IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Miller & Potter JJ A)

CIVIL APPEAL NO 32 OF 1978

Between

MURITA COFFEE ESTATE LTD .....APPELLANT

AND

ATTORNEY- GENERAL .....RESPONDENT

MBWANJU LTD.....RESPONDENT

JUDGMENT

Madan JA The appellant, a limited liability company, was incorporated in Kenya on 24th December, 1957 with a nominal capital of Shs 100,000 divided into 5000 shares of Shs 20 each the whole capital being issued and paid up.

One Douglas Leonard Bessant was a director of the company as well as the registered holder of 4999 shares.

On 24th July 1959, the company purchased a coffee farm at Kiambu (land reference No 5999). In July 1967 the Registrar of Companies struck the name of the company off the register of companies, pursuant to section 339(5) of the Companies Act. At that time the farm was mortgaged under a duly registered first legal mortgage dated 17th January 1964 to trustees of the mortgagee to secure Shs 700,000 together with interest; the balance owing under the mortgage being Shs 400,000.

On 17th December 1976, the company and Bessant filed a petition to the Registrar of Companies in the High Court (which was served on the Attorney-General on the same day) for the company to be restored under section 339(6) of the Companies Act, and also for a further order that such of the property of the company as had become vested in the Government pursuant to section 340 of the Companies Act should vest in the company for all the estate and interest in it then held by the Government.

Simpson J dismissed the petition. The company has appealed. At the appearance in the High Court on 11th February 1977 Mr Shields, who represented the Attorney-General, told the Court (and I quote):

> Perhaps there should be another party, the purchasers. The Government decided this was *bona vacantia* and disposed of it otherwise … Prepared to have abstract of title prepared. Any order made won't affect the purchaser(s). Impossible to do complete justice without their presence.

Thus spake Mr Shields. A reader of this judgment might feel mystified if Mr Shields's reference to "purchasers" is not unravelled.

In an affidavit filed in answer to the petition, Mr Njenga (the Commissioner of Lands) deponed that by Kenya Gazette Notice 2647 of 21st July 1967 the company was struck off the Register of Companies under section 339(5) of the Companies Act. Mr Njenga further deponed that upon such dissolution the property of the company before dissolution was deemed to be *bona vacantia* and accordingly belonged to the Kenya Government. Also that, on 20th December 1976, Mr Njenga wrote to the then manager of the farm, appointed by the trustees of the mortgagee in possession, at land reference No 5999, Kiambu, asking him to hand over possession of the farm to the Kenya Government; that on 21st December 1976 the farm was purchased by Mr C K Koinange for Shs 857,200 (which was paid).

Before the sale of the farm to Mr Koinange on 21st December 1976 it would appear to have been sold to another company (Mbwanju Ltd, for Shs 840,000, which money was also paid to the Commissioner of Lands). Three letters were addressed by the Commissioner of Lands (dated 25th November, 16th December and 20th December 1976), all of which he sent to the manager's farm address (PO Box 79, Kiambu). The Commissioner of Lands drew the manager's attention to Kenya Gazette Notice 2647, and said that the Government would take possession of the entire property on 21st December 1976, and had it over to the purchasers who had bought it and who would also be present at the takeover.

An abstract of title of the entire property was filed in Court which showed the company as the registered owner of the farm, subject to the first legal mortgage.

The petition was opposed by the first respondent, the Attorney-General, and also by Mbwanju Ltd which, on its own application, was joined as second respondent. The petition was not opposed by the Registrar of Companies.

Sections 339(6) and 340 of the Companies Act provide:

> (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 register 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.
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> 340. Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before the dissolution (including leasehold property but not including property held by the company in trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the Court under section 338 or section 339, be deemed to be *bona vacantia*, and shall accordingly belong to the Government.

During the course of his judgment Simpson J said:

> It is this coffee farm now of greatly enhanced value which the petitioners seek to have vested again in the company and for which an offer of Shs 1,500,000 has been received (petition, paragraph 11). Acceptance of this offer would enable the company to repay the balance of a mortgage amounting to Shs 400,000. There are no other encumbrances over or against the assets … the second petitioner [Bessant] having been declared bankrupt on 17th February 1967 was discharged on 13th July 1973 and his shares which are still vested in the official receiver for the benefit of creditors would be released against payment of Shs 212,000. The bankruptcy was due to coffee berry disease.

