Mae Properties Limited v Muigai (Civil Appeal 147 of 2018)
[2024] KECA 29 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 29 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 147 OF 2018

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

JANUARY 25, 2024

BETWEEN

MAE PROPERTIES LIMITED ..... APPELLANT

AND

MARY WACEKE MUIGAI ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Nairobi - Milimani (K. Bor, J.) delivered on 14th December 2017 in ELC Case No 312 of 2004)

JUDGMENT

1. MAE Properties limited ("the appellant" or "Mae") is a wholly owned subsidiary of Pan Africa Insurance Holdings Limited (Pan Africa). At all material times to the suit that gave rise to this appeal, it was engaged, inter alia, in the business of purchasing, selling, developing and/or dealing in immovable property. In this business, it was engaged in the sale of immovable properties in Runda Estate, undoubtedly a much sought after address in Nairobi.

2. In Board Paper No. 4 dated 10th June 1993, the management of Mae reported to its board of directors that 30 plots in its Phase I and II developments were unattractive because the plots were either in low-lying marshy areas, in swampy places, had papyrus growth on them, had clay soils, had no service on them, were next to a slum known as Muringa estate or were in unsecured isolated lonely places. It was the recommendation of the management that, instead of disposing these unattractive plots at throwaway prices, they be offered to the senior members of Pan Africa and also the directors of Pan Africa, Mae and Runda Water Company Limited, the directors being nine in number.

3. After discussions, the Board, in a meeting held on 24th June 1993, resolved that: "in view of the fact this was a connected party transaction, a legal opinion should be obtained on whether there were any factors to be considered i.e. legal, moral or probity, and to resubmit a paper with the advocates opinion at the next Board Meeting".

4. Legal advice was given by Messrs Mohamed & Muigai Advocates in which, in respect to the proposed sale to the Directors, the advocates opined:

> "(b) sale of plots to the Directors be referred to the next Board Meeting of Pan Africa Insurance Company Limited for formal approval.
>
> (c) If the sale of plots to Directors is approved by the Board of Pan African Insurance Company Limited, then an extraordinary General meeting of Mae properties to be held to formally approve the proposal."

5. A Board of Directors meeting of Mae held on 8th July 1993, resolved that any director of either Pan African or Mae who was interested in purchasing a plot from Mae should approach the management of Mae Properties Limited in the ordinary course of business and negotiate with the management the market price of the chosen plot which price was dependent on the exact position and location of the plot, actual acreage and repayment terms. The decision of the board received the sanction of the annual general meeting of Pan Africa held on 1st July 1994, which resolved that purchases of plots from Mae was one of the benefits available to non-executive Directors of the company.

6. Mary Wacheke Muigai (the respondent or Mary), was appointed an alternative Director of Mae in 1994 and subsequently a substantive Director in a meeting of Mae's Board of Directors held on 7th May 1997. Between 1995 and 1998, Mary purchased five properties from the company being LR. No. 7785/970, 7785/971,7785/1062, 7785/1063 and 7785/1064. However, regarding 7785/1062, the transaction fell through as a decision was made by Mae not to proceed with the sale and to refund Mary the purchase price of Kshs.1,500,000.00, a decision accepted by Mae in a letter dated 25th March 2003. A refund was made and confirmed in a letter of 23rd April 2023 by Waweru Gatonye & Company advocates then acting for Mary.

7. In proceedings commenced on 16th June 2004, by way of plaint, Mae complained that Mary was guilty of breach of trust and/or her obligations as trustee, as Mary purchased the properties at prices materially below the market value. It was also contended that the contracts to purchase were mala fide and against the interests of the company and for improper purposes in relation to the affairs of the company.

8. Drilling down on the alleged breaches or misconduct on the part of Mary, Mae averred that Mary failed to declare to the Directors of the plaintiff, in accordance with Regulation 84(1) of Table A Part 1 in the First Schedule by the *Companies Act*, the nature of her interest in the contracts; Mary failed to declare to the Directors, in accordance with section 200 of the *Companies Act*, the nature of the interest in the contracts; and Mary entered into the contracts at prices materially below prevailing market prices, and otherwise than at arm's length and on normal commercial terms.

9. In the end, Mae sought the following prayers against Mary:

> "(a) A declaration that she was and is a trustee of Mae in respect to the purchase properties.
>
> (b) Kshs. 10,396,087.67
>
> c. General damages
>
> d. Punitive and/or aggravate damage.
>
> e. Costs of the suit

f. Interest in (b) and (c)."

10. In her defence, Mary argued that the claim by Mae was statute barred; denied that the properties were bought at materially below market price; the claim as regards Plot No.1062 was misconceived having been repossessed; contended that the transactions were regular and duly sanctioned by both the Board of Directors of the Company at its annual general meeting; the transactions were at arm's length, and the company was at all material times aware of her interest and that constituted sufficient notice under section 200(3) of the *Companies Act*.

11. After the evidence of 3 witnesses; Bernadette Gitari (PW1), and Emma Muthoni Wachira (PW2) for Mae, and Mary (DW1) in defence, the trial court (K. Bor, J.) returned a verdict in favour of Mary, dismissing the claim of Mae. In doing so, the learned trial Judge made the following findings; the claim was not statute barred, Mary owed a fiduciary and statutory duty to Mae as a director; other people who were not directors bought 13 of the unattractive plots at the minimum price and Mary could not therefore have acted against the interest of the company; and having repossessed Plot Nos. 7785/1062 from Mary, the company's claim in respect of this plot had no basis.

12. In this first appeal, our role is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that we have not seen or heard the witnesses. This position was stated in the case of Selle & Another vs. Associated Motor Boat Company Ltd. & Others [1968] EA 123 as follows:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings off act by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955) 22 EACA 210)."

13. While Mae raised seven (7) grounds of appeal Mr. Kahura, learned counsel, representing Mae clustered them into three asserting that the learned Judge erred in law in fact in:

    a. Failing to find that Mary's purchase of the plots without making relevant disclosure of her personal interest was in breach of the fiduciary duties as a director.

    b. Finding that the plots purchased by Mary were unattractive at the time they were sold when the valuation was to the contrary.

    c. Finding that the plots purchased by Mary were bought at arm's length and duly sanctioned by Mae's Board of Directors."

14. We begin by considering submissions by the respective parties regarding the first ground. Mae submits that section 200 of the *Companies Act* (Cap 486) imposes a duty on every director interested directly or indirectly in any way in any contract or proposed contract with a company of which he/she is a director to declare the nature of interest at a meeting of directors. Counsel for Mae argued that to fulfill her statutory obligation, Mary had to disclose her interest in a duly convened board meeting of the

company. At the plenary hearing, learned counsel, Mr. Kahura, was emphatic that the disclosure had to be minuted so that the information would be available to any shareholder of the company. We were asked to contrast the conduct of Mary with those of a fellow Directors who made such a disclosure in a board meeting attended by Mary.

15. The Court was referred to the decision of the court in Nyandarua Progressive Agencies Limited vs. Cyrus Wahome Nduhiu & Another [2017] eKLR, on the importance of fiduciary duties. We were also asked to find as Cardozo C.J. in Meinhard vs. Salomon, 164 N.E 545 (N.Y.1928) on the stringency of fiduciary duties where he held that such duties required fiduciaries to conduct themselves "at a level higher than that trodden by the crowd".

16. Finally, on this issue, it is the contention of Mae that non- disclosure makes the contract voidable at the instance of the company and makes the director accountable for any profit that she derives from the contract Hely-Hutchinson vs. Brayhead Limited [1967] 3 All ER 98.

17. Responding to those arguments learned counsel, Mr Kigera, appearing for the respondent submitted that section 143 of the *Companies Act* provides that a Director may act in the way he/she considers in good faith which would most likely promote the success of the company for the benefit of its members as a whole. Counsel argued that in resolving not to dispose of the unattractive plots at throwaway prices, the Board of Directors of Mae acted in good faith and in the best interest of the company.

18. We were referred to section 145 of the Act which provides that a Director must exercise the care, skill, and diligence which would be exercised by a reasonably diligent person with both the general knowledge, skill, and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (the objective test) and the general knowledge, skill and experience that the director actually has (the subjective test). Counsel argued that various instances showed that the respondent and other Directors were diligent in the execution of their duties with respect to the subject matter.

19. It was the contention of Mary that the sale of the property was sanctioned by both the Board, and members of the parent company and that Mary's conduct did not run afoul the provisions of section 158 of the Act. Those are provisions that a company may not enter into any arrangement where a director of a company or a person connected to him acquires substantial non-cash assets of a company or the company acquires from such directors, or that other person, a substantial non cash asset unless the arrangement has been approved by a resolution of members of the company.

20. It was the defence of Mary that she acquired all properties in her name and the company and all members knew that she was a director of the company and that the properties in question were bought in her name and not through a third party. Further, that Mae failed to demonstrate any conflict she was required to declare.

21. Regarding the notice under section 200 (3) we are urged, on behalf of Mary, to interpret it as relating to a notice where a company director has a direct and/or indirect relation to a third party/company wishing to engage in a contract with the company.

22. We are asked to find that there was a malicious takeover by a new board of directors and owners of Pan Africa and the proceedings giving rise to this appeal are part of that malicious scheme.

23. To keep focus on the real controversy presented to the trial court, the pleadings before that court need to be recalled. In the plaint Mae specifically raised three allegations, two related, against Mary which it contended amounted to breach of fiduciary and statutory duty on her part; that she failed to declare to the Directors of the company her interest in the contracts contrary to the requirements of Regulation 84(1) of Table A Part 1 in the First Schedule to the *Companies Act* which was part of the articles of

Mae and also contrary to section 200 of the *Companies Act*, and that she entered into the contracts at prices materially below the prevailing market prices and otherwise than at arm's length and on normal commercial terms.

24. We take it that Mae does not challenge the decision of its Board of Directors to sell certain specified properties to members of its board and in regard to the first issue therefore we limit ourselves to examining whether Mary failed to act in accordance with the said Article and the statutory provision.

25. At the time Mary entered into the contracts with the company, the existing law was the *Companies Act* (Cap 486). Section 200 reads:

> "200 (1) Subject to the provisions of this section, it shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company.
>
> 2. In the case of a proposed contract the declaration required by this section to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration or if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested, and in a case where the director becomes interested in a contract after it is made, the said declaration shall be made at the first meeting of the directors held after the director becomes so interested.
>
> 3. For the purposes of this section, a general notice given to the directors of a company by a director to the effect that he is a member of a specified company or firm or acts for the company in a specified capacity and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm or with himself in such specified capacity shall be deemed to be a sufficient declaration of interest in relation to any contract so made:
>
> Provided that no such notice shall be of effect unless either it is given at a meeting of the directors or the director takes reasonable steps to secure that it is brought up and read at the next meeting of the directors after it is given.
>
> 4. Any director who fails to comply with the provisions of this section shall be liable to a fine not exceeding two thousand shillings.
>
> 5. Nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company."

26. In its Articles of Association, Mae incorporates Table A of the Act as modified by those Articles, Article 84(1) of Table 4 is saved is part of the Articles of the company. It reads:

> A director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest at a meeting of the directors in accordance with section 200 of the Act."

27. While there is a suggestion by Mary that the notice required in section 200 (3) relates to a notice where a Company Director has direct and indirect relation to a third party company wishing to engage in a contract with the company, we think that argument to be unhelpful in the matter at hand because

Mae does not restrict its charge to breach of sub-section 3 but on the entire provision. Sub-section 1 is unequivocal and requires a director, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the Directors of the company. Incontrovertibly, this duty extends to instances like here where a director was the person interested in a contract with the company.

28. The basis for the requirement under section 200 is that Directors must not place themselves, without consent of the company, in a position in which there is a potential or real conflict between their duties to the company and their personal interests. The duty to avoid conflict of interest was discussed by Lord Chancellor Cranworth in The Aberdeen Railway Company vs. Messrs. Blaikie Brothers [1854] UKHL 1 Paterson 394 (20 July 1854) where he stated:

> "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents; and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui que trust, which it was impossible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person— they may even at the time have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted."

29. Where a Director wishes to enter into a contract with his/her company, section 200 of the *Companies Act* Cap. 486 (then applicable) imposes a duty on the director to disclose the nature and extent of his interest to the Board of Directors in order to escape any liability. The declaration must be made at a board meeting. Similarly, the declaration must be made, even if the interest is already known to the other Directors. The rationale for this requirement was explained in Neptune (Vehicle Washing Equipment) Ltd vs. Fitzgerald [1996] Ch 274. In this case, another company acquired the majority of shares in the plaintiff company, where the defendant served as the sole Director. As per his employment contract, the defendant was entitled to a 12- month notice of termination in the event of group restructuring. During a meeting with the defendant as the sole director and the company secretary, resolutions were passed to terminate the defendant's employment contract and authorize a €100,892.62 payment to him, claimed to be due under the contract. The payment was made and he retired as director, but the meeting minutes did not note any declaration having been made by him under section 317 of the English *Companies Act* 1985, a provision similar to section 200 of our now repealed *Companies Act*. Under a new director, the plaintiff sought a declaration that the defendant received the funds as trustee and hence breached the self-dealing rule and fiduciary duty as a trustee, and requested repayment. It was held that a sole director and share- holder of a single member company was under an obligation to disclose an interest in a contract which he was contemplating terminating with the company (in this case, his own service contract) in the presence of an officer of the company preferably a secretary, and a formal declaration recorded in the company's minute book to the effect that

he has an interest in contracting with the company. The rationale for this requirement was explained by Lightman, J. at pg. 283A-C as follows:

> "The object of section 317 is to ensure that the interest of any director in any actual or proposed contract shall (unless the procedure has been adopted of giving a general declaration under subsection (3)) be an item of business at a meeting of the directors. Where a director is interested in a contract, the section secures that three things happen at a directors meeting: first, all the directors should know or be reminded of the interest; second, the making of the declaration should be the occasion for a statutory pause for thought about the existence of the conflict of interest and of the duty to prefer the interests of the company to their own; third, the disclosure or reminder must be a distinct happening at the meeting which therefore must be recorded in the minutes of the meeting under section 382 and clause 86 of Table A (consider in particular section 382(3))."

30. Bearing these in mind, how does the argument by Mary that although she did not make the declaration or give the notice contemplated by section 200, Mae was well aware of her interest in the purchases, fare? First, the Board of Directors of Mae, in a meeting of 24th June 1993, resolved that, regarding a proposal by management that non-attractive plots be sold to Directors and senior members of staff of Mae Properties Limited and Pan African Insurance Company Limited, a legal opinion be sought. After receiving the legal opinion, the Board of Directors, in a meeting of 8th July, 1993 discussed the opinion, separating the discussion in respect to staff from that of the Directors. In regard to the proposed sale to Directors, the Board resolved:

> "(d) No special policy should be formulated as regards sale of plots, whether or not the plots were non-attractive, unsellable or good, to Directors of either Pan Africa Insurance Company Limited Or Mae Properties Limited as this may either be tantamount to payment of fees or emoluments which required approval from the shareholder or even raise some ethical, moral or probity issues.
>
> (e) Any Director of either Pan Africa Insurance Company Limited or Mae Properties who was interested in purchasing a plot from Mae Properties Limited should approach the Management of Mae Properties in the ordinary course of business and negotiate with the Management the market price of the chosen plot which price was dependent on the exact (sic) the position and location of the plot, actual acreage and repayment terms."

31. To be underscored from the two resolutions is that any arrangement to sale properties of Mae to its Directors required the express approval of Mae's shareholder, the sole shareholder being Pan Africa. And unlike what the counsel for Mae submits, the resolution was different from the resolution on the scheme to employees which provided for a sale of one acre or ½ acre plot at a price of Kshs. 400,000.00 and Kshs. 250,000.00 respectively.

32. On its part, the Board of Directors of Pan African held a meeting on 24th February 1994 and resolved that the sale of plots be extended to Directors as well and appropriate recommendations be made to the AGM of the company for approval. The envisaged AGM, held on 1st July 1994, approved the purchase of plots of Mae by Directors.

33. Following that approval, a price guideline for plots in Phase V was agreed upon in a Board of Directors meeting of Mae held on 20th September 1995, and evidence was placed before the trial court that by 23rd March 1998, the said Board had approved a price guideline for plots in Phase V1.

34. Important as well is that in the AGM of Pan Africa of 1st July 1994, Mary was appointed as a Director of Pan Africa. Although it is unclear from the minutes whether this appointment was also an appointment to the board of Mae, the common position of the parties is that Mary became an alternate director of Mae from that day. Eventually, Mary was appointed a substantive Director on 7th May 1997.

35. From the evidence before the trial court which we have set out above, the following emerge; both the Board of Directors of Mae approved the sale of the unattractive properties to Directors of Mae Limited; and the AGM of Pan Africa resolved that the Directors of Mae were eligible to purchase the said plots. Again, it is critically important to remember that Mae is a wholly owned subsidiary of Pan Africa. Put differently, Pan Africa is the sole owner of Mae. For that reason, the proposed sale of the said assets to the Directors of Mae was not just within the knowledge of, but approved by, the Board of Directors of Mae, as well as the only owner of Mae, being Pan Africa.

36. Mary bought the controversial properties in her name. For that reason, the Board of Directors, Mae was well aware of her interest in the contracts. While the law is that a declaration of interest is not excused even if the interest is already known to the other Directors, the situation at hand was that the Board of Directors of Mae had formally sanctioned and approved the sales to the Directors, and in addition, set a price guide for the sales. We cannot see any practical purpose that a disclosure by Mary would have served other than rehashing information that had been discussed, agreed upon, and minuted in previous Board meetings.

37. We observe, further, that section 200 calls for disclosure to the Board of Directors and not to a general meeting of the company. But having sanctioned the sale of the properties to Directors of Mae, Pan Africa, the sole shareholder of Mae, too would have contemplated that any shareholder including Mary could purchase the properties. The argument by Mr. Kahura learned counsel for Mae that actual disclosure was still necessary because it had to be minuted so that it is evident not just to the directors but to any shareholders having a look at the books of the company is defeated by the fact that, here, the sole shareholder of Mae had given direct and prior approval for the sale of the properties to the directors. As to which property was bought by Mary and for how much, that would be in the company records which information would be available to the sole shareholder on request.

38. We think that in the circumstances of this case, it would be too pedantic to insist on Mary making another disclosure in accordance with section 200 of the *Companies Act* or the Articles of Association of the Company. It would be an unreasonable stretch of the objective of the section 200 requirement. We do not perceive any breach of that requirement by Mary and so hold.

39. Next, we discuss whether the plots purchased by Mary were unattractive and sold at an undervalue. It is submitted for Mae that there was no evidence that plots number 970 and 971 were unattractive. It is the contention by Mae that although Mary testified that those plots were on a slope, the valuation described them as "almost rectangular shaped fairly level red soils". Regarding whether plots number 1062 and 1063 were marshy, Mae points to the valuation report which reports that only 1062 and 1063 were on marshy reds soils and describes plot number 1064 "as a rectangular shaped red soils plot with a gently westerly slope."

40. Mary, in asking us to disregard the valuation, argues that the report is defective and should not be relied upon as a true reflection of the prices of the land. First, it is asserted that whilst the report states that it was prepared on instructions received on 26th January 2004, it is undated and therefore unclear as

to when it was conducted and/or concluded. Second, the provisions of sections 107 and 108 of the *Evidence Act* are cited for the maxim that he who asserts or pleads must prove by way of evidence. It is submitted by Mary that while the valuations were supposedly based on land transactions done in Runda area, there was no evidence of those land transactions to back up the statement. Further, that PW1 informed the trial court that she was not aware whether the valuations were based on the secondary market or the primary market. It is argued that primary and secondary markets are different and it is impossible to establish the true position of the valuations presented by the appellant.

41. The legitimacy of the values presented in the report was first questioned by Mary at trial but that does not seem to have been discussed at all by the trial court. On our part, we think that the probative value of the report to the matter at hand is considerably weakened because although the findings of value were said to be substantially based on land transactions done at the time with comparable property, no evidence or summary of those transactions was on the record before us. In any event, as we discuss shortly, the issue before us can be resolved without reference to the valuation report.

42. We start with plots number 970 and 971, which were purchased by Mary through agreements of 24th October 1995. These two plots fell in phase V. In a board of directors meeting held on 20th September 1995, the board recommended that the plots be sold at a minimum price of Kshs. 1.2 Million per plot "but management should endeavour to obtain even better prices". Mary was present in the meeting and would know of the resolution.

43. It is common ground that for phase V management was able to sell 34 plots for Kshs.2,200,000, Six (6) properties for Kshs.1,800,000 and twenty four (24) properties for Kshs.1,200,000. Of the latter,

    11 were bought by directors of Mae or Pan Africa. There is no evidence however that the purchase of the other 13 properties at the minimum price was at the behest or influenced by the Directors. It is not obvious to us that simply because Mary bought these two plots at the minimum, it was not the best price obtainable for the two specific plots at the time or that there was a pattern that the Directors were using their privileged positions to purchase the properties at the minimum prices. On this, we endorse the learned trial Judge's finding that:

    > " Was the Defendant in breach of trust or her statutory duty as alleged by the Plaintiff? The Court thinks not. The plots the Defendant bought were unattractive at the time they were being sold. The company took the decision to sell them to its directors and senior staff instead of selling them at throwaway prices to the public. The more attractive plots were purchased at prices higher than those set by the company. Of the 24 properties sold at Kshs. 1.2 million, 11 were bought by directors of the Plaintiffs including the Defendant. The fact that other people who were not directors bought 13 of those plots at the minimum price of Kshs. 1.2 million shows that the Defendant did not act against the interest of the company."

44. Regarding Phase VI, there is evidence that the Board approved the sale of plots at a minimum price of Kshs. 1,500,000 per plot and a maximum of Kshs. 2,500,000 but tasked management to seek better prices. In that Phase, Mary bought plots Nos. 1063 and 1064 at Kshs. 1,500,000 each through agreements of sale dated 19th October 1998. In a Board paper prepared by the General Manager of Mae on 10th June 1998, the management gave an update on the sales in the phase in two parts. Regarding the category of plots christened "prime plots", it was reported that 33 plots had been sold between the Kshs. 2,000,000 and Kshs.2,700,000. There were then the non-prime plots. In this category, there was a subset of plots referred to as non-attractive plots which included those at the bottom of the valley, those of irregular shapes and those on marshy ground. Regarding this subset, the management reported that it was its policy to sell the plots below the prices obtained for plots on both sides of the valley but not below the minimum price set by the Board.

45. Mae's reliance on the prices achieved regarding prime plots of Phase VI to put Mary in bad light is misleading because plot numbers 1062, 1063 and 1064 were non-attractive plots and fell in the none prime category. The evidence came from no one else than PW1, Mae's own valuer, whose testimony was that plots 1062, 1063 and 1064 were of lesser value as they are in a marshy area. This is what the witness said:

> " The 2 parcels are in the same location.1062,1063 and 1064 have to be lesser value(sic) as they are in marshy area.1062 is bigger"

46. In the end, we cannot fault the conclusion of the learned Judge that there was no evidence that Mary did not act in the best interest of the company.

47. Having come to those answers in regard to the first two grounds of appeal, we must indubitably conclude that the plots were purchased by the respondent at arm's length and the purchase duly sanctioned by the Board of Directors of Mae. That answers the grounds 5, 6 and 7 of the appeal which were collapsed into the one ground, the third ground.

48. Ultimately, we find no merit in this appeal and it is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

Signed

Deputy Registrar