Ngaruiya & 8 others v Haraka Farmers Ltd; Mbugua & 78 others (Interested Parties) (Land Case 161 of 2013) [2022] KEELC 2609 (KLR) (12 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2609 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE 161 OF 2013

FM NJOROGE, J

JULY 12, 2022

BETWEEN

CHARLES NGARUIYA & 8 OTHERS ..... PLAINTIFF

AND

HARAKA FARMERS LTD ..... DEFENDANT

AND

JOHN NJOGU MBUGUA & 78 OTHERS ..... INTERESTED PARTY

JUDGMENT

The Plaint

1. The plaintiffs commenced this suit by way of a plaint dated August 1, 2007 against the defendant company seeking the following orders:

    1. A declaration that the decision by the defendant to resurvey the parcels of land occupied by the plaintiffs was illegal and a nullity;

    2. A declaration that the RIM touching on the parcels of land occupied by the plaintiffs is inapplicable and invalid and should not be applied in the process of issuance of title documents for any land that would in any way prejudice the plaintiffs" interests in the land they occupy;

    3. A declaration that any title deeds issued on the basis of the RIM are illegal and that title documents be issued to the plaintiffs on the basis of the land that they occupy;

    4. In the alternative an order be made that the title deeds issued on the basis of the RIM are subject to the plaintiff's interests as people in occupation of the land;

    5. In the further alternative the defendant be compelled to act on the resolutions to the effect that title documents be issued on the basis of occupation;

6. A perpetual injunction restraining the defendant or any of its members or allottees from ever evicting, occupying, trespassing onto, or in any other manner howsoever interfering with the lands presently occupied by the plaintiffs;

7. Costs of the suit and interests any other or further relief as the court may deem fit to grant.

2. The plaintiffs aver in their plaint that they obtained leave to bring the suit on behalf of themselves and others with interest consistent with theirs in the dispute, having obtained leave to do so on May 11, 2007 in Nakuru HC Misc Civil Appl 137 of 2007.

3. It is the plaintiff's claim that the defendant was incorporated in or around 1965 with the sole purpose of acquiring land and allocating such land to its members; that to that stated end the defendant acquired LR Nos 6569/5 (Haraka A farm) and LR No 7819 (Haraka B farm); that in 1976 the company through its bona fide members in a general meeting passed a resolution that the land be distributed only to the then existing members through a balloting exercise; that the land was in 1977 properly subdivided in compliance with all government regulations in place and while involving government officers concerned and a map was prepared after which beacons were affixed to the ground to demarcate the plots in accordance with that map; that subsequently in 1978, members balloted for and were allocated their respective parcels of land on the basis of the subdivision map of 1977 and they took possession thereof; that members were shown the commercial and residential areas and the agricultural areas; that the plaintiffs extensively developed the lands allocated to them for agricultural and commercial/residential purposes as applicable; that they have brought up their families on the said plots over a period of many years and some of the original members sold their allocated parcels to newcomers who also developed the purchased plots; that however in February 1972 an illegal informal meeting convened by members of the provincial administration and attended by only a handful of the company's members and numerous non-members made proposals that the land be resurveyed; that subsequently, the defendant purported to endorse the proposals as resolutions, and on that basis a new map was created showing fresh subdivision of the land by which the plaintiffs were adversely affected; that the re-subdivision of the land is illegal in that it was done without inter alia, without any lawful resolution and in violation of the law in the *Companies Act*; that a number of title deeds have been issued in accordance with the new RIM, thus creating much confusion and disturbance of the original members on the ground in that they are threatened with displacement from their plots under the old RIM, which effect the plaintiffs resist and label as "improper" due to the extent of developments so far carried out on their parcels; that almost all members of the defendant are threatened with displacement and that the new RIM cannot be implemented without occasioning untold misery, loss and damage to the occupants in the farm hence the suit.

The Defendant.

4. The defendant was represented by a legal firm by the name Ngunjiri Gakinya & Co who filed their notice of appointment on November 23, 2007 in the matter but no defence to the claim was filed. However, the said firm executed a consent on behalf of the defendant in the matter allowing the application dated November 15, 2007 which sought orders of status quo pending the hearing and final determination of the instant suit.

The Interested Parties' Defence

5. The interested parties successfully applied to be joined to the suit vide a motion dated June 15, 2011. They then filed by leave of court a defence dated April 3, 2011. The interested parties' defence to the claim is that the plaintiffs have no locus to sue on behalf of any other person; that leave to sue on behalf

was obtained through misrepresentation; that the plaintiffs had no authority to develop plots that did not legally belong to them and that the plaintiffs are not in occupation of the suit properties.

Hearing

6. Hearing took place on October 5, 2021 when the plaintiffs called evidence and closed their case and on November 16, 2021 when the interested parties called the evidence of one witness and closed their case.

Evidence of the Plaintiff

7. PW1 was John Githiro Nduro, the 3rd plaintiff. His evidence is that his land measures 3.75 acres; that the directors of the defendant, upon request by members allocated them quarter-acre pieces of land for settlement purposes while the company continued farming on the suit land known as LR No 6569/5; that subsequently the directors bought LR No 7819 and the company farming activity was extended to that farm; that all parcels allocated to members were of equal size and every member got his share; that later on other directors took office and alleged that the farm had not been properly subdivided and hence called a meeting intending to include the riparian areas in the subdivision; that members were divided over the issue of that sort of subdivision and it was resolved that each member remain on his plot; that however some members vacated their plots while others refused to do so; that the resulting area list showed different parcels sizes and the structures erected by members in the first settlement areas were supposed to be demolished yet some were permanent houses whose owners refused to vacate; that PW1 was evicted from his original parcel. The plaintiffs aver that only a minority of members approved of the new subdivision; that balloting was done secretly; PW1 produced a surveyor's report (P Exh 4) and the original map (P Exh 1) to support the plaintiff's claim. PW1 stated that that there was no resolution made by the existing members allowing registration of new members, but new faces could be seen at the farm. PW1 stated that there had been a previous case, to wit, LDT Case No 66 of 2006 and produced some documents from those proceedings as P Exh 3(a) – (c).

8. Upon cross-examination by Mr Muriithi, PW1 revealed that his ballot was No 8; that he had attended the meeting that resolved that the subdivision had not been done properly and that a roll call was made thereat; that however, he was not present at the meeting that authorized that new members be recruited. He further stated that he had declined to receive the new title under the new subdivision which he termed as not genuine since he had disagreed with fresh subdivision; he also revealed that that he had been sued for eviction earlier on.

9. Upon re-examination he stated that there had been no consensus at the meeting that the land be re-subdivided afresh.

10. PW 2, Charles Ngaruiya Ngotho, the first plaintiff, testified on the same date as PW1 and adopted his recorded statement dated April 27, 2012. His evidence is that he has land at Haraka farm, having been allocated land in 1978 by the defendant; that he has been affected by the new RIM; that now there is an intention to move him from his land which movement he does not want to take place.

11. Upon cross-examination by Mr Muriithi PW2 stated that he had two shares; that the LDT case never resulted in any award; that he was not involved during the new subdivision; that some members hold titles while others do not possess any; that he never sought title under the fresh subdivision since he was not content with the new survey.

12. Upon re-examination by Mr Kahiga he stated that there was disagreement among members concerning the resurveying of the land.

13. At that juncture the plaintiffs closed their case. The defendant's case was also deemed as closed and the interested parties called evidence in support of their case.

Evidence of the Interested Parties

14. IPW 1, John Njogu Mbugua testified on November 16, 2021. His evidence is that the interested parties have authorized him to represent them in the instant case; that he has land at the Haraka farm; that the defendant company was dissolved in 2007 and it has no power over the land anymore; that he has title to his land, issued in the year 2000; that he believes that every person should go and settle on his land; that however some persons have declined to vacate from others' land; that the land was subdivided in 1989 and balloting was conducted in 1992; that subsequently, one faction in the company commenced legal proceedings which lasted until the year 2000; that in the year 2000 the members' documents were taken to Nairobi and they were granted leave to obtain titles; that the registrar of companies gave them a letter which they took to the land registrar, Nakuru; that now the two farms, Haraka A and Haraka B have been subdivided and each individual member has titles; that afterwards some persons with titles complained that their lands were occupied by others; that it is the interested parties' lands that are occupied by the plaintiffs, and the plaintiffs should be removed from those lands.

15. Upon cross-examination by Mr Kahiga for the plaintiffs, IPW1 stated that he was one of the founder members of the company and it began with 320 members; that now the farm has more than 320 members; that the company land was subdivided into 380 portions; that there was an initial survey conducted in 1977; that that exercise however could not have produced titles. He admitted that the plaintiffs took possession of their parcels in 1977 after that exercise; that the new subdivision was agreed at during a meeting; that he was the secretary involved in the second subdivision; that this dispute has been taken to administrative offices before; that the titles in the bundle have different acreages; that members were to get titles according to the shareholding and many had bought different levels of shareholding depending on their financial capacity and that each share was worth about 3.2 acres. Despite that, he admitted that some members had as little as 0.0433 acres as evidenced by the copies of titles in the interested parties' bundle of documents. However, he also added that when allocated land was situate on a slopy area, its size would increase. He denied that he was involved in the inflation of the number of members from 320 to 380; that it was the plaintiff's group led by one Hiram Nganga and John Githiri (PW1) who increased the membership in the company to 380; that he was elected in 1984 and received the register of 380 members; he indicated that there is no unsubdivided land remaining and that all titles to the subdivisions have issued; that he went to Nairobi and surrendered the company certificate of incorporation and seal and the company was wound up.

16. Upon re-examination by Mr Muriithi, IPW1 stated that he is no longer director of the company and that some of the plaintiffs have already collected their titles.

17. At that point the interested parties closed their case.

Submissions

18. The court ordered the filing of submissions by all parties and the parties having complied by March 3, 2022 the instant suit was reserved for judgment.

19. The plaintiffs submitted that M/s Ngunjiri & Co Advocates entered appearance on behalf of the defendant and a consent was entered into which was adopted as an order of court on November 23, 2007 allowing an interlocutory application dated November 15, 2007 seeking injunctive orders against the defendant pending the hearing and disposal of the suit and that the status quo obtaining as per the map prepared by the farm mapping unit on August 12, 1997 be maintained till determination of

the suit. Those orders have not been discharged. The plaintiff's counsel then reiterated the contents of the plaint and stated that the issues for determination were as follows: whether a case can be sustained against the defendant; whether the meeting resulting in the resurvey and reallocation of land was properly convened and/or ratified by the shareholders of the company; whether the resultant RIM, the subsequent resurvey and reallocation was proper and legal; what orders should be granted to remedy the plaintiff's plight, and who should bear the costs of the suit.

20. Citing *Salomon v Salomon* 1897 AC 78 and *Victor Mabachi & another v Nurturn Bates Ltd* civil appeal No 247 of 2005 [2013] eKLR it was submitted for the plaintiffs that the defendant company possesses capacity to sue and be sued. Regarding the contention by the interested parties that the defendant was wound up as per the gazette notice number 10534, the plaintiff's counsel submitted that that gazette notice was subsequently revoked by gazette notice number 12847. The plaintiff submitted that the reliance on the gazette notice number 10534 of 2007 by the interested parties was due to their involvement in the hasty attempt to wind up the defendant's company in order to defeat any litigation that may arise from their fraudulent actions of resurvey, reallocation, illegal and unprocedural meeting. A submission is made that it is the actions of the "patriotic" shareholders of the defendant that occasioned the revocation of that first notice by the registrar of companies.

21. Regarding whether the meeting authorizing the resurvey and the reallocation was properly convened; the plaintiff's counsel submitted that the meeting was convened in 1992 by the provincial administration leading to the impugned decision to prepare the new map and redistribute the company's parcels of land to the members. However, to the plaintiffs, the feeling that they were sidelined and that the decision was arrived at by few individuals made them reject that decision which they term as illegal and unsound and inconsistent with values and agenda of the company. Sections 130, 131 and 132 of the *Company's Act* cap 486 is cited as providing for procedure for company meetings for annual general meetings and special general meetings yet the interested party's witness never demonstrated the kind of meeting convened in 1992. It is further submitted that even if that meeting took place, no procedure was followed by the company or by persons purporting to act for the company. It is stated that under section 132 only the directors are empowered to convene an extraordinary company meeting like the one claimed to have been convened; that under section 133 of the Act, a 21-day notice served on all members of the date and time of the intended meeting was a prerequisite for the meeting; that there is no mention of the notice to members or the convener of the meeting; that there was no indication of who requested for the meeting; that there was no circulation of the resolution to the members as required by section 140 and 142 of the Act and that the deliberations arising from the meeting were illegal null and void and the resultant resurvey, reallocation and RIM were improper and illegal. The plaintiffs contend that the old map used to survey and allocate the land in 1978 by the farm planning unit of the ministry of agriculture and which led to balloting by members is the applicable map to date. They stated that the new RIM map was never agreed on by the members and was never ratified and that the map prepared by the farm planning unit and published by the director of surveys is the true and the original map showing the land as earlier allocated to the members of the defendant. It is further urged that all the developments: road networks; trading centres etc. have been developed in accordance with the farm planning unit map and the new map has disrupted settlement and business for the plaintiffs. The plaintiffs' counsel referred to a report prepared by Wahome Werugia, licensed land surveyors, contained in the plaintiffs' bundle of documents stating that the new plan contains very many plots that have not been numbered and whose ownership is unclear; the report recommends that this is an irregular phenomenon in an RIM. The plaintiffs urged the court to consider that report favourably. It is the plaintiff's case that there are unscrupulous persons who want to enrich themselves and therefore the new RIM should be declared void. Regarding the appropriate remedies, the plaintiffs state that they have illustrated that it is proper for the court to

uphold the proprietary interests of the old members of the defendant, most who are elderly men and women without any other abode apart from Haraka farm and which they have called home since 1978 and that the orders sought in the plaint should be granted as prayed.

22. Regarding costs, the plaintiffs, citing *Judicial Hints on Civil Procedure*, 2nd Edition (Nairobi) Law Africa) 2011 at page 101 and *Joseph Oduor Anode V Kenya Red Cross Society*, Nairobi High Court civil suit No 66 2009; (2012) eKLR as well as section 27 of the *Civil Procedure Act* cap 21, urge the court to award them the costs of the suit.

23. The defendant never filed any submissions.

24. The interested parties' submissions were filed on March 2, 2022. They concurred with the plaintiff on some of the issues for determination and add the following: whether the defendant holds any title deeds capable of being challenged; whether the plaintiffs have a cause of action against the defendant over title deeds and against the interested parties as registered owners; whether there is privity of contract between the plaintiffs and the interested parties capable of enforcement through the present suit; whether the court can grant an order of perpetual injunction above the interest of the interested parties/title holders and whether the rights of the members are above the rights of the interested parties who are title holders.

25. Citing *Dishon Muthama Nzina & 26 others v The Attorney General & 7 others* 2018 eKLR, *Sylvester Barake Maina & another v Registrar Of Companies*, [2019] eKLR, *Speaker of National Assembly v Hon James Njenga Karume* 2008 eKLR, *Jackson Wachuga v Eastern Kitui Stores Ltd* 2008 eKLR, the interested parties submitted that no application was brought to reinstate the defendant to the registrar of companies and no suit can be reinstated against it as it lacks locus standi. It is further averred that the procedure for reinstatement of a company that has been dissolved was set out in section 339 of the repealed *Companies Act* and the same is replicated in section 912 of the *Companies Act* 2015, and that if the said company was reinstated by way of corrigenda the same was irregular and the registrar did not have the requisite power to reinstate the same.

26. Citing *Margaret Njeri Wachira v Eliud Waweru Njenga* 2018 eKLR and *Re Dishon* (supra) and *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 others*, civil appeal number 246 of 2013 the interested parties submitted that the plaintiff did not provide any proof of proprietorship over the company land and their claim cannot be maintained. It is submitted that the farms Haraka A and Haraka B did not exist and the plaintiffs have no *locus standi*.

27. Citing sections 24, 25 and 26 of the *Land Registration Act* and *Omondi v National Bank of Kenya & others* 2001 EA 177, the interested parties submitted that they enjoy the protection of the Act and the certificates of title or title deeds issued to them are prima facie evidence of proprietorship and that the validity of those titles was not challenged. They further aver that only the defendant company can take action to enforce its legal right before it was dissolved and that once it was dissolved all its rights ceased to exist.

28. Regarding privity of the contract, it was submitted, citing *Edward v Hallwell* 1950 2 All ER 1064 At 1066 and *Grace Wanjiru Munyinyi v Gideon Waweru Githunguri & 5 others* HCC NKR civil case No 116 of 2002, that the plaintiff's suit was filed in abuse of the process of court.

29. Regarding whether this court can issue the orders sought by the plaintiffs, it is submitted, citing section 2 of the repealed *Companies Act*, that the remedies in the suit should have been sought before the High Court since they involve the decisions and the workings of the defendant company.

30. The interested parties, citing S*peaker of National Assembly v James Njenga Karume* eKLR 425 and *Kenya Breweries Ltd & another v Washington Okeyo* 2021 EA 109, urged that the prayers sought cannot be granted.

31. The interested parties also cited *Republic v Independent Electoral & Boundaries Commissions Ex-Parte Mohamed Ibrahim Abdi & others* 2017 eKLR for the proposition that costs follow the events as a general rule and that where the costs shall not follow the events the court shall give the reasons.

Determination

32. There is no doubt that this is a representative suit leave having been obtained *vide* Nakuru HC MISC APPL 137 of 2007. The following issues arise for determination by this court in this suit:

    a. Whether this court has jurisdiction to determine this matter;

    b. Whether the defendant company is in existence;

    c. Whether or not the meeting and resolution recommending a resurvey of the farm was illegal;

    d. Whether the plaintiffs are adversely affected by the said resurvey;

    e. Whether the interested parties' titles ought to be cancelled;

    f. Who ought to bear the costs of the suit?

33. As to whether this court is possessed of jurisdiction to determine this suit, this court simply restates the provisions of article 162(2)(b) of the *Constitution* and section 13 of the *Environment and Land Court Act* 2012. Those provisions of constitution and statute mandate the court to hear and determine any dispute relating to the environment and use and occupation of and title to land which are undoubtedly the subject matters of the present suit. It is noteworthy that the interested parties sidestepped this issue in their submissions. The principal subject matter in this litigation is land. If the impugned registry index map is allowed to stand, it is evident that it may occasion some disturbance on the ground and cause some persons to shift residences or investments. The reference to an illegal company meeting is merely a guiding light to show the court where matters relating to the company administration went wrong. Titles would have to be declared illegal null and void if the plaintiff's claim were to succeed and thereafter, a new RIM would have to be registered respecting the original boundaries as demarcated by the farm planning unit. It is not necessary to say more. After applying the foregoing "predominance" test, this court has arrived at the conclusion that this is a land matter that falls within the province of the definitions in article 162(2)(b) of the *constitution* and section 13 of the *Environment and Land Court Act* from which this court's jurisdiction is derived. This court hereby rules that it has jurisdiction to hear and determine this case.

34. Regarding whether the defendant is in existence the contents of two gazette notices cited by the parties are relevant. While citing *Dishon Muthama Nzina & 26 others v The Attorney General & 7 others* 2018 eKLR, *Sylvester Barake Maina & another v Registrar Of Companies*, [2019] eKLR and *Jackson Wachuga v Eastern Kitui Stores Ltd* 2008 eKLR, it has been argued by the interested parties that by virtue of gazette notice No 10534 of October 24, 2007, the defendant company stood dissolved three months after the date of issuance of that gazette notice and no application was brought to reinstate it to the register of companies and consequently no suit can be sustained against it. In response to the interested parties' argument, the plaintiffs state that the defendant company was revived *vide* gazette notice No 12847 of October 22, 2010, that is about 3 years after the issuance of the dissolution notice, and that therefore the company exists. They accuse the interested parties of mala fides for the

dissolution of the company saying it was meant to defeat any possible litigation and cover up for the alleged unprocedural meeting and the allegedly illegal resurvey and reallocation of land.

35. On their part the interested parties beef up their argument by citing section 339(6) of the *Companies Act* (now repealed) which provided as follows:

> " 339 (6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register the court on an application made by the company or members or creditor before the expiration of ten years from the publication in the gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon a certified copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

36. A very comprehensive process which the registrar of companies may follow suo motu in initiating and effecting the dissolution of a company is provided for in section 339 (1) – (5) of the *Companies Act*. First the registrar has to have a reasonable cause to believe that a company is not carrying on business or in operation whereupon he sends to the company a letter inquiring into that aspect. Thirty days should elapse after that letter is sent, after which the registrar should, within 14 days of their expiry, send the company another letter citing the first letter and indicating that no response has been received. After the second letter is sent the registrar should wait for 30 days and if no response to it is received within that period, he shall publish in the gazette a notice with a view to striking out the name of the company from the companies register. A notice is also sent to the company indicating that at the expiry of 3 months from the date of the notice that unless cause is shown to the contrary the company will be struck off the register and the company will be dissolved. Under section 339(3) these notices and letters are not required of the registrar by the law where the company or any official of the company has requested him to strike off the company or has notified him that the company is not in operation. Under the provisions of section 339(5), at the expiry of 3 months from the date of the notice, unless the contrary is shown by the company, the registrar may strike the company name off the register and publish a notice thereof in the gazette upon which publication the company shall be dissolved.

37. The interested parties' sole witness, DW1, stated in cross-examination by Mr Kahiga that he was the person who instigated the dissolution of the company. His evidence went as follows:

> " I went to Nairobi and gave the company certificate and seal and the company was wound up."

38. If that is what took place, then the registrar was not bound to issue the numerous letters and notices under the provisions of section 339(1) and (2) but would issue a 3 month notice under section 339(3) and a final notice under section 339(5), the latter dissolving the company. Though it is agreed that the notice dissolving the defendant company under section 339(5) was issued, no copy of such was produced and I would have expected the interested parties to do so. This court took a dip into the Kenya gazette online archives in a search that verified that indeed the gazette notice cited mentioned one company by the name "Haraka farmers limited". It stated as follows:

> " Gazette notice No 10534

The Companies Act

(cap 486)

Intended dissolution

Pursuant to section 339 (3) of the *Companies Act*, it is notified that at expiration of three months from the date of this gazette the names of undermentioned companies shall unless cause is shown to the contrary be struck off the register of companies and the companies shall be dissolved.

number

Name of company

121138

Auto Rescue limited.

116408

Adili Holdings limited.

89069

Cyberia limited.

116702

Dean Andrews promotions limited.

103981

Express Connections limited.

118490

Equity Link limited.

76057

Group Five Kenya Limited.

70971

Ghezira Africa Services Limited.

Haraka Farmers Limited.

Leston Agencies Limited.

58788

Italian Styles Limited.

kiawaama Company Limited.

75618

Mutual Fair Exchanges Limited.

123708

Miap Consultants Limited.

24327

Octagon Enterprises Limited.

70379

Red Star Services Station Limited.

52779

Racs Limited.

32184

Shogun Limited.

69665

Silentflow Autoparts Limited.

100785

Shackell Holdings Limited.

28914

Tawakal Manufacturers Limited.

21222

The City Commercial; Printers Limited.

59583

Viking Computers Limited.

Dated the October 24, 2007.

F.S.M Nganga,

Senior deputy registrar of Companies:"

39. The interested party relied on the decision of Hon Kimaru J in a ruling dated October 9, 2008 in *Jackson Wachuga v Eastern Kitui Stores* 2008 eKLR which cited the judgment, delivered earlier, of Hon Waweru J in the same case as follows:

> " [In order for the examination provided in this rule to be conducted the judgment-debtor, if a corporation, must of necessity be in existence.] A company that has been struck off the register, and hence dissolved, cannot be said to be in existence. There is no dispute here that the defendant/judgment-debtor was struck off the register by the registrar of companies under the provisions of section 339 of cap 486 and thereby dissolved. The defendant/judgment-debtor is therefore no longer in existence. Furthermore, by operation of section 340 of cap 486, all its assets, subject to any order which may at any time be made by the court under section 338 or section 339 of the Act, is deemed to be *bona vacantia* and shall accordingly belong to the government. Whether or not the government has taken over such property in fact cannot be investigated under rule 36 of order XXI. The law says that that is what must happen, and this cannot be second-guessed by the deputy registrar under the aforesaid rule. Section 338 (1) gives the High Court power to declare dissolution of a company void at any time within two (2) years of the date of the dissolution on an application being made for that purpose by the liquidator of the company or by any other person who appears to the court to be interested. Section 339 (6) gives the court power,

on an application made by the company or member or creditor, before the expiration of ten (10) years from the publication in the gazette of the notice of the company having been struck off the register, if satisfied that the company was at the time of striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order that the name of the company be restored to the register. It is common ground that there are no orders as aforesaid that have been made."

40. On his part, Hon Kimaru J in the same case of *Jackson Wachuga v Eastern Kitui Stores* 2008 eKLR had this to say in his own words:

> "I am in agreement with the reasoning of Waweru J (in the portion of his judgment quoted at the beginning of this ruling), that once the registrar has dissolved a company, he lacks power to restore the same back to the register. If any interested party wishes to have the company restored to the register, such a party must make an appropriate application to the court as provided by section 339(6) of the *Companies Act*. The registrar has neither the authority nor jurisdiction to restore a company which he had dissolved pursuant to the powers donated to him by section 339(5) of the *Companies Act*. It is only the High Court which has the jurisdiction to restore such a company back to the register of companies. The registrar cannot purport to exercise authority he does not have by reviving a dissolved company through a backdoor route of making a corrigenda in the Kenya gazette. If the registrar genuinely make a mistake in publishing the gazette notice dissolving a company, he is at liberty to apply to the High Court for appropriate orders restoring the company inadvertently or mistakenly dissolved when exercising his powers pursuant to the provisions of section 339(5) of the *Companies Act*."