Paragraph 7 of the petition stated that no annual returns were filed by the company with the Registrar of Companies in accordance with the Companies Act between 1963 and 1967. The judge held that as the petitioners gave no reasons it could reasonably be inferred that it was not due to mere inadvertence but that at the date of striking off the company had ceased to operate.

I hold the judge concerned in high esteem; but I think he drew an incorrect inference. The failure to file annual returns can be due to a variety of reasons, the commonest of them being oversight on the part of directors of the company. I appreciate that five years is a long time; but failure to file annual returns does not necessarily connote that the company is not carrying on business or is not in operation. Even companies which are alive and healthy sometimes fail to file annual returns due to no other primary reason than merely oversight on their part to do so. The manager had been installed on the farm by the mortgagee in possession. The only purpose could have been to keep up the farm with a view to realizing the balance of the mortgage loan which, apart from selling the farm, might be done by maintaining it. In the words of North J in *Re Outlay Assurance Society* (1887) 34 Ch D 479, 482, at any rate the company was still alive.

The manager had stepped into the shoes of the company through the person of the mortgagee in possession. All this satisfies me that with the mortgagee in possession the company was in operation, in so far as it could be at the time of the striking off. It matters not if the company was not carrying on business; for being in operation is one of the three alternatives provided in section 339(6), each one of which authorizes the Court to make an order to restore the company to the register of companies.

Section 353(6) of the Companies Act 1948 (the English equivalent of our section 339(6) gives the Court jurisdiction only to restore or to refuse to restore the company to the register; and the Court has no jurisdiction, under section 353 (or otherwise), to impose a penalty (beyond costs) as a condition for the company's restoration to the register; see *Re Moses and Cohen Ltd* [1957] 3 All ER 232 (a case involving, *inter alia*, failure to make annual returns).

Simpson J could, therefore, have validly made an order on the basis that the company was in operation.

I think that the situation before the judge also gave rise to the third alternative: "or otherwise that it is just that the company be restored to the register".

What is "just" in a case like this is a question of the circumstances surrounding this issue in each case. In deciding the matter it would be relevant to take into consideration first, as the judge did, the absence of any opposition by the Registrar of Companies. Secondly, the fact that a large increase in the value of the assets of the company would, if the name of the company were restored to the register, enable the company to repay the balance of the mortgage loan, and the principal shareholder (Bessant) to pay his creditors. This, I think, would foster healthy commercial conditions in addition to rehabilitating an institution and an individual, ie, the company and Bessant. How this was to be achieved would be a matter for the company and its advisers.

Thirdly, looking at the abstract of the title filed in Court, the company was still the registered owner of the farm, subject to the mortgage. A sale of immovable property of the value of Shs 100 and upwards can be made only by a registered instrument; (see section 54, of the Transfer of Property Act; and see also *Industrial & Commercial Development Corporation v Kariuki & Gathecha Resources Ltd* [1977] Kenya LR 52.

In so far as the situation in the High Court went, the Government had not parted with the farm under a valid legal sale. Only on being asked did the State counsel tell us that a new grant of title had been issued to Mr Koinange since the judgment of the High Court; I assume (we have not been told) in respect of the same land as comprised in land reference No 5999.

Simpson J seems to have accepted that the farm had been sold. He held that, once any asset had been sold, the Court had no jurisdiction under section 339(6) to set the sale aside; and that, when a company is restored to the register, the only property that can revest in it is property of which the Government had not

disposed. The judge thus refused the prayer in the petition for the revesting of its property in the company. We are not concerned with this issue. The company did not ask for a revesting order to be made in the appeal before us.

I understood Mr Salter, who appeared for the company, to submit that the Government ought not to have sold the farm pending the final determination of the petition in view of the following provisions of section 52 of the Transfer of Property Act:

> During the active prosecution in any Court having authority in [Kenya], of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

Mr Salter also referred to the following passage in my judgment in *Mawji v US International University* [1976] Kenya LR 185, 201:

I think the situation in Kenya is or it ought to be, this: the Court has power to prevent a breach of the provisions of section 52 in proceedings before it in which any right to immovable property is directly and specifically in question by imposing prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings, except under the authority of the court and upon such terms as it may impose. This is to ensure that which Turner L J had in mind does not happen. He said in *Bellamy v Sabine* (1857) 1 DeG & J 566, 584…: "It is … a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo,* subject again to be defeated by the same course of proceeding."

I fear that section 52 cannot come to the aid of the company in this case, because I think that not only the right to the immovable property (the farm) is not directly and specifically in question in these proceedings, but also because of section 138 of the same Act (which seems to have been borrowed from the Government Grants Act 1895 of India), which reads:

> Nothing in this Act contained shall affect, or be deemed ever to have affected, the construction or operation of any grant or other transfer of land or of any interest therein heretofore made, or hereafter to be made, by or on behalf of [the Kenya Government] to, or in favour of, any person whomsoever; but, subject to the provisions of the Crown Lands Ordinance [Act], or as the case may be, the Crown Lands Ordinance 1902, every such grant or transfer shall be construed and take effect as if this Act had not been passed and, subject as aforesaid, all provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor.

Section 138 seems to take away power from the Court to inquire into the validity of a grant made by the Government. The new grant of title must have been issued instead of registering a transfer of the existing title to land reference No 5999 with a view to overcome the juristic hurdles created by the mortgage and section 52.

Fourthly, the judge, having come to the conclusion, that "I would be prepared to make an order restoring the company to the register" he should have gone on to make the order instead of refusing it and saying as he did:

> … but since the only asset which would revest in the company on such restoration has been sold by the Government such an order would be pointless.

Not only there was no evidence of a valid sale before Simpson J, he must have felt and so decided that it

would be the right thing to do to make the order. It was tantamount to a holding by the Court against which no crossappeal had been filed. The judge dissuaded himself from making the order, I think, without taking into account certain aspects such as the following. At the risk of repetition: the Registrar of Companies did not oppose the petition; the value of a company is for (and to) its shareholders, even if the company is left bereft as a result of the sale of its property after it is struck off the register; and sometimes the very name of a company carries value by way of goodwill in the name. In addition to any other gains that may accrue to a company after being re-animated, its shareholders may start business afresh with the advantage of having a company already incorporated; and they may recoup some of their losses; also they may, possibly, be able to enforce any cause of action that the company may have had before the striking-off.

In particular, it cannot be pointless to restore a company to the register when the feeling of the court is, as expressed by the judge:

> In the present case the sale on which the Commissioner of Lands relies was made after the filing of the petition.
> It is difficult to resist the suspicion that this was a hasty move designed to deprive the Court of its discretionary power to order revesting the property in the company.

The judge spoke with feeling and appropriate frankness; and, consistently with the traditional task of the judiciary, he drew the attention of the appropriate authority to a questionable act committed by a department of the executive. The property of the company was disposed of after the filing of the petition, I apprehend, under the assumption that the court's jurisdiction had gone on a perpetual holiday.

Fifthly, the Government ought not normally to dispose of the immovable property of a company acquired by it as *bona vacantia,* for the Court may declare the dissolution void before the expiry of ten years (during which period, although seemingly the absolute owner, in effect the property is held by the Government in its care in the interest of the company). Until the period of ten years has expired, the Government's apparently absolute ownership of immovable property may be brought to end by an order of the court. No attempt has been made to justify the transfer of the farm either as being in the public interest or otherwise advisable; no, not in any way at all.

Lastly, if a company or any member or any of its creditors feels aggrieved by the company having been struck off the register, the law in its wisdom empowers the Court on an application made by the company or a member or a creditor up until ten years (twenty years in England; see section 353(6) of the Companies Act 1948) to make an order restoring the company to the register under section 339(6). The long period of ten years allowed to apply for registration is, in my opinion, a clear indication that the policy of the law is that, if it is at all possible, a company which has been struck off the register ought to be restored and not terminated for all time.

Therefore, the judge also validly could and should have made the order on the basis that otherwise it was just that the company be restored to the register.

I would therefore allow this appeal with costs both here and in the High Court, set aside an order of the High Court dismissing the petition, and substitute an order that the company's name be restored to the register of companies. I would give a certificate for two advocates including Queen's Counsel both here and in the High Court.

We are also asked in the memorandum of appeal to make an order that the sale of the company's land to Mr C K Koinange be set aside; and that Mr Koinange should account to the company for all moneys received and expended by him from his possession of the land; alternatively, that the Court should direct an inquiry as to damages and order payment to the company of such amount as may be found due, with interest. These reliefs must be refused; suffice it to say that Mr Koinange is not a party to these proceedings.

As Miller and Porter JJ A agree, it is so ordered.

Miller JA. The appellant, Murita Coffee Estate Ltd, appeals to this Court from the dismissal of its petition to be restored to the register of companies with certain attending discretionary benefits upon such restoration. The decision dismissing the petition was handed down on 20th April 1977 by Simpson J.

The entire case revolves around the relevant provisions of the Companies Act "the Act" and for purposes of this judgment I will reproduce them most pertinent of those provisions emphasizing such portions as appear to be directly due for consideration and limit myself to the interpretation and the intended application of those statutory provisions.To me this is an unusual case and reference to decided cases would no doubt miss the crucial point for the purposes of what the Legislature intends.

The Act is entitled:

> An Act of Parliament to amend and consolidate the law relating to the incorporation, regulation and windingup of companies and other associations, and to make provision for other matters relating thereto and connected therewith.

The company was incorporated on the 24th December 1957 and was in default for failing to file annual returns for a period of five years and the Registrar of Companies struck the company's name off the register in July 1967, as directed by section 339(5) of the Act. Nothing arises in the case as to the striking off *per se*, except to note the provisions of the Act under which the registrar's discretion was exercised and the results envisaged by those provisions.

I must immediately say, in passing, that where the Legislature empowers constitutional arms of Government or governmental bodies to exercise discretion in any matter, maximum care should be taken in the exercise of such discretion lest it is made to appear, unjustifiably, that the Legislature is taking back the very rights or benefits it has expressly bestowed.

Section 339 (5) of the Act provides:

> At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, or the liquidator, as the case may be, strike the name of the company off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved.
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> Provided that: (1) the liability, if any, of every director, officer and member of the company shall continue and may be enforced as if the company had not been dissolved…

It is therefore clear that the Legislature does not contemplate that, by striking the company's name off the register, it must be deemed never to have existed, or as dead. The intention of the Legislature is made clearer and unmistakable in sections 339(6) and 340:

> (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 member 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.
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> 340. Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before the dissolution (including lease-hold property but not including property held by the company in trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the Court under section 338 or section

339, be deemed to be *bona vacantia* and shall accordingly belong to the Government.

In this case the principal asset of the company was a coffee estate at Kiambu, land reference No 5999, purchased by the company on the 24th July 1959 with the director, Mr Bessant, holding 4999 of the 5000 issued, paid-up, shares of nominal capital of Shs 100,000; and at the time of the striking-off of the company's name from the register there was a legal mortgage over the estate (of 17th January 1964), the loan being only partly repaid with a balance of Shs 400,000 outstanding. The petition to the High Court for restoration to the register prayed (a) that the name Murita Coffee Estate Ltd may be restored to the register of companies, and, (b) that such of the property of the company as had become vested in the Government pursuant to section 340 of the Companies Act should vest in the company for all the estate and interest therein held then by the Government.

With respect to the company's principal asset (ie the land), there has been in the court below and here much contention surrounding the circumstances of the grant of the land to Mr Koinange for Shs 857,200 before the expiration of the ten years from the publication of the Gazette notice referred to in section 339(6).

Simpson J in the High Court observed:

> In the present case the sale on which the Commissioner of Lands relies was made after the filing of the petition. It is difficult to resist the suspicion that this was a hasty move designed to deprive the Court of its discretionary power to order revesting of the property in the company.

and, further, it has been explained to this Court that a new grant of title to the land in favour of Mr Koinange has been issued since the judgment of the High Court appealed from, thereby securing the protection of section 138 of the Transfer of Property Act:

> Nothing in this Act contained shall affect, or be deemed *e*ver to have affected, the construction or operation of any grant or other transfer of land… or on behalf of [the Kenya Government] … subject as aforesaid, all provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor.

The above observations of the trial judge with respect to the sale of the company's land could not have been more appropriate; and the result or crux of the present situation in the simplest of terms is this:

> The jurisdiction of the courts having been thereby anticipatorily or accidentally overlooked so as to pronounce finally upon the merits of an application by "the company" as provided in section 339 (6) of the Act, and despite the clear intention of the Legislature that a company merely struck off the register (by name only) should be considered dormant but not dead, the law has been virtually left to try itself in the circumstances of this case.

Accordingly, and still with the question of the interpretation of the relevant statutory provisions in the case as my primary concern, it would appear that the governmental authority which disposed of the company's land was moved by these seemingly all-embracing phrases of section 340 of the Act: "all property and rights whatsoever … be deemed to be *bona vacantia* and … belong to the Government".

More particularly (and in my view), it would appear that the authority acted upon a literal interpretation of the phrase "belong to the Government"; but I think that such "belonging" must be construed within the intendment and purposes of the Act and the Legislature's specific provisions for a case such as this, as set out in section 339(6) (the restoration of a company's name to the register). Where, therefore, the Legislature has bestowed upon the company the recuperative benefits of section 339(6) with a time limit of ten years in which to seek and secure the same (*in toto* if possible), I rule that until after the passage of that period of ten years (or the operation of the specific prescribed circumstances or conditions within the Act, or by dint of the operation of prior statutory provisions), the Legislature has designated the Government to be no more than an interim custodian.

I have used the term "seemingly all-embracing" because in this case Simpson J directed attention mainly to the land which has been granted away, no doubt on the ground of the company's name having been struck off the register. In my view, the phrase "rights whatsoever" in section 340 (perhaps unhappily) encompasses the right to dispose of the company's landed property in the absence of express statutory provisions to the contrary.

I believe, however, that as a matter of the interpretation of the relevant statutory provisions and the due process of law, section 339 of the Act must be given due cognisance within the intendment of the Act itself and the manifest desire of Parliament therein; and, what is more, it has been for ages settled that every section of an Act of Parliament must be construed as having effect as a substantive enactment. It must therefore be concluded that the Legislature did not intend the provisions of section 339 to be meaningless; or that the phrase "rights whatsoever" in section 340 should be applied in derogation of the provisions of section 339, except by stated exclusion; and there is none applicable to the facts of this case.

Simpson J was, with respect, in obvious difficulty when he said in his judgment:

> I would be prepared to make an order restoring the company to the register but since the only asset which would revest in the company on such restoration has been sold by the Government such an order would be pointless.
>
> No authority cited to me offered guidance as to the principles applicable in determining what is "just".

I believe and I rule that the process of law, whereby the land which comprised the company's principal assets on the one hand and its name on the register on the other were both administratively treated, is subservient to the will of Parliament (Parliament via the Legislature in the promulgation of the Act); and, as I see it, that which is "just" has been directed to be applied by section 339(6) of the Act. I am also of the view that it is constitutionally unjust to put it out of the reach of any individual (including a company *qua* company, such as the appellant in this case, being also an individual in law) to pursue his rights whatever they may be, even though (perhaps) they are apparently conjectural; provided that those rights have been left unaffected either by the Government in its role as a custodian (despite the granting of the land to Mr Koinange) or by (eg) *res judicata* in respect of any (as yet unaffected) rights at the instance of the Government, or otherwise. I do not therefore agree with the view of the judge of the High Court to the effect that, because the company's land was granted away to another person, it would be pointless to restore its name to the register.

I fully appreciate the understandable difficulty in which the judge found himself. Indeed it can be readily seen from the text of the passages of his judgment above that he at least recognised the company's entitlement to the restoration of its name to the register.

A close examination of section 339(6) reveals that the Court is directed (if satisfied) to grant an applicant company (as in this case) two distinct discretionary reliefs. The first is the restoration of its name to the register; and the Court may then (if also satisfied) go further and (the second relief) direct, and make, provisions for placing the company and all other persons in the same position as nearly as may be possible as if the name of the company had not been struck off.

In my view, and as a matter of interpretation, any apparent futility in granting the second relief as was prayed in the petition (the petition itself being evidence of the dormant company's intention to carry on as a company if given the opportunity), is no bar to the granting of the first relief.

Indeed, the judge (correctly) did not consider himself prevented from ordering the restoration of the name to the register. He did not say, "I would have been prepared but for …" He said, "I would be prepared … but …." which to me connotes an existing willingness, but for that which he considered to be the obstacle. In my opinion, however, there is no interpretational inter-dependence between the two reliefs; and the second relief is not a *sine qua non* for the granting of the first. If anything, the granting of the second relief is ancillary to the existence of the first, and not *vice versa* as is implied by the judge's reason for

wholly dismissing the petition.

For the above reasons the very first ground of appeal to this Court succeeds, ie:

> The judge, having found that he would be prepared to make an order restoring the [company's] name to the register, erred in law in holding that such an order would be pointless because the Government has sold the [company's] only asset, instead of holding that it was just to make such order.

The remaining four grounds of appeal, which treat in detail the facts and circumstances of the second prayer of the petition to the High Court and the judge's observations and findings thereon, have been sufficiently dealt with in the course of my judgment maintaining my course of adhering to the interpretation of the salient and relevant statutory provisions in the case as I see them; I do not therefore consider that I am called upon to go any further.

In my view, the facts and circumstances of this case invoked the legal maxim *ad ea quae frequentius accident jura adaptantur* (laws ought to be, and usually are, framed with a view to such cases as are of frequent rather than such as are of rare or accidental occurrence).

In the light of this maxim and on the foregoing examination of the Kenya statutory provisions involved, as I have intimated at the outset of this judgment, I do not consider it necessary to refer to decided cases of this or other jurisdictions, or to treat such matters as the constitutional rights of the subject unless legally destroyed, or which raw interpretation should incline as between the State and the subject where ambiguity or the like arises in the tenor of statutory provisions, because I confidently find nothing doubtful or ambiguous in the terms of the relevant statutory provisions or with respect to the intentions of Parliament and the Legislature.

I would accordingly allow the appeal, set aside the judgment of the High Court, and order that (as envisaged by section 339(6) of the Act) the company's name be restored to the register of companies.

The costs of this appeal and of the petition to the High Court to the company; and I certify as to Queen's Counsel and junior advocate here and in the High Court.

Potter JA. I also would allow this appeal with costs both in this Court and in the High Court, set aside the order of the High Court and substitute an order that the company's name be restored to the register of companies.

I would also give a certificate for two advocates, including Queen's Counsel, both in this Court and in the High Court.

I am satisfied that it is just that the company should be restored to the register. With respect, I think that Simpson J applied the correct principle, namely that the Court will not make an order restoring a company to the register unless it is shown that some good may accrue from the order (see *Stiebel's Company Law and Precedents* (3rd Edn) Vol 2, page 735).

However, Simpson J was persuaded that the company's farm Land reference No 5999 had been sold by the Commissioner of lands to Mr C K Koinange and that an order for the restoration of the company to the register would be pointless.

The abstract of title of land reference No 5999 filed in the record of appeal shows the company as the registered owner, subject to a first legal mortgage. During the hearing we were informed by Mr Shields, who appeared for the Commissioner of Lands, that a fresh grant of title had been issued to Mr Koinange since the judgment of the High Court. In this unsatisfactory state of affairs I think that justice requires that the company should have the opportunity to take legal action should it be so advised.

I do not think that we should consider setting aside the sale to Mr Koinange in these proceedings, to

which he was not a party. Furthermore, I think that it would be imprudent for this Court to consider making any such order in view of its limited knowledge of the material facts.

In case the actions of the Commissioner of Lands are the subject of further litigation, I would not wish to express any views on the meaning or effect of section 340 of the Companies Act, under which the company's estate in the land became *bona vacantia*, or on the possible effect of sections 52 and 138 of the Transfer of Property Act.

Appeal allowed.

Dated and delivered at Nairobi this 10th day of August 1979.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR