



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM; WAKI, NAMBUYE & KIAGE, J.J.A)

CIVIL APPEAL NO. 40 OF 2013

BETWEEN

MIARAGE CO. LTD.....APPELLANT

AND

MWICHUIRI CO. LTD.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Meru

(Makau, J) dated 26th July, 2012

in

H.C.C.C. NO. 145 OF 1999)

JUDGMENT OF THE COURT

1. On the face of it, the matter before us is a normal dispute between two land buying companies over a land deal gone sour. The companies are **Miarage Company Ltd** (hereinafter ‘Miarage’) and **Mwichuiri Company Ltd** (Mwichuiri). But the factual and legal cobwebs surrounding the matter are galore and not easy to disentangle. Among the cobwebs are:-

- *the very existence of the companies themselves as legal entities for 40 years since the dispute started in 1976 up to date;*
- *the authenticity of the leadership of the companies in their respective Boards of Directors over the period;*
- *the number of registered membership of the companies;*
- *the propriety of appointments of numerous Advocates on record for the companies throughout the litigation period;*
- *the relationship between the companies and **Miarage 1 Self Help Group** registered on 1st October 1999, **Miarage Self Help Company Ltd**, **Mwichuiri One**, **Mwichuiri Two** and **Mwichuiri Three**; and their interplay with land purchases in Naro Moru, Laikipia, Meru and Nyeri;*
- *the relevance of court cases mentioned but not exhibited such as: **HCCC 1168/1972, HCCC***

There is no clarity on those issues from the record before us, but they may well be of little relevance to the appeal. Clarity or no clarity, however, it is the duty of a court of law to unravel seemingly intractable problems in accordance with the law and substantial justice, and we shall therefore do what we can from information made available to us in the appeal record to resolve the issues raised.

2. The appeal arises from the decision of the High Court, (**Makau J.**) made on 26th July 2012, in which the learned Judge dismissed an application made by Miarage on 5th March 2012 seeking to set aside a judgment made in favour of Mwichiri by **Kasanga Mulwa J.** nine years earlier on 22nd May 2003. A short background to the application is pertinent.

3. Before 1976, Miarage owned a parcel of land in Meru District adjoining Nanyuki municipality measuring in excess of 600 Hectares and known as LR No. 9835 (Grant I.R 72276). By an agreement entered into on 15th July 1976, Miarage sold half the land (315 Hectares) to Mwichiri for Shs. 690,000 and the purchase price was paid in full. Miarage proceeded to have the land subdivided into two halves which they registered in their name as LR. 9835/1 and 9835/2, respectively. The intention was to transfer LR 9835/1 to Mwichiri whose members took possession and commenced further subdivision plans. But this was agricultural land and the transaction was subject to the consent of the Land Control Board. However, Miarage did not apply for the consent, insisting that Mwichiri had not paid some outstanding rates and other outgoings on the transaction which they assessed at Sh. 550,000, but which Mwichiri was reluctant to pay as there was no clarity on the demand. The land remained untransferred but Mwichiri and its members continued to occupy it.

4. On 27th October 1999, Mwichiri took out an **Originating Summons** (O/S) in Nairobi HCCC No.2057 of 1999, under **Order 36 Rule 3D** of the **Civil Procedure Rules** for a declaration that they had been in adverse possession of the land, peacefully and without interruption for more than 12 years before the application and had thus extinguished the title of Miarage over it. They sought an order to issue vesting LR 9835/1 in Mwichiri's name.

5. The application was served on Miarage through the Chairlady of the company at the time, **Angela Nyawira Ndiuini** (Angela) and they appointed **M/S Wangondu & Company advocates** to act for them. The company also responded to the O/S on 11 November 1999 when Angela swore a Replying Affidavit confirming that she was the Chairlady of Miarage and admitting the sale of the land to Mwichiri, the willingness of Miarage to transfer the land, and the possession taken by members of Mwichiri pending completion of the sale transaction. She contended, however, that the possession was not adverse as it was pursuant to the sale agreement which Mwichiri had breached by refusing to pay rates and other outgoings. She imputed bad faith and mischief on the part of Mwichiri and reiterated that Miarage would only transfer the land when the outgoings were settled.

6. The file was transferred to the High Court in Meru in December 1999 and given a different number, HCCC 145/99. After several skirmishes relating to the membership and leadership of the companies, the authority to appoint advocates and claims that Miarage had been deregistered in 1995, all of which were resolved, the O/S fell for hearing and determination before Kasanga Mulwa J. on 6th March 2003. The learned Judge confirmed from the record that both firms of advocates on record for the parties had been served with hearing notices. But only Mwichiri's counsel and their one witness in the matter attended court. The O/S was heard and the judgment was delivered on 22nd May 2003. In the judgment, (hereinafter '**the Kasanga Mulwa judgment**') the learned Judge examined and evaluated the affidavit evidence filed on both sides and the oral evidence tendered on behalf of Mwichiri and found that the sale agreement between the parties was null and void for all purposes for want of consent of the Land Control Board; that Mwichiri and its members had been in continuous and uninterrupted possession of the land for over 17 years since 1980; that Mwichiri never acknowledged the title of Miarage over that period; that the possession was adverse to the title of Miarage who despite the knowledge of the open and notorious occupation did nothing about it; and that the title of Miarage had not only been extinguished but Mwichiri had acquired good title and were entitled to registration of the land in their name subject to

payment of rates and other lawful dues to the State. There was no appeal against that judgment.

7. Mwichuri then embarked on the process of executing the decree by demanding production of the original title from Miarage and when it was not forthcoming, they took out contempt proceedings against Angela as the Chairlady. She was summoned and cross examined on the whereabouts of the Title and she said she used to have it as a Director of Miarage but was no longer a Director. As far as she knew, it was taken by a group known as **Miarage Self Help Group** which paid the outstanding debt. The Chairman of that group was **Jackson Kiraithe** (now representing the appellant before us), she said. Miarage itself, she further said, had ceased to exist after subdividing its land to its members. That was on 7th November 2003. The bill of costs was taxed in the presence of counsel for both companies on 11th December 2003 and on 24th September 2004 Mwichuri filed an application seeking a vesting order, an order for Miarage to execute the conveyance and in default the Deputy Registrar of the Court to do so, and an order for the original Title to be produced failing which the conveyance be registered without it. **Onyancha J.** heard that application and granted it on 9th February 2005. The documents were subsequently executed and the transfer in favour of Mwichuri was registered on 16th December 2008. Thereafter, the Title was changed to **The Registered Land Act (RLA)** and members of Mwichuri continued to be issued with RLA titles.

8. On 23rd June 2010 , both **Jackson Kiraithe** who claimed to be the chairman of Miarage and his father, **M’Mutea M’Ibutu** who claimed to be the chairman of Mwichuri, instructed new Advocates to act for the respective parties. This they did without the knowledge of the advocates on record. The new advocates then filed a consent setting aside the Kasanga Mulwa Judgment. They also agreed to have the suit heard afresh and filed another consent for the Title of the land to revert to Miarage. The advocates on record immediately protested and filed an application for setting aside the purported consents which application was heard by **Kasango J.** on 30th June 2011. In her ruling, Kasango J. found the consents were unlawful and suspected fraud since the new advocates never attended court to justify their appointment or actions despite service of hearing notices. She set aside the consents and restored the Kasanga Mulwa Judgment as well as all consequential actions taken pursuant thereto. The new advocates were ordered to pay the costs of the application personally.

9. Jackson Kiraithe (hereinafter ‘**Kiraithe**’) returned to court four months later on 17th October 2011 and sought an order allowing Miarage to act in person through him and Makau J. allowed him to do so. That is when he filed the application for setting aside the Kasanga Mulwa Judgment on 5th March 2012, which matter we now revert to.

10. The motion that fell for consideration before Makau J. invoked **Order 10 rule 11 of the Civil Procedure Rules, 2010(CPR)** (previously **Order IXA Rule 10**) and sought two substantive orders as follows:

a)-----

“b) That the Honourable Court be pleased to set aside the ex-parte judgment entered herein on 22.5.03 and the decree made on 27.5.05.

c)-----

d) The plaintiff’s(sic) respondent by themselves, their members or agent(sic) be restrained by an injunction from using their fraudulently acquired titles for TIMAU/TIMAU BLOCK 3 to do any development, transaction on the former Miarage property LR 9835/1 until this case is heard and determined in(sic) merit and the order to be served to O.C.S. Timau Police Station and the Ontulili chief and the land registrar Imenti North District for execution.”

11. In the affidavit in support of the motion sworn on 5th March 2012, Kiraithe swore that he was ‘the director and chairman’ of Miarage. He further swore that Miarage never knew anything about the case until 11th March 2010 when a letter was written to him by the Permanent Secretary, Ministry of Lands (PS) responding to his complaint that Miarage land was irregularly transferred to Mwichuri. The PS

explained in the letter that the transfer was regular since the Land Registry had merely complied with court orders. It was upon retrieving the court records, that Kiraithe discovered that they were obtained by people who were not directors of Mwichuiri but he never managed to reverse the process despite complaining to the Land Registrar and the Anti-corruption Commission. According to him, Miarage had been struck off the Companies' register vide Gazette notice No. 7464 of 1st December 1995 and the striking off was only reversed vide Gazette notice No. 3478 of 3rd April 2009- that is, about 14 years later. For those reasons, he asserted, Miarage was not in existence and was never served with any court process and therefore the Kasanga Mulwa judgment was not only *ex parte* but also irregular and so amenable to setting aside.

12. The response by Mwichuiri, through its Chairman, Jacob Matumbi Mberia (**Jacob**), was fast and firm that Kiraithe was neither a director nor the chairman of Miarage since the Chairlady was Angela Nyawira Ndiuini (**Angela**). Jacob asserted that Kiraithe was indeed a member of Mwichuiri as was his father, Mutea M'Ibutu, with whom they fraudulently and secretly attempted to reverse the Kasanga Mulwa judgment but were stopped by Kasango J. The Originating Summons decided by Kasanga Mulwa J. was duly served on Angela who was at the time the Chairlady of Miarage and the company responded through Advocates lawfully appointed by it. He further asserted that the hearing notice for the O/S was also properly served on the advocates on record and therefore the Kasanga Mulwa judgment was regular and was duly executed without any lawful attempt made to stop Mwichuiri or any of its members since 2003. After execution, there was nothing to set aside since the land ceased to exist and different titles were issued to numerous persons who were not parties to the suit. He denied any fraud or other wrong doing by Mwichuiri.

13. Makau J. appreciated that the application before him called for the judicious exercise of his wide discretion. He considered whether the judgment was regularly entered; whether there was a valid defence which was not a sham; whether the judgment caused any prejudice; and whether there was any explanation for delay. In his view, the discretion was exercisable to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the cause of justice. The learned Judge then examined the affidavit evidence on record and considered the submissions of the parties and found as a fact that the summons to enter appearance in respect of the O/S was duly served on Miarage on 29th October 1999 and the company instructed Advocates who filed grounds of opposition; that Miarage thereafter instructed various other advocates to pursue the matter; that when the matter came up for hearing before Kasanga Mulwa J. on 6th March 2003, a notice was duly served on counsel on record for Miarage; that the Kasanga Mulwa judgment was regular; that the affidavit in support of the motion did not disclose the nature of the defence, if any, and therefore there was no valid defence, or a defence which was not a sham, on record; that the subject matter of the O/S no longer existed as it was transferred to persons who were not parties to the suit and had not been given an opportunity to be heard; and that the explanation for delay that the company had been deregistered in 1995 was of no moment because appearance was entered and legal counsel appointed by the company but there was no explanation tendered for failure to attend the hearing. Those findings provoked this appeal.

14. Kiraithe raised four issues in his memorandum of appeal which may be summarized:

That the learned Judge erred in law in:

- ***failing to set aside the ex parte judgment when there was a good reason to do so.***
- ***not finding that the appellant had a good defence which raised triable issues.***
- ***denying thousands of Miarage members of part of their land.***
- ***deciding the case against the weight of evidence.***

In his written and oral submissions, Kiraithe departed from his earlier contention that Miarage was not served with summons to enter appearance and instead asserted that Angela, who was served, was not a director of the company at the time and she was being dragged into issues she did not know. He further asserted that Miarage was not in existence after being deregistered in 1995; that he made an application and obtained a consent order for setting aside which was subsequently revoked by Kasango J. for

reasons he did not understand; that Makau J. misunderstood the motion as seeking to set aside the judgment for want of service of summons to enter appearance when, according to him, the basis for setting aside was lack of service of hearing notice when the suit was heard and determined before Kasanga Mulwa J.; that the suit involves land belonging to hundreds of poor peasants who would suffer substantial loss; that although he did not annex any defence to the motion, he would argue that Miarage did not sell a portion of its land and should be given an opportunity to put forward the defence; and that the decision was against the weight of his affidavit evidence. He finally cast aspersions on learned counsel for Mwichuri, **Mr. Mburugu Kioga**, contending that he was not validly appointed to act for the company and should not address the Court.

15. On his part, Mr. Kioga complained that Kiraithe was a busybody in this matter and was only using a fake resolution of a purported Board meeting of Miarage authorizing him to represent the company. He reiterated the replying affidavit of Jacob stating that Kiraithe was indeed a member of Mwichuri and had been allocated various parcels of land by that company. In passing, we observe that the issue of representation of Miarage by Kiraithe was discussed and determined in his favour in an interlocutory application in this appeal on 22nd May 2014 and we need not revisit it. Nor do we question the propriety of appointment of Mr. Kioga to appear for Mwichuri, since he filed a Board resolution to confirm the appointment. As regards the appeal, Mr. Kioga submitted that it was not contestable that the summons to enter appearance in the O/S was served on Angela and there was no protestation that she was not a director or chairlady of Miarage at the time. On the contrary, the company appointed counsel, entered appearance, filed grounds of opposition and changed counsel on various occasions thereafter. It cannot also be contested, urged counsel, that the hearing notice was served since the trial court was satisfied on affidavit evidence that indeed there was service but no explanation for the absence. As for the contention that Miarage had been struck out, Mr. Kioga submitted that the submission was self-defeating. For, if it were so, there was no application made before any court within 10 years of striking out as required under **Section 339** of the **Companies' Act**, Cap 486 Laws of Kenya which was operative at the time. In that event, Kiraithe would lack *locus standi* to pursue the matter and there would be no prejudice in rejecting this appeal.

16. We have anxiously but carefully considered the appeal and the submissions made before us. In the end, we have come to the conclusion that the appeal ought to fail. We are conscious that this is a first appeal which questions the exercise of the discretion of a trial court. Other than examining the entire record and affidavit evidence to form our own independent impressions thereon, we must bear in mind the timely caution which this Court has always flagged out and which we take from the case of ***Mbogo & Another Vs Shah (1968) EA 93 at page 95, per Sir Charles Newbold P.:-***

“...a Court of Appeal should not interfere with the exercise of the discretion of a single 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....”

17. We observed at the opening paragraph of this judgment that the record before us is deficient in supplying crucial information that would have assisted the courts to take a balanced view of the dispute between the parties. The onus for supplying such information lay on the appellant and it is not clear whether the omission to supply it was by design, lack of candour or accident. Either way, it would be against equitable principles to allow the applicant to take advantage of his own omission by granting favourable orders. Take, for example, the vexing issue of the authenticity of the Directors of the respective companies. Why was it difficult to obtain records from the Company registry to show, prima facie, the rightful directors as at the time the Originating Summons was filed? That would have easily resolved the contention put forth by the appellant that Angela was not the Chairlady of Miarage at the time. Or take the other vexing issue of the existence or otherwise of Miarage at the time of filing the O/S and the reinstatement of Miarage 14 years later. Other than annexing copies of two gazette notices, there was nothing to show the reasons for such gazettelements.

18. The first gazette notice dated 1st December 1995, No 7464 invoked **Section 339** of the **Companies**

Act (now repealed) (**the Act**) which empowered the registrar to send two letters, one ordinary and one registered, within a space of 60 days, to a company enquiring whether it was “carrying on business or in operation”. If there was no response, the registrar would then publish a gazette notice under **Subsection (5)** which was invoked and states thus:

“At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, ... strike the name of the company off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved:

Provided that-

(i) the liability, if any, of every director, officer and member of the company shall continue and may be enforced as if the company had not been dissolved;

(ii) nothing in this subsection shall affect the power of the court to wind up a company the name of which has been struck off the register.”

19. There is nothing on record to show compliance with that Section before publication of the gazette notice. Were there any letters sent to Miarage? Were they received and ignored or responded to? To the contrary, the record before us shows that Miarage was still an operational land buying company which was busy distributing land to its members and fighting off Mwichuiru which had made an agreement with it to buy a portion of the land. Even after the suit was filed, Miarage was busy in court instructing lawyers, filing and defending applications and obtaining court orders for and against it well into the year 2005. The appellant does not question these actions of Miarage but instead takes cover in the gazette notice which he annexed with his motion dated 5th March 2012. He also annexed a gazette notice dated 3rd April 2009 which simply stated:

“In gazette notice No. 7464 of 1995 delete “11046 Miarage Company Ltd.”

20. Under the Act, a company which is struck off under **Sub section (5)** can only be reinstated by the court under **subsection (6)** which states:

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

21. There seems to be nothing on record to show the intervention of the court within the time allowed under the law. If the section was properly invoked and the striking out reversed, then it would follow, in our view, that the *status quo ante* was resumed and the validity of all actions by or proceedings in favour of or against the company were validated as if the first notice was never published. If, on the other hand, there was no reinstatement within 10 years as required under **Sub section (6)**, it would mean that the property of Miarage was rendered *bona vacantia* and was amenable to further proceedings under **Section 340** of the Act. Once again, the appellant has done nothing to clear the air in relation to the gazette notices and, in our view, neither he nor the company ought to derive any benefit from them.

22. The trial court, and indeed this Court, was entitled to rely on the material placed before it for the exercise of its discretion. Where no material is made available, there is no basis for exercise of discretion. Court discretion cannot be exercised on the basis of pity, whim or caprice. **Order 10 Rule 11** of the CPR

upon which the motion was predicated provides:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and consequential decree or order upon such terms as are just.”

The entire Order covers ***“Consequence of non appearance, default of defence and failure to serve”***. It was therefore erroneous for the appellant to advance the criticism that Makau J. misunderstood the import of the motion. The learned Judge considered both the issue of appearance and defence and found that Miirage had entered appearance and responded to the O/S. He also examined the issue of service of hearing notice when the suit was heard, and found it was. He stated thus:

“I do not agree with the applicant's assertion that they were not served with summons to enter appearance as the court record indicates otherwise. Furthermore when the case came up for hearing before the trial Judge, the court was satisfied the applicant's advocates were served with hearing notices and were absent.”

On that basis, the court found, and we agree, that the Kasanga Mulwa judgment was a regular judgment.

23. In our considered view, the learned judge, in reaching that decision, took the approach approved by this Court in considering applications for setting aside, as summarized in the case of ***Bouchard International (Services) Ltd vs. M'Mwereria [1987] KLR 193 per Platt, JA, thus:***

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. ..It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction”.

24. It was admitted by the appellant that there was no draft defence annexed to his application but he said he would have contested the sale of Miirage land to Mwichuri. That is the same sale which was plainly admitted by Miirage through Angela and which Kasanga Mulwa J. found was of no legal effect. Once again, it would have been an idle piece of defence even if it was allowed in, and Makau J. was right in stating that there was no defence. The most disturbing aspect which the learned judge considered, and which has also exercised our minds, is the delay caused in this matter since the dispute arose in the 1970s

leading to the filing of the O/S in 1999 with the consequence that numerous other persons have acquired registered interests in the disputed land over the period but have not been enjoined in the suit or given an opportunity to be heard. On a balance, the undoing of the 13 year-old Kasanga Mulwa judgment would cause more harm than the retaining of it and ending this litigation. All indications are that Miarage intended to sell a portion of its land but if there were individuals who caused any monetary loss to the company, this can still be pursued. There would thus be little if any prejudice.

25. For those reasons, we think the appeal is for dismissal and we so order. As the two land buying companies appear to be in a state of flux without clear and verifiable records, we order that each party bears its own costs of the litigation, both here and in the court below.

Dated and delivered at Meru this 19th day of October, 2016

P. N. WAKI

.....

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