



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: M'INOTI, MURGOR & KANTAL, J.J.A.)**

**CIVIL APPEAL NO. 63 OF 2011**

**BETWEEN**

**MUROKI ESTATES LIMITED.....APPELLANT**

**AND**

**MENGO FARM LIMITED.....RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Nairobi*

*(Sitati, J.) delivered on 17th day of February, 2011*

**in**

**H.C.C.C. No. 534 of 2005)**

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**JUDGMENT OF THE COURT**

The parties to this appeal have engaged in various litigations and we must navigate the long journey of those litigations to properly bring out the issues and resolve them in this appeal.

**Nairobi H.C.C.C. No. 534 of 2005** was between **Mengo Farm Limited** (the respondent) and **Muroki Estate Limited** (the appellant). That suit was about a parcel of land known as **L.R. No. 11437** (“the suit property”) situate in Trans Nzoia measuring about 70 acres. A title had been issued by the government to the respondent and registered as **I.R. 19846/1**. It was alleged in the plaint that a fraudulent transaction had taken place in 1982 involving the appellant and one of the directors of the respondent whereby the suit property was sold to the appellant. A case was filed – **H.C.C.C. No. 3574 of 1989** between the parties to this appeal and in a judgment delivered on 29th November, 1990 the said transaction was declared fraudulent and was nullified by the court.

It was further alleged in the plaint that after that judgment, the respondent became the victim of another fraudulent transaction when one **Eunah Wamuyu Kariuki** forged documents and held herself out as a shareholder and director of the respondent company and in the process obtained possession of Certificate of Title to the suit property. The said Eunah Wamuyu Kariuki not only took possession of the suit property but proceeded to sub-divide it into 23 portions with an intention of selling and transferring the portions to 3rd parties. This forced the respondent to go to court again – **H.C.C.C. No. 34 of 1998** against the said Eunah Wamuyu Kariuki. The respondent was successful in that suit where it was decreed in the Judgment delivered on 6th August, 1998 that the defendant in that suit (Eunah Wamuyu Kariuki) do pay damages for trespass; a permanent injunction was issued against her restraining her from holding herself out as a director or shareholder of the respondent or from trespassing on the suit property. She was also ordered to deliver the Certificate of Title to the Respondent; to pay general damages plus interest and costs of the suit. Having lost the suit and in the face of the orders decreed Eunah Wamuyu Kariuki disappeared completely never to be found again. The respondent therefore successfully applied to the Registrar of Titles to cancel the old title and issue a new one to the respondent which was done on 16th February, 2000.

The respondent’s woes were not over as the suit property appears to have attracted the eyes of many suitors, never mind that they did not wish to pay any bride price!

The appellant owned a parcel of land adjacent to the suit property. In or about 1994 as the events discussed were ongoing, the respondent discovered that the appellant had trespassed onto the suit property by allowing its servants and agents to enter the suit property on the foot of a purported sale agreement entered in 1994. That is the event that precipitated the suit, the subject of this appeal where the respondent prayed

for a permanent injunction restraining the appellant, its servants or agents from dealing, trespassing or alienating the respondent's property (the suit property); an order to stop the appellant or its servants and agents from claiming the suit property, damages and costs of the suit.

The appellant was served with Summons to Enter Appearance and the Deputy Registrar being satisfied that summons had been served, upon application from the respondent, entered interlocutory Judgement. A formal proof then took place where Kubo, J. took evidence. The Judge was satisfied that the respondent had proved its case and in a Judgement delivered on 5th

October, 2005 the Judge entered Judgment as prayed in the plaint further awarding damages to the respondent in the sum of **Kshs.7,840,000.**

In an application filed more than a year later (21st November, 2006) the High Court was asked to set aside the ex-parte Judgment; that the appellant be allowed to file a defence and pending those prayers there be a stay of execution of the said Judgment. In a supporting affidavit of Peter Makokha Makanda who described himself as a director of the appellant it was deposed amongst other things that he was summoned on 19th May, 2005 by one **Osman Ahmed Mohammed** (he had since died) to Kitale where he went accompanied by 2 other directors of the appellant. He knew the deceased (Osman Ahmed Mohammed) as a son of a person who had sold the suit property to the appellant. Informed that the appellant had been sued in Nairobi he was made to sign some papers and tricked to believe that a defence would be filed. Further, that they had purchased the suit property from the respondent as per a sale agreement he produced and paid purchase price; that the appellant had filed a case at Kitale being H.C.C.C. No. 98 of 2005; that the appellant had settled over 400 families on the suit property and, finally, that there was a good defence to the suit.

**P. Kihara Kariuki, J** (as he then was) handled that Chamber Summons partly, as did **Mutungi, J.** but the same was heard substantively by **Kubo, J.** the Judge who had entered Judgement for the respondent. This whole process took some time – from 18th September, 2006 to 19th November, 2007 when the Judge reserved it for a ruling to be delivered on 10th December, 2007. The file then disappeared from the radar and somewhere along the way Kubo, J. retired from the Judiciary and could not deliver a ruling. It took the intervention of the Chief Justice who on 15th February, 2010 nominated **Sitati, J.** to write and deliver a ruling in the matter. Sitati, J. was equal to the assigned task. In a ruling delivered on 17th February, 2011 the Judge makes several findings – she is not persuaded that the appellant is deserving of the orders sought; the Judge finds that the appellant did not go to court with clean hands and had engaged in lies and falsehoods; the Judge found that the appellant had engaged in forum shopping by going to many courts on the same subject matter; there is a finding that failure to file a defence was deliberate; there is a finding that the suit is res judicata; that the proposed defence was not likely to succeed and for all those findings the Chamber Summons failed and was dismissed.

Those orders provoked this appeal premised on the Memorandum of Appeal drawn for the appellant by **M/S Risper Arunga & Company Advocates** where 10 grounds of appeal are taken. We summarize them as: that the Judge misdirected herself on the law relating to setting aside of ex parte Judgment under the then **Order IXB Rule 8** (now renumbered **Order 10 rule 11**) **Civil Procedure Rules**; that the Judge failed to properly exercise her discretion; that the Judge failed to appreciate that failure to set aside the Judgment would occasion injustice and hardship to the appellant's shareholders; that there were triable issues in the draft defence; and that the Judge should have found that the plaint was fatally defective. The Judge is in addition faulted for failing to consider the wider interests of justice and, finally:

***“THAT the findings of the Learned Judge were against the weight of the available evidence.”***

We are asked to allow the appeal and set aside the said ruling.

When the appeal came up for hearing before us, the appellant, who had appointed new lawyer's **M/S Zablon Mokua & Company Advocates** (Notice of Change of Advocates filed on 26th February, 2015) had filed written submissions on 9th July, 2015. The respondent's written submissions were filed on 23rd July, 2015. The parties did not find it necessary to highlight those submissions and they left the whole matter to us.

We have gone through the whole record and the submissions before us.

The following facts stand out:

- i) In Kitale H.C.C.C. No. 98 of 2005 Ibrahim, J (as he then was) in a ruling delivered on 29th December, 2006 found that, the appellant, while awaiting a hearing in the Chamber Summons application (the one in Nairobi H.C.C.C. No. 534 of 2005 ruling whereof is subject of this appeal) had filed the said suit in Kitale seeking similar orders; that the application was found to be in blatant abuse of court process and was disallowed; that the appellant had not disclosed those facts to court but suppressed it; that the findings of Ibrahim, J. raised issues of res judicata and estoppel.
- ii) In a Judgement delivered in H.C.C.C. No. 3574 of 1989 between the respondent and others (as plaintiffs) v the appellant & another (as respondents) Tank, J. found that the respondent here was the registered proprietor of the suit property and Judgment was entered accordingly.
- iii) In H.C.C.C. No. 34 of 1998 where the respondent was Plaintiff and the appellant was Defendant involving the suit property, Keiwua, J. found that the suit property belonged to the respondent here and entered Judgment accordingly.

Sitati, J. considered those facts and further delved into the other facts in the case before her. On the issue of whether Summons to Enter Appearance had been served on the appellant the Judge found the summons had, indeed been served as was admitted by Peter Makokha Makanda in the affidavit we have already discussed. That summons, it was admitted, were served in the presence of a lawyer for the appellant, one Mr. Kidiavai, and 2 other directors of the appellant. The Judge also considered a further affidavit by the said Peter Makokha Makanda where the deponent, who had admitted service of summons, turned around to deny service. The Judge further found that a

transaction involving the suit property which was a controlled transaction would require consent of the Land Control Board of the relevant area which consent was lacking in the case making such transaction voidable. The Judge found that the appellant had approached the court with dirty hands; had failed to make material disclosure; had engaged in falsehoods; that there was no excusable mistake or error on the part of the appellant; that failure to enter appearance was deliberate; that in the face of previous Judgments the suit was res judicata; that there was no viable defence.

Considering the facts we have set out and the detailed evaluation of the material before Sitati, J. we would reach the same conclusions that the Judge reached. It will be remembered that the appellant approached the High Court asking it to exercise a judicial discretion. On exercise of judicial discretion the predecessor of this Court pronounced itself strongly as long ago as 1968 in the famous case of **Mbogo v Shah [1968] E.A. 93** where **Clement De Lestang, VP** had this to say:

*“.....it is well settled that, this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its discretion is clearly wrong, because it has misdirected itself or because it has not acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion.”*

The President of the Court, **Sir Charles Newbold** expressed himself as follows in that case:

*“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”*

Upon a whole consideration of the case we are of the opinion that Sitati, J. exercised her discretion judicially and correctly. She did not misdirect herself on any matter and she arrived at the correct decision.

The appeal has no merit and we dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 24th day of July, 2020.**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**