proposed, defeated the privity of contract argument.

27) In dissuading the court from the validity of the Applicant's arguments, it was submitted that there are exceptions to the general rule of privity of contract. Daykio calls into aid the following passage in the Court of Appeal decision of Aineah Liluyani Njirah vs. Agha Khan Health Services[2013] eKLR:-

"8. More fundamentally, however, when the contracting parties intend to give a right of enforcement to a third party, *"it is difficult to see how it can be said that effect is given to that intention by allowing the promisee, but not the third party, to sue...where an unjust or illogical result is caused by the privity rule*.[8] (Emphasis supplied). It would surely be much simpler and clearer to give

effect to the intentions of the contracting parties by allowing the third party to enforce the contract.

9. In some countries, various pieces of legislations have already been passed with specific exceptions to the Privity rule, because there is recognition that it can cause hardship, especially for consumers. For example the English **Sale of Goods and Supply of Services Act of 1980** provides that:

***"Where a consumer buys a car on a financial deal, and the car turns out to be defective ("not fit for purpose"), they have the choice of suing either the dealer or the finance company."***

Depending on the type of finance package, the actual sale might be between the dealer and the finance company, so the consumer might be a third party to the car sale and might not be able to sue, but the Sale of Goods and Supply of Services Act 1980 means that the privy rule is not an obstacle to the consumer to sue either the dealer or the financier.

10. Similar reforms have occurred in other common law jurisdictions, notably in Canada, Australia and New Zealand where in appropriate cases, courts have carved out new exceptions to the rule if not by outright reform.[9] The courts have achieved this by "*making use of devices such as constructive trusts or estoppel to allow a third party to bring an action in a suitable case."[10]*

11. There are now many exceptions to the privity rule, both at common law and in the statute books. They developed in an ad hoc fashion as a response to specific situations where the courts or the legislatures ascertained a need to grant third parties the right to enforce a contract made for their benefit.[11] Second, a third party should be able to enforce a term of the contract when the contract expressly states that the third party has a right of enforcement, regardless of whether or not the contract benefits the third party. Third, the third party should have a right to rely on a term of a contract which excludes or limits the liability of the third party, provided that was the intention of the parties.

12. There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so".

28) As to the relationship of this matter with HCC. 230 of 2015, it was contended that being an interested party in the earlier suit, Daykio cannot be said to be an actual litigant and cannot seek actual remedies.

29) It has been said time and time again that the power of the Court to strike out a pleading is discretionary in nature to be exercised with greatest care and caution (see for example Crescent Construction Co. Ltd vs. Delphis Bank ltd [2000] eKLR). It is a power to be used in only the clearest of cases. Elaborating on this, the Court of Appeal in Kavinga Estates Limited vs. National Bank Of Kenya Limited [2017] eKLR observed;-

"Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, order 2 rule 15 of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;

"15.(1) 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." (Our emphasis).*

The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may". Order 2 rule 15 which retains word for word".

30) It is common ground that Purple Saturn was not privy to the SPA. Nevertheless that in itself cannot exonerate Purple Saturn from these proceedings because the proposition that a contract affects only parties to it is but a general rule. Indeed even the decision in AFC (*supra*) cited by the applicant acknowledges this. Whether or not Daykio has a reasonable cause of action against Purple Saturn must therefore be evaluated from the entire circumstances of the transaction.

31) The contract that has given rise to the dispute herein is about the purported sale of shares in Purple Saturn to Daykio. The shares is therefore a central issue in the dispute. The suit is substantially about whether or not the SPA should be completed and the shares transferred to Daykio. Whether Purple Saturn is a necessary Defendant turns on whether there are any legal obligations assigned to Purple Saturn under the terms of the SPA to effectuate the transfer of the shares to Daykio and if so, if Purple Saturn was aware and accepted the obligations.

32) This, it would seem, is the place of clause 5.5 (not 5.4 as submitted by counsel for Daykio) of SPA which reads;-

> 5.5 The Vendor will procure that a Board meeting of the Company shall be held on the completion date at which:
>
> 5.5.1 the transfer of the Sale Shares (subject to stamping) shall be approved for registration and the Purchaser and its nominees shall be registered as the holder of the Sale Shares in the register of members of the Company;
>
> 5.5.2 each of the persons nominated by the Purchaser shall be appointed directors, auditors and secretary of the Company respectively with effect from the close of the meeting;
>
> 5.5.3 the resignations referred to in sub-clauses 5.2.6 and 5.2.7 shall be tendered and accepted so as to take effect at the close of the meeting; and
>
> 5.5.4 the minute of such Board meeting shall be certified as true and correct by the directors of the Company.

33) The effect of this term in the contract was that, albeit through Galba, Purple Saturn needed to approve the transfer of shares for registration. That, it is argued by Daykio, is a necessary step towards completion of the transaction. The issue of the Board meeting in which the approval would be given is alluded to in paragraph 16 of the Plaint.

34) As to whether Purple had knowledge of this obligation, Muya on behalf of Daykio depones;-

> "3. *THAT in response to paragraph 1 of the Notice of Motion Application, the Amended Plaint discloses a cause of action against the 2nd Defendant. The 2nd Defendant and its directors were fully aware of the Share Purchase Agreement (hereinafter "Agreement") entered into between the Plaintiff and Galba Mining Limited (the 3rd Defendant). However, instead of completing the said Agreement, the Defendants, failed to honour its obligations with regard to the agreement and more so, the directors of the 2nd Defendant engaged in fraudulent activities with the intent of changing the directorship of the Company thus seeking to compromise the above transaction which they were fully aware of (I make reference to paragraphs 23-42 of the Amended Plaint)".*

This is a matter of evidence, something for trial. For now this Court holds that it is not irrational for Purple Saturn to be joined as a Defendant. The claim by Daykio against Purple Saturn is not a trifle.

35) The prospects of the Plaintiffs action herein against Purple Saturn is improved if Kofinaf and Galba succeed in their claim against Purple Saturn in HCC. NO. 230 of 2015. The claim in that matter is largely pegged on the existence and legality of an alleged trust. This Court has had occasion to remark on the viability of the claim of Kofinaf and Galba as follows;-

> "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) <u>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).</u>
>
> (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 120of 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 27thFebruary 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"

36) If the claim of Kofinaf and Galba in HCC. No. 230 of 2015 cannot be characterised as frivolous then I am unable to hold that the claim by Daykio here against Purple Saturn is frivolous and vexatious. In reaching this finding I also bear in mind the Court's earlier observations as to why Purple Saturn is a necessary party.

37) Let me turn to the argument that this claim is wholly unnecessary because of the pendency of HCC No.230 of 2015 in which the two Plaintiffs there seek the specific performance of the SPA from Purple Saturn amongst other defendants. The relevant prayers are couched;-

XVIII. Specific performance of the Share Purchase Agreement dated 10th December 2014 entered into between the 2nd Plaintiff and Daykio Plantations Limited.

XIX. Alternatively, an order authorizing the 1st Plaintiff to transfer the property, LR No. 11288 to Daykio Plantations Limited or such third party as the 1st Plaintiff shall elect in terms of the Agreement for Sale dated 4th July 2013 as read with the Loan Agreement dated 4th July 2013.

38) While Daykio admits that it is the beneficiary of the two Prayers, it argues that it is merely an interested party therein and cannot seek actual remedies. The propriety of a Court making substantive orders in favour of an interested party as though it were a main party has been discussed recently by our highest Court. In Methodist Church in Kenya vs. Mohamed Fugicha & 3 Others [2015] eKLR, the Supreme Court held;-

"[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of *hijab* would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution. It is on this basis that he *cross-petitioned at paragraph 34 of his replying affidavit,* for the Muslim students to be allowed to wear the *hijab,* in accordance with Articles 27 (5) and 32 of the Constitution.

**[52]** The cross-petition was expressed in straight terms: "*I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs, and … I am also cross-petitioning that Muslim Students be allowed to wear a limited form of hijab (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya, and their right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution."*

[53] What should we make of a cross-petition fashioned as such" Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Karioki Muruatetu & Another v. Republic & 5 others,* Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

"*Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.*

*Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court***"** [emphasis supplied].

[54] In like terms we thus observed in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal No. 290 of 2012 (paragraph 24):

**"***A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be*

*heard to seek to strike out the suit, on the grounds of defective pleadings.*"

39) Clearly as an interested party Daykio cannot insist on any prayers in its favour. It has to ride on the goodwill of Kofinaf and Galba who are the true owners of the suit. It cannot, for instance, stop Kofinaf and Galba from withdrawing the suit if they so choose. This is not an enviable place to be. Daykio are entitled to bring a separate suit in which they have a measure of control.

40) Ultimately the Notice of Motion of 16th May 2017 is determined as follows:-

(i) Prayer 3 and 4 of the Motion are allowed.

(ii) In respect to prayer 2, although the amended Plaint filed pursuant to the order of Court made on 10th May 2017 is struck out, the suit stands as presented in the original Plaint of 5th February 2016 and filed on the same day.

(iii) The Application has partly succeeded and the Applicant shall have half the costs of the Motion.

**Dated, delivered and signed in open Court at Nairobi this 2nd day of May, 2019.**

**……..**

**F. TUIYOTT**

**JUDGE**

Present:-

Kamau for 21st Defendant

Gichoi for Havi for 2nd Defendant

Thatcher for Hannan for 1st and 3rd Defendants

Gathoni for Gatonye for Plaintiff

Omugana for Macharia for 2nd Defendant

Nixon – Court Assistant