41. While agreeing with Hon Kimaru J that if any interested party wishes to have the company restored to the register, such a party must make an appropriate application to the court as provided by section 339(6) of the *Companies Act*, this court is unable to find that the express or indirect import of the judgment of Waweru J in *Jackson Wachuga v Eastern Kitui Stores* 2008 eKLR was that once the registrar has dissolved a company, he lacks power to restore the same back to the register. Circumstances may occur where a mistake, malice or even alleged fraudulent conduct such as lamented by the plaintiffs herein, may land the name of the wrong company among those listed in a notice under section 339(5). The question arises as to whether, if the registrar can or can not reinstate the company name into the register *suo motu*. In such a case the registrar must be deemed to be undertaking his administrative duties of the nature for which his office was created under the law. Holding otherwise would unnecessarily saddle the courts with a myriad of minutiae of corrections generated by events which the registrar obviously has capacity to handle within his jurisdiction and that undesirable outcome is unfit for an already overloaded justice system. It is not for this court to create imaginary litigation or mirages of such imaginary litigation where there is no complainant. It must be assumed that if any person is indeed aggrieved by the decision of the registrar, he would be at liberty to approach the court for relief under the enabling provisions of article 50 of our very liberal *Constitution* of Kenya 2010. In this court's view then, the registrar has power to reinstate a name into the register where there is sufficient reason to do so and he does not have to wait until an order of court is issued.

42. In this suit, this court is unable to agree with the interested parties' submission that the defendant company is non-existent for three principal reasons. One is that the basic rule of evidence is that he who asserts proves. Ours is an adversarial justice system. I have already stated that none of the parties produced the gazette notice No 10534 of 2007 in evidence. It was upon the interested parties to establish that the defendant company does not exist. That could not have been established by a mere unsubstantiated claim from the witness stand or a mere submission from the bar. The interested parties

failed on a preliminary basis to establish that the defendant company was dissolved when they failed to produce and own that gazette notice.

43. Secondly, whereas the company incorporation number is provided for the other entities named in the gazette notice, none is mentioned against the name "Haraka Farmers Limited." Consequently, it is not possible to decipher whether that dissolution was indeed in respect of the defendant company. Perchance the interested parties had produced that notice as evidence, they would still have had to jump over the hurdle of proof that that was the defendant company.

44. The third reason is that using a subsequent notice, the registrar of companies has already reinstated the company that was struck off by the first notice and no objection has been raised in court or elsewhere by the interested parties or by any other person that the registrar has committed any wrong in law by so doing. The registrar of companies is the person charged with keeping the register of companies. I am persuaded that, he not having acted suo motu in dissolving the company mentioned in the notice, then he must have had a good ground to issue a corrigendum that reinstated the company into the register. It is clear that even as this judgment is being written, the registrar now considers the company called "Haraka Farmers Limited," if that reference was indeed to the defendant company, as being in existence and listed in his register as no contrary evidence has been issued. It is possible that, having issued gazette notice No 12847 as corrigenda, had the registrar been summoned by any of the parties the evidence that he would have given is that the company exists, and it would have been upon the person at whose instance he was summoned, to prove otherwise. I also do not find any provision in law stipulating that the registrar is expressly barred from reinstating a company into the register if he finds that he has been misled, especially where he relied on third party information and did not act suo motu. In stating this I differ with the direction adopted by the learned judge, Hon Kimaru J in the ruling in *Jackson Wachuga v Eastern Kitui Stores* 2008 eKLR, but it is this court's view that there is sufficient justification for such deviation. The conclusion of this court is therefore that the defendant company is in existence and has locus standi to be sued and indeed entered appearance in the suit and entered into a consent that still stands to date. Gazette notice No 12847 of October 22, 2010 is in this court's view legal and it achieved the desired effect of reinstating the company named 'Haraka Farmers Company Ltd.' back into existence.

45. As to whether the resolution recommending a resurvey of the farm was illegal, the plaintiffs submitted that a meeting was convened by members of the provincial administration in 1992 in cahoots with some purported members of the company which led to the decision to prepare a new map and to redistribute the land. The plaintiffs aver that the decision was arrived at by a minority of the members and for their own benefit, and the decisions thereat were unsound and inconsistent with the agenda and values of the company. The plaintiffs submit that the procedure employed in respect of the meeting did not conform to the procedure required either of a general meeting or a special meeting as provided for by section 131 and 132 of the *Companies Act* (now repealed). According to the plaintiffs the convener of the meeting is not named and no notice was issued to members. There is also no evidence of the circulation of the intended resolution as required by section 42 of the Act. The plaintiffs aver that due to the afore mentioned omissions and irregularities the meeting was illegal null and void. The defendant did not respond to this issue and the interested parties failed to submit on it.

46. That this court must proceed with the inquiry from the point of establishing whether the initial survey claimed to have occurred in 1977 occurred or not is not in doubt, for it is only a positive finding on that issue that will disclose if there was need for a meeting and a resolution to depart from that survey and settle upon a new one. In this regard it is noteworthy that two maps, said to have been approved by the government, were produced without demur by the defendant and the interested parties, for both Haraka A and Haraka B farms. I consider those maps to be genuine.

47. Upon cross-examination PW1 stated that there was a meeting that approved of the re-subdivision of the land and that he was in attendance although he had not been invited. That meeting occurred long after the plaintiffs and other company members had settled on their plots. PW2 stated that he was given land in 1978 and if the new registry index map (RIM) is to be implemented, he would be adversely affected. IPW1, the interested parties' chief witness stated in his cross-examination that the survey of the suit land was originally conducted by the ministry and the plaintiffs took possession of their portions of land in 1977 pursuant to that exercise. Indeed, he stated that many are the company members who took possession of their parcels in accordance with the 1977 survey. According to him there was no dispute between 1977 and 1992. He stated that the members agreed on the new subdivision at a meeting and that he was the secretary involved in the second subdivision. However, he averred that the 1977 demarcation of the land never yielded titles. He stated that there were originally 320 members but later the number grew to 380. He denied that the company leadership increased the membership, but later contradicted himself by accusing PW1 and others in company leadership before of increasing the number of company members. It is clear therefore from the evidence of the witnesses in this case that there was an initial subdivision which settled the original members and that there was a second subdivision which occurred long after the first. It is agreed by the interested parties that either contemporaneous with or by the time of the second subdivision the company membership exponentially and inexplicably increased from 320 to 380, and in this growth in numbers this court sees a motive for instigating a second subdivision of the company land.

48. Exh 4 is a report by Wahome Werugia licensed land surveyors, commissioned by the plaintiffs, regarding the ground status of what were formerly the company farms identified as LR No 6569 and LR No 7819.

49. The report states that in its compilation the surveyors preparing it relied on the plan used by the farm planning unit of the ministry of agriculture in 1978 to settle members, the registry index map for Kamaara /Mau Summit Block 6, the list of members and their shares, the area list and documents faulting the RIM received from the plaintiffs.

50. According to the report members were originally communally settled on one quarter-acre holdings each while the company farmed the land in accordance with the then policy that changed by 1978 so that members could be allocated agricultural portions. The company invited the farm planning unit of the ministry of agriculture to settle the individual members on their agricultural portions which resulted in the members having two portions each: one original quarter-acre residential plot and one agricultural plot of about 3 acres. The report states that the complainants are rejecting the RIM for the reason that it failed to take consideration of developments effected on the ground by some members while it did so for others, and the consequence will be that many members will be forced to move from the area where they have effected such developments. The agricultural plots were affected only to a small extent but the residential plots were affected to a great extent; some plots are too big and some too small compared to the standard size of 3 acres per share that had been expected; some plots were left unallocated and some were left numberless, and bona fide member's names were omitted from the register. The report states that the plan used to allocate the agricultural portions to the members was the one prepared by the farm planning unit and most of the existing developments including private and public investments have been effected in accordance with that plan. According to the report the current RIM is the one that has been rejected by the plaintiffs since it ignored most of their developments existing as at the time of the new survey in 1991-1992; that RIM has ignored the villages and placed agricultural plots over them; it has subdivided communal lands and dams and schools into numerous quarter-acre plots. The RIM also contains very many unnumbered small plots which according to it should not be the case in an RIM. The cemetery plot set apart in the original farm mapping unit design

was also allocated to an individual. The report further states that though the land given to the county council is intact and the villages are still intact on the ground with fenced homesteads, newly created proposed plots of 50x100 feet all cut through existing developments and developed perimeter fences to old plots thus affecting fully developed land with mature trees and fences; most of the farm was as it was in 1978 on the ground because many members had refused to vacate their old plots. The report finalizes by stating that the amount of development and personal attachment on such old plots should be considered and compensated for before a member is moved; that the unnumbered plots should be explained; that members should be allocated their shares where they had effected developments and that common lands should be shared equitably based on shareholding while providing for public amenities. Photographic evidence of the developments of members which are supposed to be either abandoned by those members or demolished once new owners take possession according to the RIM are exhibited at the back of the report.

51. This court is persuaded beyond peradventure that from the foregoing analysis there is sufficient proof that the plaintiffs and other members of the company are bound to be adversely and considerably affected were the implementation of the RIM on the ground effected. The clearest evidence that such will be the resulting scenario is the claim by the interested parties that the plaintiffs are in occupation of their land. This having been company land such serious repercussions of a resurvey of company land should have been premised on a valid resolution by the members. It is clear that if members were aware of the extent to which they would sustain loss they, it would be unlikely that they would support such a resolution that would uproot them from parcels they settled on in the 1970s and plant them in new surroundings to start developments afresh.

52. In the light of the foregoing, and sufficient ground having been laid by the plaintiffs that there was a meeting that resolved that such resurvey be done and that the said meeting was orchestrated by non-members and infiltrated by impostors, then the burden shifted to the defendant and the interested parties; the exact nature of that burden was to demonstrate to this court that the provisions of the law in the *Companies Act* were complied with to the letter in the convening of that meeting and they have failed to bring such proof. Consequently, this court has no difficulty in finding and declaring illegal and null and void the meeting and the resolution to resurvey the land contrary to the manner in which the farm planning unit of the ministry of agriculture had planned it in 1977 which is engendered in the ground occupation by many of the original company members. I therefore find that the plaintiffs would be adversely affected by the implementation of the RIM produced as P Exh 2 by as the foregoing discussion on the evidence from the surveyor's report produced as P Exh 4 clearly shows.

53. The next question I must deal with is whether the interested parties' titles ought to be nullified as prayed by the plaintiffs. In regard to the sanctity of title, the provisions of section 25 of the *Land Registration Act* state as follows:

> " 25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
>
> (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

54. Section 26 of the *Land Registration Act* provides as follows:

> "26. (1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
>
> (2) A certified copy of any registered instrument, signed by the registrar and sealed with the seal of the registrar, shall be received in evidence in the same manner as the original."

55. I have already indicated that there was illegality in the re-subdivision of the company land and that the law regarding company meetings and resolution making was not demonstrated to have been followed. The interested parties have not clearly accounted for why the plots represented by their titles issued under the RIM overlap the plaintiffs' developed lands with the potential effect of displacing the plaintiffs if boundaries are adopted as per the new titles to be issued under the new RIM. Though the interested parties' submission is that the suit is untenable for the reason that the company was wound up and title deeds issued, it is clear from the evidence before court that that is not the case. The company is still in existence and the surveyor's report clarifies that very many plots carved out of what was formerly the company land which appear on the RIM are either unnumbered or numbered and unallocated. Many of the residents are said to have refused to collect title deeds issued under the new RIM as they do not approve of the re-survey of the land that it represents.

56. There is evidence in this case that some persons tampered with the defendant company's land and areas surrendered for public amenities and riparian lands and had them dealt with in accordance with their wishes without caring an inch how their dealings would affect or deprive the plaintiffs and other members. If the plaintiffs were entitled to two parcels of land - one residential quarter-acre and the other a larger agricultural, so be it, for, as policy then was in those times, that was their good fortune. No new and unexplained membership should have been allowed to adversely affect their accrued entitlements and any subdivision that did so was irregular. Their rights to the two types of plot each had accrued by the time the second subdivision was conducted to give birth to the RIM now under challenge. There is no justice that would be evident in displacing original company members - or even those who purchased plots from them - who have been in possession of their portions for decades, in favour of newcomers. The irregularities in failing to hold a proper company meeting and secure a proper company resolution that would address the needs of old members with vested interests in the original allocations, the indiscriminate subdivision of common land and allocation of public utility parcels created under the impugned new RIM are part of the grounds as to why the titles the interested parties

hold can not be considered valid as it is clear therefore that they originate from a flawed process. Besides, the interested parties had a chance to demonstrate that the titles they hold were valid and they failed to do so. Contrary to the expected epic opposition to the claim the interested parties failed to demonstrate that they were original members of the defendant company entitled to land within the company farm, that they held shares in the company and that they balloted for their plots alongside the plaintiffs. It has been stated in other decisions in this and other courts that when a title is challenged the holder must clearly demonstrate that he obtained it legally for it to be declared valid. In the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR the Court of Appeal stated as follows:

> " ...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property."

57. In the circumstances of this case, I cannot hold that the titles held by the interested parties to be valid as they flow from a flawed process. They are null and void and they must be cancelled as should be the RIM through which they were created.

58. The conclusion of this court is that the plaintiffs have established their claim on a balance of probabilities. I therefore enter judgment for the plaintiffs against the defendant company and the interested parties jointly and severally and I issue the following orders:

    a. A declaration is hereby issued declaring that the decision by the defendant to resurvey and the resultant resurvey of the parcels of land known as LR Nos 6569/5 (Haraka A farm) and LR No 7819 (Haraka B farm) to yield the RIM produced as P Exh 2 in this suit contrary to the 1977 demarcation map prepared by the ministry of agriculture's farm mapping unit are illegal and a nullity;

    b. A declaration is hereby issued declaring that the plaintiffs and all original members of the defendant are entitled to remain in occupation of the land parcels they have developed and on which they were settled by the defendant company pursuant to the 1977 map prepared by the ministry of agriculture's farm mapping unit;

    c. A declaration is hereby issued declaring that the registry index map (RIM) produced as P Exh 2 in this suit is inapplicable and invalid in so far as it contradicts the 1977 map prepared by the ministry of agriculture's farm mapping unit or adversely affects the parcels of land occupied and developed by the plaintiffs and all other original company members settled on the defendant's former farms comprised in LR Nos 6569/5 (Haraka A farm) and LR No 7819 (Haraka B farm) and purports to evict them from their already developed lands;

    d. An order that the registry index map (RIM) produced as P Exh 2 shall not be applied in the process of any further issuance of title documents henceforth and it is hereby cancelled;

    e. An order that the title deeds issued on the basis of the RIM are incapable of defeating the interests of members in occupation provided that the members were settled by the company under the 1977 survey by the farm mapping unit of the ministry of agriculture;

f. A declaration that any title deeds issued on the basis of or emanating from the RIM produced as P Exh 2 are illegal and null and void in so far as they purport to adversely override or overlap the parcels created under the 1977 survey by the farm mapping unit of the ministry of agriculture and they are hereby cancelled.

g. An order that the director of surveys shall prepare a fresh registry index map (RIM) adopting as faithfully as possible the layout, positioning, boundaries and contents and other pertinent features of the demarcation conducted by the farm mapping unit in 1977 so as not to disturb member's developments as far as practicable and the fresh RIM shall observe the ground occupation and developments effected on the ground by the plaintiffs and all original members of the defendant company as long as that occupation is on the basis of the demarcation by the farm mapping unit done in 1977;

h. The chief land registrar shall only issue fresh titles in accordance with the fresh RIM prepared under order no (g) herein above;

i. A perpetual injunction is hereby issued restraining the defendant and the interested parties from, occupying, trespassing onto, evicting the plaintiffs or in any other manner howsoever interfering with the lands presently occupied by the plaintiffs other than for the purpose of implementing order number (g) herein above issued;

j. An order that the director of surveys shall restore all the land parcels reserved as public amenities and riparian areas under the demarcation by the farm mapping unit in 1977 and mark them clearly as such on the registry index map and his other records;

k. An order that the orders herein above shall also apply to original settled members' successors or transferees as the case may be;

l. The costs of the instant suit shall be borne by the interested parties.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 12TH DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU