IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 66 OF 2015

BETWEEN

RICHARD K. BUNEI

FREDRICK TUHOTO MAITERI

MICHAEL NDUNGU NDEGWA

JAMES NGARI KAMOTHO

WILSON WAMITI NGETHE

PRISCILLA WANGARI THAIRU

GEORGE MURIUKI KAIRU

BENJAMIN KAMAU KIMANI

LYDIA WANJIRU GICHOYA

MURIITHI MUGO T/A GEO-ESTATE

DEVELOPMENT SERVICES.....APPELLANTS

AND

LORIEN RANCHING COMPANY LIMITED.....1ST RESPONDENT

WILLIAM ARAN BIRGEN

JOHN MURITU MAINGU

KAHIGA KAMAU

KOSKEI MARITIM (Being sued on behalf of themselves

And on behalf of alleged 795 members…….....2ND RESPONDENTS

(An appeal from the Judgment of the High Court of Kenya at Nyeri, (Ombwayo, J.) dated 22nd April, 2015

in

H.C.C.C NO. 248 OF 1998)

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JUDGMENT OF THE COURT

Nearly fifty years ago, on 19th November 1968, a group of enterprising citizens keen on investing in that precious commodity, land, incorporated a Company known as Lorien Ranching Company Limited, (the Company).

Its main purpose or object was to purchase a farm from the departing white settlers and settle its members thereon as one of the new-found benefits of Independence. To that end, they bought some two parcels of land L.R No. 10025/2 and 2495,-situated within the expansive and eye-pleasing Rumuruti Division of Laikipia District, from David and Pamela Partridge. The sale transaction concluded in the year 1970 and the Company's 613 members were allocated their respective portions of the sprawling 9,700 -acre property (the Farm) on which they settled.

During those early days the Company's secretary was one William Arap Birgen (Birgen). According to the statement of claim filed by the Company before the High Court at Nyeri, Birgen failed, refused and neglected to pay for his qualification shares in the Company with the result that he resigned as a Director/Secretary of the Company on 5th May 1970. Despite that, however, from about 1973, Birgen and a group of other individuals went about collecting funds from members of the public under the pretext that they had land to sell to them. That land it turned out, was the Farm, bought by the Company, and share certificates of doubtful authenticity were issued to those members of the public.

Somewhere between December 1978 and January 1979, those supposed members of the Company, at the forefront of whom were Birgen, John Karumba, Joseph Murithi Maingu, Kaiga Kamau and Koske Maritim attempted to move into and settle on the Farm but the genuine members, who were already in occupation, repulsed and ejected them, and the invading group (which may hereafter referred to as the "Birgen Group") never set foot on the Farm again. What they could not attain physically they moved to do juridically. In 1983, the Birgen Group filed a suit at the High Court at Nyeri being **HCCC No. 80 of 1983** seeking certain injunctions against the Company. Several years later on 2nd October 1992, a consent order was recorded before Tunoi, J (as he then was) which was expansive and extensive in its terms (hereafter the Tunoi consent). It not only purported to settle the membership and control of the Company, but also provided for the sub-division of the Farm and allocation of it to various groups of people comprising the Birgen Group.

While all that was happening the Company had proceeded with the process of surveying of the Farm and the issuance of documents of title to its members with the help of then Provincial Administration. The Birgen Group, keen to scuttle that process, proceeded to the High Court in Nyeri and filed a Judicial Review Application No. Nyeri Misc. Cause **No. 253 of 1994** by which they successfully sought to prohibit the Chief Land Registrar, the Land Registrar and the District Commissioner, Laikipia, from processing or issuing title deeds. They were also granted an order of *certiorari* to quash the subdivision of the Farm that had been made and the respective title deeds issued.

It is when the Birgen Group moved to execute those judicial review orders that the Company became aware of the legal manouverings that had been orchestrated by the Birgen Group and moved to the High Court in Nyeri in the suit leading to this appeal. The suit was against the afore-mentioned persons at the helm of the Birgen Group. The defendants were described as ***"all adults of sound mind residing and working for gain in the Republic of Kenya and … are being sued together with an alleged 795 others whose names they have given in a Schedule in Nyeri HCCC No. 80 of 1993 …."*** It was contended by the Company that the said suit the Birgen Group colluded with one **Samson Malakwen Arap Serem** to obtain consent orders fraudulently. The particulars of fraud were given as follows;

> ***"(a) The defendants misled the Court that they were shareholders while in fact they were not.***
>
> ***(b) The defendants concealed a material fact that the 613 genuine members of the Company had paid the full purchase price of the farm way back in 1970.***
>
> ***(c) The defendants failed to disclose to the court that it was impossible for them to be made members of a farm which was already settled by its*** *bona fide* ***members since 1970.***
>
> ***(d) The 1st defendant misled the court and the other defendants that he was still a director and shareholder of the plaintiff while in actual fact he had ceased to be so.***
>
> ***(e) The first defendant collected money from his Co-defendants and used the same to enrich himself and tried to use the court process to impose illegal member on the plaintiff's farm.***
>
> ***(f) The defendant's colluded with one Samson Malakwen Arap Serem so that at one point in the court proceedings Wilson Arap Brigen became a defendant while he was a plaintiff. The proceedings were wholly fraudulent.***
>
> ***(h) The defendants fraudulently entered names of strangers in the plaintiff Company's Registrar of members which register they have hidden now."***

The Company contended further that on 29th October 1991 the Laikipia Land Control Board granted the consent for the subdivision of the Farm as a prelude to the issuance of the title deeds to its genuine members so that a purported application for consent by a sub-group of the Birgen Group led by one **Samuel Githika Kinyanjui** and the grant of the same by the Rumuruti Land Control Board on 27th July 2006 was illegal, without legal basis and therefore null and void. It also averred as follows;

> ***"12B. Despite the fact that the plaintiff's genuine members have title deeds the defendants and their proxies have been masquerading as members of the Company and have caused the Company's register to be amended to include strangers as members and shareholders of the Company. The Company is currently pursuing the removal of these strangers from the Company's register vide proceedings in NAKURU HIGH COURT CIVIL CASE NO. 274 of 2010.***

12C. The said strangers have also obtained orders vide judicial proceedings in NYERI HIGH COURT MISCELLENEOIS CIVIL APPLICALTION NO. 264 of 2008 without notifying the genuine members of the Company who are in actual occupation of the land parcel in question. This honourable court has in its ruling delivered on 11/02/2011 stayed the implementation of the said orders pending the hearing and determination of this suit based on the decision of the Court of Appeal in NYERI CIVIL APPEAL No. 234 of 2003 where it directed that the matter ought to be determined on merit and not on technicalities."

The Company complained that unless the illegal orders were set aside its genuine members would continue to be harassed with court orders fraudulently obtained and be denied their right to quiet possession of their lawfully acquired parcels of land. Accordingly, it prayed for orders and declarations that;

"(i) The orders obtained against the plaintiff by the defendants in HCCC 80/1983, HC MISC. 253/1994, NYERI HIGH COURT MISCELLENEOUS CIVIL APPLICATION NO. 264 OF 2008 and in any other case relating to the plaintiff be set aside as they were fraudulent orders.

(ii) The defendants, their agents, servants and/or workers or those claiming under them be restrained from trespassing into the plaintiff Company's farm or using the Company's name to sue.

(iii) There be a declaration that the consent allegedly issued on 27/07/2006 by Rumuruti Land Control Board in LCR No. 84/06 and LCR No. 86/06 is null and void.

(iv) On determination of this suit all other prior suits fraudulently filed for in the name of the plaintiff or against the plaintiff be deemed to have been concluded by this suit and orders obtained in those prior suits be deemed to have been abated by the final orders made in this suit.

(v) The defendants be condemned to pay the costs of the suit."

In answer to the plaint as originally filed, Birgen through the law firm of Kigano & Co. Advocates entered appearance and filed a defence. In it he stated that he was a paid up member/shareholder of the Company and denied having resigned as a shareholder or secretary and denied further having misrepresented himself as a director of the Company and collected monies from the public or issued fake certificates of membership to strangers. He averred that the 613 members claimed by the Company were neither paid up members thereof nor settled in the Farm. He asserted that he had lived on the Farm until 1982 and that he was even then its director/chairman. He denied using fraud to impose illegal members on the Company. He contended that it was the surrender of the Farm's original titles and issuance of new titles to the Company's 613 members that was fraudulent. He defended the orders given in previous suits and castigated the Company's action as incompetent, untenable, frivolous and vexatious having been commenced without a resolution of the Company's genuine Directors, being *res judicata* and statute-barred. He then intimated that he would raise a preliminary objection to the competence of the suit.

On 26th May 2003 the said preliminary objection was in fact raised but not by Birgen, who had by then expired. It was raised by counsel for Birgen's co-defendant that the suit was incompetent and *res judicata* before J.V.O. Juma, J (as he was then) who, however, dismissed it. This prompted an appeal to this Court being Nyeri **Civil Appeal No. 234 of 2003** by the same Kahiga Kamau. After hearing that interlocutory appeal, the Court (Githinji, Waki & Visram, JJ.A) found no merit in it and by a judgment dated 11th December 2009 dismissed it observing, among other things, that Kahiga Kamau had never filed any papers in the court below nor given notice of preliminary objection which he raised 'out of the blue' and that it was necessary that the suit be determined on evidence and not through technicalities.

Before the trial commenced, however, a group of ten people led by **Richard K. Bunei**, and who are the appellants herein, filed an application on 15th April 2012 by which they sought to be enjoined in the suit as interested parties. They also prayed that a draft defence they annexed to that application be deemed to be their defence to the suit. In that statement of defence the appellants described themselves as the "registered directors" of the Company. They labeled the suit as being destitute of legal foundation as a representative suit and both vexatious and embarrassing, and Jackson K. Too as a person masquerading as the Company's director causing confusion and despondency in the Company. They defended the impugned orders in the other suits as lawful orders that were just and expedient for the welfare of the Company while terming the suit as not maintainable for stated reasons.

The matter eventually proceeded to hearing with a total of five witnesses testifying for the Company and producing relevant documentary proofs. **Francis Kiago Ndirangu** testified as a state counsel in the office of the Attorney General who was deployed in the office of the Registrar of Companies as an Assistant Registrar. For the appellants some two witnesses testified.

After receiving submissions from the respective parties, Ombwayo, J by a considered judgment signed and dated 27th March 2015 and read on his behalf by Waithaka, J on 22nd April 2015, found the Company's case proved and granted the prayers sought. The appellants were condemned to pay the costs of the suit.

That determination aggrieved the appellants who filed a notice of appeal and thereafter a record of appeal. The memorandum of appeal states that the learned Judge erred in law and fact in;

- ***Granting orders against the respondents that were never sought by the Company.***
- ***Granting orders against deceased defendants and unnamed 795 persons without hearing them.***
- ***Failing to note that the Company was always represented by its registered directors when the impugned orders were granted.***
- ***Holding that unregistered directors could transact the Company's business.***

- ***Adjudicating over a dispute over which he had no jurisdiction.***
- ***Trashing all laws on the management of companies against evidence.***
- ***Condemning the appellants to pay costs.***

They therefore sought the setting aside of the judgment of the High Court and in its place an order dismissing the suit with costs payable by **Jackson Kipkemei Too**.

At the hearing of the appeal, learned counsel appearing for various parties, namely; **Mr. Kamweru** for the appellants (save the 3rd); **Mr. Kipkenda** for the Company; **Mr. Nganga** for the Birgen Group that were the initial defendants; all indicated that neither they nor their respective clients/had any objections to Waki J.A. sitting to hear this appeal given that he was on the bench that decided **Civil Appeal No. 234 of 2003**, the interlocutory appeal we have already referred to. Also not objecting was Michael Ndungu Ndegwa, the 3rd appellant who appears in person.

Arguing the appeal, **Mr. Kamweru** argued the grounds of appeal in three tranches. On the propriety of the orders given by the learned Judge, counsel argued that prayer 3 which directed the release of title deeds in the custody of the District Land Registrar and District Commissioner Laikipia or his successor be issued to the Company's *bona fide* 613 members had been cancelled by an amendment to the plaint and to grant it was a fatal misdirection. Counsel also criticized the learned Judge for making an order of costs against the appellants yet they had never been sued but had applied to be enjoined in the suit. Mr. Kamweru next took issue with the learned Judge for making orders against persons who benefited from the impugned orders from previous suits without affording them an opportunity to be heard, thereby condemning them unheard. According to counsel, each of the hundreds of people should have been issued and served with summons in person as they were not effectively represented by the five defendants named in person. He questioned whether the authority to represent the numerous other people granted to the five in respect of a former suit could be subsumed in the suit before the learned Judge and answered his own question in the negative, insisting that the 795 persons ought to have been personally named failing which **'they were mere ghosts',** yet the judgment does affect the 795 of them. He considered this to be a fatal flaw in the judgment.

On the question of fraud, **Mr. Kamweru** submitted that in all the suits preceding the one before the learned Judge there were always two groups allied to two directors **Serem** and **Birgen** with no other directors featuring. As the issue in context was the correctness of the alleged directorship of each, it was incumbent upon the Company to prove that those who obtained prior orders were not directors. It needed to do so by way of an extract from the Registrar of Companies, failing which it failed to prove that they had authority to act as they did, and to bind the Company. He cast doubt on the **Form 203A** produced by the Company which had the following changes;

> ***"With effect from 13th October 1982 Mr. Samson Arap Malakwen resigned as the Company's Chairman and Director and in his place Mr. Richard Chumo Too was appointed Chairman and Director."***

He took issue with it because it was lodged on 26th April 1996 while making reference to changes that occurred some fourteen years previously, which should have been filed within fourteen days. Moreover, at that time the consent orders before Tunoi. J had been made. This, in counsel's view, explained the Registrar's position that **Richard Chumo Too** and **Paul Too** had never been directors of the Company. He proceeded to defend the acts of his clients, the appellants, as being legitimate, lawful acts of directors and therefore efficacious to bind the Company as its own acts. He went on to state that shareholders are not the owners of the property of the Company and therefore when its directors decide to dispose of its property, such sales are lawful and effective, not open to challenge. On the contrary, it was the acts of the **Serem Group** in seeking the help of the Provincial Administration to subdivide the Farm to those they perceived it properly belonged to, and who were from one ethnic group, that was unlawful and was in fact stopped by the orders of Ang'awa, J.

Counsel criticized the learned Judge for not finding the suit defective in that it leveled complaints against the Registrar of Companies; the Attorney-General and Serem Arap Malakwen but none of them was enjoined in the suit. He rested by contending that the learned Judge "argued with the law" in not accepting the law as set out in **Section 384** of the former Companies Act that a copy of the extract from the Registrar is conclusive and that therefore the appellants were the *bona fide* directors of the Company.

Mr. Nganga stated simply that he supported the appeal on behalf of "my clients" who are the 795 members." He stated that the plaint was fatally defective.

Also supporting the appeal was **Michael Ndegwa** the third appellant in person. He asserted that **Jackson Too** who filed the suit on behalf of the Company was not a member. He claimed to have joined the Company in 1990 and that he had been its director since 2010. The Company, he said, never resolved to file the suit before the learned Judge.

Rising to oppose the appeal, **Mr. Kipkenda** highlighted his written submissions. He contended that the persons who purported to represent the Company in the impugned previous court proceedings were not duly elected directors of the Company. He drew a picture of long-standing calculated intention by various groups of people to insinuate themselves and bulldoze themselves into the Company over the last four decades. He drew our attention to a letter dated 27th January 1978 in which the Company's then advocates protested such attempts by a Company known as Ruguru Farmers Company Limited who had purported to unilaterally and without the consent or authority of the Company to pay funds into the Company's account with the Agricultural Finance Corporation (AFC).

Counsel also drew our attention to a letter dated 16th September 1980 from Kosieyo & Partners, Certified Public Accounts addressing at length and comprehensively the issue of the Register of the Members of the Company and which found that the genuine members were 500 in number belonging to the Serem Group and categorically stating that the Rogoro and Birgen Groups were not members of the Company.

The final, accurate list of members of the Company was agreed upon at 613 before Masime, J in a consent order recorded before him on 28th October 1982 arrived at after the Provincial Administration officers had been sued in **H.C. Misc. 19 of 1982**. That consent order was produced before the learned Judge by the interested parties as Ex7. In counsel's submission, this is the number that lawfully represents the

membership of the Company. The 613 have settled on the Farm ever since and have since received title deeds for their respective portions. The appellants and the other respondents do not have physical possession of the land and their claims thereto are entirely misplaced.

Turning to the extensive Tunoi consent, J. Mr. Kipkenda pointed out that the Company was not represented. It would have been represented by **Richard Chumo Too** who was its Director and Chairman as at that date of 2nd October 1992. He also drew our attention to the fact that even on the face of the consent order, the names of **Samson Arap Malakwen** and **Wilson Arap Birgen** appear, not as Directors of the Company, which they were not, but, curiously, as "Consultants." They were not representing the Company.

Counsel's view was that the consent was a fraud for non- representation of the Company and by reason of its providing for a plan for collection of monies yet there was no need for more money the Company's loan with the AFC having already been repaid in full as was confirmed by AFC's Debt Recovery Officer **George Obayi Injenga** (PW5). His testimony was that it was paid in full on 24th June 1983.

Further, pressed **Mr. Kipkenda**, the consent order was to the effect that the Company's land be allocated to various groups such as the Wangari Group, the Karen Group as well as Kamotho's Group, who are the Rogoro Group. All these groups, which counsel described as **"ghostly and amorphous groups that wanted to reap where they did not sow**" were unknown to and had no dealings with the Company and were not entitled to any of its land so that the consent was clearly calculated to defraud the Company.

Counsel next submitted that the application for consent to sub-divide made to the Rumuruti Division Land Control Board on 27th May 2006 was improper and of no effect as the land in question had long before then been sub-divided and title deeds issued to the owners. To him, this was an attempt by the 120 members of the Rogoro Farmers to benefit from an illegal subdivision and acquire the Company's land without paying a penny. Another application dated 22nd May 2006 to the same end was by "Nyakinyua Group (300 Acres) Lakinya Group (600 Acres) and the Serem Group (150 members)" and it, too, sought to give effect to the Tunoi consent which was entered into without the Company's knowledge or involvement.

Answering the contention that the suit was improperly filed, **Mr. Kipkenda** drew our attention to the **Form 203 A** dated 28th August 2008 which notified the Registrar of Companies of the charge of directorships with **Jackson Kipkemoi Too** replacing **Richard Chimo Too** as Chairman, the latter having died at the Company's Farm at Lorien in Laikipia on 24TH April 2007 as attested to by the Certificate of Death No. 61357 dated 24th June 2008. He asserted that it is **Richard Chumo Too** (deceased) who was chairman as at the time the suit was filed.

Reverting to the membership of the Company, counsel drew our attention to the testimonies of PW1, 2, 3 and 4 as well as that of the 1st appellant who all affirmed that the original members were 504. The first appellant in cross-examination confirmed, indeed, that only 504 members, the original ones, resided on the farm even though, according to him, the membership had grown to 4662. Mr. Kipkenda concluded by stating that none of the 795 people reside or have ever resided on the farm and they therefore had no legitimate claim against the 613 members of the Company who have always been in occupation. He urged us to dismiss the appeal.

Making reply to those submissions, **Mr. Karweru** reiterated that Richard Chumo Too was not a director when the Tunoi consent was recorded and the return of changes of directorships was made way after the consent was recorded. He pointed to the yet earlier proceedings, of 31st October 1991, where Samuel Malakwen, Samuel Kinyanjui, Joseph Wamuturi and Wilson Birgen are recorded by Tunoi, J as having appeared before him as Directors of the Company to make the point that they properly entered the Tunoi consent for the Company. Counsel castigated the issuance of any titles to the 613 members of the Company as being illegal for having been done in violation of the orders given by Angawa J and Tunoi, J, and for the titles having been processed before the surrender of the head lease which occurred in December 1994. To him, therefore, the issuance of the titles was impeacheable and there effectively were no titles at all. He concluded by frowning upon the confidential communication dated 11th September 1990 from the District Commissioner, Laikipia to the Chief Magistrate at Nyeri which confirmed, among other things, that the *bona fide* members of the Company were 613 already settled and that the Government had already subdivided the farm into that number of portions.

We have taken the trouble to set out in some detail the historical background and the salient points in controversy as can be gleaned from the pleadings, the voluminous documentary evidence, the proceedings and the submissions in keeping with our duty as a first appellate court to subject the entire evidence to a fresh thorough and exhaustive examination before arriving at our own independent conclusions of fact. We do so alive to the fact that unlike the learned trial Judge, we have not had the benefit and advantage of hearing and observing the witnesses as they gave their testimony. Accordingly, we make due allowance for that and will give the Judge's factual findings due respect but will not hesitate to depart therefrom in the event that they are based on no evidence, proceed from a misapprehension of the evidence, or are otherwise plainly wrong. See ***SELLE & ANOR vs. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS*** **[1968] EA 123**; ***PETERS vs. SUNDAY POST LTD*** **[1958] E.A 424**; ***MUSERA vs. MWECHELESEI & ANOR*** **[2-007] 2 KLR 159.**

We have duly and anxiously undertaken that re-hearing exercise and find it convenient to deal with this appeal by narrowing it down to three out of the five issues that the learned Judge identified for consideration and which we paraphrase as follows;

> ***"1. Whether the suit was properly before theCourt/competent.***
>
> ***2. Who are the members of the plaintiff Company.***
>
> ***3. Whether the orders obtained in Nyeri HCCC No. 80 of 1983, 253 of 1994 and 264 of 2008 were fraudulent.***

On the first issue, namely the propriety or competence of the suit as filed before the High Court, the appellants' contention before us, as it was before the learned Judge, was that the suit was incompetent for various reasons such as; it was brought by non-registered directors of the Company and it was against numerous unnamed defendants some of whom were deceased. The 800-odd persons comprising "the Birgen Group," and who collectively are referred to as "The 2nd Respondent" and represented by **Mr. Nganga** also took that position. Indeed, this

was the single issue raised by **Mr. Nganga** in his written submissions, his view being that the Company did not pass a resolution to file suit, and **Jackson Kipkemei Too** was not and had never been its director and therefore had no authority to sign any document on its behalf. He cited the case of ***BUGERERE COFFEE GROWERS LTD vs. SEBADUKA & ANOR*** **[1970] EA 147**.

The contrary view, propounded by the Company through **Mr. Kipkenda** is that the suit was proper and had been instituted with the requisite authority. In dealing with this issue, the learned Judge weighed the evidence tendered by the Company's witnesses about the removal of **Wilson Arap Birgen** on 5th May 1970 and his replacement as director and chairman of the Company on 17th June June 1970 as well as the Notification of Change of Directors and Secretaries for which a receipt was issued and produced as PEXH 18 and concluded that **Joha Chebongei Chumo** to replace the said **Richard Chumo Too** who had died. The learned Judge also considered the meeting held on 25th June 2010 which addressed the grave issue of some individuals masquerading as members, shareholders and directors of the Company as well as yet another meeting held on 8th March 2008, and concluded that the Notifications filed by the Company were preceeded by an election. He then delivered himself thus;

> ***"Having considered the Registrar General and the plaintiff's evidence especially PExh 18 and 19 and Dex 1-9 I do find that the defence exhibits are not backed by the notifications of change signed by the chairman and secretary and therefore the said letters are not proof that the persons named therein were the officials of the Company. On the other hand the notification of change lodged into the Registrar of Companies Registry is proof that the leadership of the Company was changed. The plaintiff produced minutes of the meeting held on the 8/3/2008 at Koibabei Lorien to show that the notification of change was presented after an election.***
>
> ****....****
>
> ***The fact that the Registrar of Companies received the returns from the Kipkemei Arap Too's group and issued a receipt is evidence that there was a notification of Change of Directors by the plaintiff. Section 201 does not require the Registrar to take particular action upon the presentation of the notification of change. On the first issue I do find that the suit is therefore competent."***

Having ourselves perused the documents on record as well as the testimony of witnesses on both sides as recorded by the learned Judge regarding the authority for its institution, we are in no position to fault the conclusion he arrived at with regard to the competence of the suit. We are amply satisfied that there was sufficient evidence to establish on a balance of probabilities that Jackson Kipkemboi Too was a director at the inception and continuation of the suit by the Company and was therefore both qualified and, from the record, also authorized to represent and act on behalf of the Company. The Form 203A lodged with the Registrar of Companies giving notice of change of directors and secretaries was clear in its terms and efficacious in its effect. It stipulated that **Jackson Kipkemboi Too** was appointed with effect from 8th March 2008 as Chairman and Director to replace **Richard Chumo Too** who died. The notification was paid for. In the absence of any other notification of change of Directorships lodged or produced in accordance with **Section 201** of the then Companies Act to show that **Jackson Kipkemei Too** was ever removed and replaced, we find, as did the learned Judge, that the appellants' assertions and that of their witness **Francis Kiayo Ndirangu (DW1)** to be hollow and devoid of factual foundation.

We also find no merit in the contention that the suit was filed without authority in that there was no resolution of the Board of the Company on which it was anchored as ought. We have perused the record and the evidence tells a different story. The Company did produce in evidence minutes of the meeting of the Board of Directors held on 14th November 1994. Those minutes as captured, and which were not seriously contested or otherwise controverted, provide a plain answer to the appellants' contentions and it is this: the filing of the suit was authorized as was the appointment of the firm of Kipkenda Chebet & Co. Advocates to pursue the same. The minutes provide as follows;

> ***"STANGERS***
>
> ***It was noted with the seriousness it deserves that there are strangers attempting to claim to have interest/rights over the Ranch. The meeting took issue particularly on ghost directors and members who have put up a spirited attempt to enter, occupy and acquire rights over the Ranch. The meeting unanimously resolved to pursue a permanent and logical solution vide the process of law. The Board thus resolved to appoint a firm of Advocates to handle all legal matters affecting the Company.***
>
> ***APPOINTMENT OF FIRM OF ADVOCATES***
>
> ***The Board unanimously resolved to appoint M/S KIPKENDA CHEBET & COMPANY ADVOCATES, PROTECTION HOUSE, PARLIAMENT ROAD, 2ND FLOOR, P.O. Box 57080, TEL 218993/229100, NAIROBI, to be their Sole Attorneys. It was further resolved that the chairman and secretary as a matter of urgency call on the said Advocates and supply them with a copy of this resolution and also instructions to commence representation on this matter, with a view of assisting the members have title deeds to their rightful portions."***

Furthermore, as a matter of law, the ***Bugerere case*** relied on by the appellants is no longer good law as declared by the Supreme Court of Uganda which overruled it in ***United Assurance Co. Ltd vs. Attorney General:*** **SCCA No. 1 of 1998** and ***Tatu Naiga & Emporium vs. Virjee Brothers Ltd*** **Civil Appeal No. 8 of 2000**. Those decisions have been approved and adopted by this Court in ***Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others*** **[2015] eKLR.** See also ***Fubeco China Fushun vs. Naiposha Company Limited & 11 Others*** **[2014] eKLR**, a decision of the High Court.

We find no basis therefore for disagreeing with the learned Judge's conclusion that the suit was competent.

As regards the 795 unnamed defendants some of whom the appellants claimed had since died, we do note that the issue was raised before this Court in **Civil Appeal No. 234 of 2003** in two of the four grounds of appeals canvassed before it as follows;

"3. Failing to afford opportunity to the other unrepresented parties present in court to be heard.

4. Failing to appreciate that there were other numerous respondents who were entitled to be heard and who remained unserved as proceedings commenced."

The Court saw the issue raised for what it was and observed that the issues were being raised out of the blue but nevertheless it allowed them to be canvassed before making a categorical finding as follows;

"No issue was raised about the joinder of parties or service of notices upon the defendants. At any rate, there is on record an order granting leave that the parties be served through the media and the order was complied with."

We note from our own perusal to the record that the issue of 795 members and others or some of them allegedly dead was first raised by the appellants who, after their application for joinder in the suit was granted, filed a defence to the amended defence on 1st April 2012 in which they claimed at paragraph 11 that the suit by the Company was not maintainable for the same reasons we have adverted to previously and, specifically, because it;

"... seeks orders against dead persons and unidentified 795 members who have never appointed the identified defendants to act on their behalf."

It is worth noting that in the plaint as first filed before the High Court, the Company sued some five named defendants **"on behalf of themselves and on behalf of alleged 795 members."** The first thing to note is that it was not just any group of 795 persons that were targeted in the suit but rather those who were connected to the named defendants led by Birgen, the nexus being their alleged membership to the Company. Now, it is quite clear that the Company did not dream up those people who together numbered 800. Indeed, the Company did not go seeking them out. Rather, the litigation pitting the Company with the 800, who are really the Birgen group, was commenced by that group now being described as "unnamed", "amorphous" or "ghostly" by the same Birgen Group and their legal teams. That group went to the High court in Nyeri and there filed Civil Suit No. 80 of 1983 which is titled as follows;

"WILSON ARAP BIRGEN & 799 OTHERS ……. PLAINTIFFS

VERSUS

LORIEN RANCHING COMPANY LIMITED ……. DEFENDANTS

That is the suit within which the Tunoi consent, in its terms very favourable to Birgen and the 799, and quite adverse to the persons the Company recognized as its true members, were recorded. They were identifiable enough, specific enough and real enough to sue in that suit but the argument being made in this appeal, and the proceedings giving rise to it is that they are unidentifiable and indeterminate in what is a classic case of blowing hot and cold, approbating and reprobating. At any rate, any doubts whether the said persons were aware of the court proceedings are dispelled by the order granted on 27th November 2002 for the said defendants to be served by advertisement. Such advertisement was duly carried in the ***Daily Nation Newspaper*** of 30th April 2003 giving notice of hearing of the suit. We think, with respect, that the argument about unknown, unnamed and undetermined defendants is a red-herring and we would not accept such a self-serving technicist argument to detract from the merits of the respective claims of the parties. We think the learned Judge thought so too, as did this Court in **Civil Appeal No. 234 of 2003** when it directed that the suit proceed to determination on evidence as opposed to technicalities.

Before we move to the next issue, we find it germane to point out that the Birgen Group totaling 800 in this appeal is described as ***"William Arap Birgen, John Muritu Maingu, Kahiga Kamau Koskei Maritim. (Being sued on behalf of themselves and on behalf of alleged 795 members) 2nd respondents."*** They are represented by Mr. Ng'ang'a who represented them still at the High Court. It is inconceivable that counsel did not know who his clients were but, more tellingly, in Mr. Ng'ang'as written submissions, he did not mention, let alone address, the issue of unknown or undeterminable defendants or respondents. Instead, he attacked the competence of the suit on yet another technicality alone – namely that it was supported by the affidavit of a stranger and was unbacked by a resolution of the Company. This attempt to side-step the real issue is hardly surprising as it is on record that the 795 persons' names were attached to a schedule in the suit they themselves filed!

We are clear in our minds that all of those objections of a technical character were bound to fail both at the High Court and before us. We accordingly reject them and hold that the suit was competent.

The next issue, which is essentially the first substantive one on which the entire long history of the litigation involving the various parties herein revolves is who are the true *bona fide* members of the Company? It is the appellants' position essentially, that the members of the Company have grown exponentially overtime. As at the recording of the Tunoi consent, the number as captured in clause 4 was this;

"That the membership of the Company is 2500."

That number, which is the Birgen Group, grew to 4662, according to the appellants, notwithstanding that by an order made on 28th October 1982 the High Court allowed only 613 members to occupy the Farm. The appellants' first witness Richard Koskei Bunei on being cross-examined by Mr. Kipkenda for the Company testified as follows;

"I was a member of Lorien Ranching Company in 1970. I paid Kshs. 500 to be a member. The Kshs. 500 was for one share.

One share was 11 acres. At the time there were only 500 members (shareholders). By the time I became a shareholder the land had been bought. The owner of the land had been paid by the Company. There are 4662 shareholders of the Company. Out of 4662 members 504 reside on the Farm. The order of 1982 P/P exhibit 7 dated 28th October, 1982 H.C.C.C. No. 1982 (sic) allowed only 613 persons to occupy and own the land. I do not know whether an appeal was filed. I do not know whether the order was set aside. I have never tried to find out. Birgen's group was evicted by Provincial Administration and the chief committee. I saw the minutes of Lorien Ranching Company of the meeting held at District Officer's office on the 15th September 1982. The District Officer appointed a committee. The committee was to supervise the subdivision of the land. According to the Nakuru miscellaneous 19 of 1982 the genuine members to be settled were 613, the shareholders of the company screened were 613."

He went on to state that the numbers had reached 4662 but ***"I do not know how much they have contributed …. I do not know where the money for the 4662 has been applied."***

Another witness called by the appellants, Francis Kiayo Ndirangu of the office of the Registrar of Companies testified that "according to the latest list of members there are 4465" During cross-examination he stated as follows;

"In exhibit No. 7 the plaintiff was Lorien Ranching Company and the defendant was Peter S. Karibu and others. The order of 28th October, 1982 declared who the members were. The order said that Samson Malakwen Serem's group is the genuine group of shareholders. The genuine group according to court was 613 members. I am not aware of the appeal."

The Company on the other hand has consistently maintained that its true *bona fide* members entitled to and in fact in physical occupation of the Farm are 613 in number. From our own perusal of the record, it is quite clear that there is ample documentary evidence to establish the current number of members or shareholders.

It is convenient for us to start with the letter dated 16th September 1980 from Kosieyo & Partners. That firm of certified Public Accountants had been instructed by the Registrar of Companies vide a letter dated 5th September 1978 to immediately compile the Register of Members before carrying out an audit assignment on the Company. In its letter, which the firm addressed to the District Commissioner Laikipia District with copies of various persons and officers including the Registrar of Companies, the Chairman of the Company, the Chief Legal Officer of the Agricultural Finance Corporation, Mr. Wilson Arap Birgen and various local administrators, Kosieyo and Partners comprehensively addressed the issue of membership after perusing all the available documents. We think the letter to be of great importance and we set it out *in extenso* even as we marvel that this controversy should still have persisted nearly four decades after it was penned. They stated as follows;

"We have pleasure in enclosing herewith a list of 500 members from group A led by Mr. Samson Malakwen Arap Serem. From the information made available to us through documents and personal interviews between the warring factions, we certify that Group A has supplied to us all information and documents available to prove that they are genuine members of the group which purchased the Lorien Ranch from both David Partridge and Pamela Blyth Partridge. We therefore confirm that according to our audit and information only 500 members whose names are shown in group A are the shareholders in Lorien Ranching Company Limited.

We have rejected the following groups from membership of Lorien Ranching Company Limited:-

(1) Group B whose shares were supposed to have been transferred from Rogoro Farmers Company Limited to Lorien Ranching Company Limited. We have failed to see any connection between the two companies. Any agreement for a merger was supposed to be drawn by the Advocates, but, this document has not been shown to us for audit. The only payment amounting to Kshs. 180,000/= which was remitted to Agricultural Finance Corporation by the Directors of Rogoro Farmers Company Limited was subsequently returned to their lawyers, Messrs, Muthoga, Gaturu & Company during September, 1978.

We therefore confirm that according to records available to us, Rogoro Farmers Company Limited have not yet purchased any shares in Lorien Ranching Company Limited. Therefore the Directors of Rogoro Farmers Company Limited cannot claim to be Directors of Lorien Ranching Company Limited and even the members of the public who contributed their money to Rogoro Farmers Company Limited have no right at all to claim any shareholding in Lorien Ranching Company Limited. This group is led by Mr. Kamotho.

(2) Group C sharesholders are led by Mr. Wilson Arap Birgen. We confirm that this group collected money from members of the public but the leaders have shown no documentary evidence to us how they used the money. The claim they do not have any Bank Account at all. The only connection between this Group C and Lorien Ranching Company Limited is through Mr. Wilson Arap Birgen. It has been confirmed through documents made available to us that Mr. Birgen was an original founder member of Lorien Ranching Company Limited although he had not purchased his own shareholding in the Company.

The records available show that after he had been removed from the Company's leadership, he engaged himself into (sic) activities of collecting money from members of the public. He has failed to satisfy us that he had mandate to sell shares on behalf of Lorien Ranching Company Limited. Even if he had any mandate, then he has not accounted for the money which he collected from the public. Therefore, this Group is not a member of Lorien Ranching Company Limited. High Court Order in Civil Case No. 74 of 1978 is relevant.

(3) From Group A, we have a list of 56 people who are alleged to be sons of original members who were sold shares by the Directors of Lorien Ranching Company Limited. The Board of Directors have failed to convince us that these were genuine transactions. We therefore express an opinion that these sons of Directors be excluded from membership of this Company.

Finally we wish to recommend to the District Commissioner, Laikipia, Board of Directors and members of Lorien Ranching Company Limited to consider including into membership of the said Company squatters who have stayed in the farm since colonial days. We understand that their number is quite small.

We do hope that when the question of membership is settled through the meeting to be held at your offices on 26th September, 1980, then we shall be in possession (sic) to commence the audit of operations of Lorien Ranching Company Limited. In the meantime, we would be most grateful if membership of the Company would be finalized."

It will be noted from that letter that Kosieyo & Partners found that Rogoro Farmers Co. Ltd had, by unauthorized injection of funds into the Company's account held at Agricultural Finance Corporation hoped and attempted to somehow infiltrate the Company and impose additional members upon it. There is indeed on record correspondence from the Company's advocates protesting against such manourvres and even threatening legal action. Indeed, one such letter, dated 27th January 1978 by the firm of Jones & Jones Advocates and copied to the Directors of the Company, the AFC and the Registrar of Companies stated as follows;

"We act for Lorien Ranching Company Limited who have handed over to us the correspondence exchanged between your firm and the Agricultural Finance Corporation.

We have been acting for Lorien Ranching Company Limited since its incorporation. The directors of the Company have informed us and we also note from the correspondence that you had attempted to pay funds into corporation without any authority whatsoever from the registered directors of the Company. In doing so you are, we are told, attempting to impose additional members into the Company. We note that your letter dated 2nd November, 1977 is copied to Rogoro Farmers Company Limited. It is well known that Rogoro Farmers Company Limited have failed to obtain a farm and to appease its members they are trying to bulldoze their way into our client Company.

Kindly take notice that unless you refrain from further attempts to pay money into our client Company's account with the Agricultural Finance Corporation or if any attempt is made to create disturbance in the Company our instructions are to institute High Court proceedings and obtain injunctions against yourselves and your clients."

The Rogoro Group had no right to be and never were members of the Company. The increase of the Company's members from 500 as found by Kosieyo & Partners to 613 as asserted by the Company is also traceable from the documents on record. The letter from Kosieyo & Partners ended with the hope that the question of membership would be settled at the meeting to be held on 26th September 1980. Whether that meeting did take place is unclear but there was engagement on the issue of membership some of which involved litigation in the form of Judicial Review Proceedings at the High Court of Nakuru namely Misc. **Civil Case No. 19 of 1982** in which the Company apparently sued The District Commissioner Laikipia, the Chief of Salama Location and the Local Councilor. That suit was settled by a way of a consent order recorded before Masime J on 28th October 1982. The four clauses of that consent which settled the issue of membership and entitlement to the Farm as follows;

"By consent:

(1) Samson Malakwen Serem's group is the genuine group of shareholders of Lorien Ranching Co. Ltd and should take over the management of the farm.

(2) The farm to be subdivided and the process of subdivision should be commenced immediately.

(3) That the following be considered for plot allocation in the order of priority:

(a) 501 shareholders registered under Serem's group;

(b) Members of 56 children of the original shareholders identified by an overseeing committee of the farm under the chairmanship of the District Officer Rumuruti;

(c) 7 squatters of the farm namely:

1. Katemi Wachanga

2. Ndirangu katemi

3. Peter Karanja Chege

4. Ndirangu Wanjiru

5. Wachira Githae

6. Wahianyu Ndegwa

7. Nyambura Kiambi

(d) 49 persons already settled on the farm known us Birgen's"

Simple arithmetic shows that the total of the various groups in that consent is 613. There was no appeal or other challenge to that order and by all indications it was fully executed with the 613 members being settled upon the Farm as sub-divided into individual members parcels.

Our short answer therefore on the question of membership of the Company is that it comprises the 613 members that the Company has always maintained to be its genuine and *bona fide* members.

We now turn to the question of whether the orders obtained in HCCC 80 OF 1983 as well as in 252 of 1994 and 264 of 2008 were fraudulent, which we shall answer together with the issue raised in this appeal of whether it was proper for the learned Judge to declare those orders to be null and void. The plaint avers that the Tunoi consent in particular was fraudulent in several respects the particulars of which were pleaded as we have set them out earlier in this judgment. We think that in view of the various findings we have already made, the conclusion is inescapable that the consent orders that were made against the interest and to the prejudice of the Company and its *bona fide* members numbering 613 were fraudulent through and through. There seems to be no doubt and it is plain to see that the Birgen Group, sued as defendants in the High Court were not shareholders of the Company yet they held themselves out to be; they concealed the fact that there were only 613 genuine members of the Company who had paid the full purchase price and been settled on the Farm since 1970 being facts they were fully aware of; Birgen misled his group and the courts that entered the consents that he was a shareholder and Director of the Company while well knowing that he never was and/or had ceased to be so; Birgen collected money from various members of his group including his co-defendants which never did nor could reach, the Company yet used court proceedings to attempt to impose strangers on the Company's Farm; Birgen in collusion with Samson Malakwen Arap Serem colluded for Birgen to appear as a defendant and conclude consents when he in fact was a plaintiff; and the Birgen Group fraudulently entered names of strangers in the Company's register as pleaded in the plaint.

On our own assessment and analysis of the evidence, the fraud committed against the Company that emerges was even more egregious than was pleaded and particularized. Taking fraud to mean, as it does from Black's Law Dictionary 9th Edn. 2009 Thomson Renters P 731; **"a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment, a misrepresentation made recklessly without belief in its truth to induce another person to act; …unconscionable dealing,"** it is evident that the consent orders that were under attack in the suit, especially the Tunoi consent, were a cynical study in fraudulent conduct on the part of the Birgen Group who included the defendants in the Court below. It is instructive that the Tunoi consent order was made in **Civil Suit NO. 80 of 1983** filed by Wilson Arap Birgen and 799 Others against the Company which further reinforces our earlier findings that the protests of innocent victimhood of some unknown, unserved, undeterminable defendants who may not have been aware of the proceedings in the court below is wholly unmeritorious.

In that consent, the Coram reads that the defendants (sic) were present. As the Company was the defendant and its true directors not having been present, with none in fact named as such in the order, and absent any authority for participation in that suit, the coram itself was false and misleading and was setting the stage for proceedings detrimental to the Company.

The consent also named **Samson Arap Malakwen** and **Wilson Arap Birgen** as 'Consultants', a term the context and meaning whereof is not immediately discernible. It then proceeded to lay down various orders which can only be described as a study in depredation and depletion of the Company's land by literally sharing it out to strangers, persons and groups that were not entitled. This was being done without the knowledge, consent and authority of the Company and, by all appearances, entirely without consideration, in what was clearly an attempt to subvert and abuse the judicial process by deploying it as a forum and tool for a most calculated, detailed and vicious scheme of land theft. It purported to establish the membership of the Company at 2500 which was a four-fold inflation of the true membership. It purported to authorize or direct the opening of a bank account in the Company's name with some four persons as its signatories including **Wilson Arap Birgen** and **John Kamau Kahiga** who has featured prominently in this endless rounds of litigation against the Company. It allocated some 300 acres to an amorphous group called the "Wangari Group" and then added some 120 people comprising "Kamotho's Group" into the Birgen Group. It also deigned to allocate some 600 acres to the Karen Group. All of this appears to have been a systematic quartering and squandering of the Company's land in a veritable free-for-all. It involved misrepresentations and concealment of various obvious facts as we have already established them from the record. It was all an obvious fraudulent scheme and we say so cognizant of the high standard of proof for fraud as it is quasi-criminal in character.

How then was the Company to deal with the fraudulent consent orders once they came to its attention? A central plank of the appellants' complaints before us, and captured in ground 6 of the memorandum of appeal, is that the learned Judge lacked jurisdiction to impeach and therefore nullify the court orders said to have been obtained by fraud. It is telling, though, that neither **Mr. Kamweru** nor **Mr. Nganga** and **Mr. Ndegwa** who supported the appeal attempted in their address to us to assail the learned Judge's orders consequent upon finding that fraud had been established a propos the consent orders. Indeed, their respective written submissions are also silent on the subject. And we think there was cause for that coyness.

The jurisdictional competence of the court below to entertain a fresh suit to nullify court orders previously made in other suits on account of fraud had previously been raised in the proceedings leading to this appeal by way of preliminary objection which Juma, J. by a brief ruling made on 28th May 2003 rejected thus;

"At the commencement of the hearing of this suit, counsel for one of the defendants took up a preliminary objection to the effect that this suit is incompetent. If the plaintiff seeks to set aside orders in those earlier cases, then the application should have been brought in those earlier cases, and not to file a new case. The other objection is that the suit is res judicata.

It would appear that counsel did not understand the import of this case. If I got what counsel for the plaintiff was arguing about, it is to the effect that the defendants, purporting to be duly authorized agents of the plaintiff filed suits against other parties. The present suit is by the "legal" plaintiff against those who misused its name. This is a complete new case with a new cause of action and parties are clearly different.

As to whether applications in earlier cases (sic) to set the judgments or rulings aside, the position was well covered by the decision of the Privy Council in HIP FOONG HONG vs. H. NEOTIA AND COMPANY (1918) AC 888 where the Privy Council held that when it is alleged that a judgment has been obtained by fraud an independent action to set aside the judgment is more convenient mode of procedure than a motion for a new trial supported by affidavit."

Kahiga Kamau, one of the respondents herein and a member of the Birgen Group whom we have previously noted as being at the heart of a lot of the judicial skirmishes between the parties, is the one who had raised that preliminary objection and upon its dismissal, he moved to this Court vide **Civil Appeal No. 234 of 2003** aforesaid. This Court, after expressing its opprobrium against fraud when proved to have been used to deceive the court, as an ***"insidious disease***" that ***"spreads and infects the whole body of the judgment",*** dismissed the appeal and authoritatively endorsed the holding of the Privy Council in the above-cited **HIP GOONG HONG** case (supra) quoting with approval the judgment of the Committee as delivered by Lord Buckmaster at P 894;

"A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail; ….where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient."

This Court also referred to and accepted the earlier decision of the Queens Bench Division in ***COLE vs. LANGFORD*** **[1898] 2 QB 36** which, after considering the decisions of Jessel M. R. in ***FLOWER vs. LLOYD*** **6 Ch. D 297** and Lord Justice Baggallay in ***BAKER vs. WADSWORTH*** **[1898] 67 L.J. Q.B 301** held that;

"Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside."

Finally, this Court did also consider and was fully persuaded by yet another English decision, this time of the former House of Lords in ***JONESCO vs. BEARD*** **[1930] AC** which held categorically and in a manner that seemed to put the matter beyond dispute that;

"It is the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action, in which the particulars of the fraud must be exactly given and the allegation must be established by strict proof.

Although there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial, if for any special reason departure from the established practice is permitted; the necessity for stating the particulars of fraud and the burden of proof are in no way abated and all the strict rules of evidence apply."

Given that resounding endorsement of a new trial as the mode for uprooting a judgment obtained by fraud, spoken no less than by this Court itself, we do not see that any arguments to the contrary stood any chance. The appellants knew this well and kept their peace. The decision of this Court was before the learned Judge and it was binding upon him. In proceeding to hear and determine the case he proceeded properly and we, on our part have no difficulty finding and holding that the suit was competent and that fraud having been established, the learned Judge was perfectly entitled to nullify the fraud-tainted consent orders.

The upshot of our consideration of this appeal is that it is wholly devoid of merit. We must say that the manner in which the consent orders were obtained in those previous suits do speak a startling degree of misuse of the judicial process in the pursuit of an insatiable greed and avarice that stops at nothing to achieve its ends, including subverting the legal process. A court of law once informed of such fraud and properly moved by evidence, cannot shirk its responsibility to strike the resultant orders and decrees with infirmity and nullification as did the learned Judge.

The appeal stands dismissed with costs.

Dated and delivered at Nyeri this 22nd day of November, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR