IN THE COURT OF APPEAL
AT KISUMU

(CORAM: OMOLO, TUNOI & AGANYANYA, JJ.A)

CIVIL APPEAL NO. 261 OF 2008

BETWEEN

NAGENDRA SAXENA ……..……...……. APPELLANT

AND

MIWANI SUGAR MILLS LIMITED ……...…… 1ST RESPONDENT

MIWANI SUGAR COMPANY (1989) LIMITED (IN RECEIVERSHIP) ……..……..... 2ND RESPONDENT

JOHN G. KIMANI t/a JOGI AUCTIONEERS …...… 3RD RESPONDENT

CROSSLEY HOLDINGS LIMITED ……..…….. 4TH RESPONDENT

(An appeal against the ruling and order of the High Court of Kenya at Kisumu (Mwera, J) dated 13th June, 2008

In

H.C.C.C. No. 225 of 1993)

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JUDGMENT OF THE COURT

By a plaint dated and purportedly lodged in the High Court at Kisumu on the 28th June, 1993, Nagendra Sexena, the appellant herein, claimed from Miwani Sugar Mills Ltd., the 1st respondent herein, a total of United States Dollars 400,000 on the foot of an alleged agreement between them. We say the plaint was *"purportedly"* lodged because as it turned out the issue of whether the plaint had been properly lodged arose before Mwera, J whose ruling and orders is the subject of the appeal before us. Mwera, J appears to have found and held in his ruling given on the 13th day of June, 2008 some fifteen years after the suit was filed that there was no evidence before him that the appellant had paid the requisite court fee payable on the plaint. The plaint was filed on behalf of the appellant by his then advocates, M/s Naphtally J.B. Hawala. Upon its filing a summons was issued on the very same day for service upon the respondents. There was no dispute before Mwera, J that the summons was never served upon the 1st respondent. It appears that Mr. J.B. Hawala, who was acting for the appellant died. The date of his death is unavailable from the record. Matters then rested there until the 28th May, 2007, some fourteen years from the time the suit was instituted when Mr. Ian Gakoi Maina of M/s Gakoi Maina & Company Advocates, filed a notice of change of advocates. By his letter dated Wednesday 23rd May, 2007 and received at Kisumu on 24th May, 2007, Gakoi Maina told the Deputy Registrar.

"***We herewith make a formal application for extension of validity of the summons in this matter. We undertake to pay your charges. Your co-operation shall be very highly appreciated."***

The application mentioned in the letter was brought pursuant to ***Order V Rule 1 (2)***, ***Order XLIX Rule 5*** of the then Civil Procedure Rules and ***section 3A*** of the Civil Procedure Act. The application, by way of a summons in chambers asked for an order that:-

"The Honourable Court be pleased to extend the time for re-issue of the summons in this matter and the time thereof be enlarged."

The grounds stated on the face of the summons were three, namely:-

"1. THAT the advocate for the plaintiff did not serve the plaint and the summons on the Defendant Company.

2. THAT the advocate for the Plaintiff, Naphtally, J. Hawala, passed away, a fact that the Plaintiff only recently ascertained.

3. THAT in the circumstances it is possible to serve the Defendant with fresh summons and it shall be appropriate in the prevailing circumstances."

The summons was supported by the affidavit of Mr. Gakoi as follows:-

"2. THAT I was instructed by the Plaintiff on 4th May, 2007 to go on record for him in place of Naphtally, J Hawala.

3. THAT upon perusal of the court file I discovered that there was no service upon the Defendant and the summons have (sic) now expired.

4. THAT the Plaintiff in this matter currently resides in Mumbai – India and had relocated along with his whole family in the year 1995 after his business collapsed due to the acts and omissions of the Defendant herein the subject of the claim against the Defendant.

5. THAT the Plaintiff all along knew that his advocate was pursuing the conduct of this suit when he was in India until he later discovered that his advocate died.

6. THAT it is only fair and just that fresh summons be issued against the defendant in order for the Plaintiff to continue their long standing matter.

7. THAT the suit against the Defendant has a high probability of success."

The summons was apparently to be heard before the Deputy Registrar and despite the long passage of time was not to be served on anybody. Of course, under ***Order 5 Rule 5*** of the Civil Procedure Rules, the court may extend the validity of a summons in the absence even of the plaintiff but the appellant was not merely asking for the extension of the validity of the summons; he was also asking for extension of time within which to apply for the extension of the validity of the summons. ***Rule 7*** of ***Order 5*** **(1)** provides:-

"Where no application [for extending the validity of a summons] has been made under sub-rule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons."

As we have seen, the original summons in the suit was issued on 28th June, 1993 when the suit was lodged and the twenty-four months within which the court could have extended its validity ran out on or about 27th June, 1995. Applications for extension of time are provided for under ***Order 49 Rule 5*** which the appellant specifically cited in his chamber summons lodged on 28th May, 2007 seeking to extend the

validity of the summons first issued on 28th June, 1993. An application under ***Order 49 Rule 5*** cannot be heard ex parte and is not one of the applications which can be heard by a Deputy Registrar exercising powers conferred by ***Order 48***.

Be that as it may, the appellant's summons for extending time to reissue the summons and to extend the time for its validity came before Mr. Abdul El – Kindy who was a Principal Magistrate and a Deputy Registrar. Mr. Gakoi Maina appeared before him all by himself and told the Deputy Registrar:-

"Application is dated 28/5/2007 . We are seeking the court to extend time for issue of summons. The Party's advocate on record did not serve the summons and has since passed away. It is supported by an affidavit by myself and opponent (sic). Plaintiff left the country after business collapsed. All along he thought it was having (sic) pursued his advocate. He thus came to me and I found out there was nothing done. I, therefore, pray this be allowed.

ABDUL EL-KINDY/PM.

COURT: Allowed the summons to issue and to be served within 2 weeks."

This was on the 29th May, 2007 and incidentally that was the very first day the suit which had been filed on 28th June, 1993 was being dealt with by a judicial officer. Thereafter matters moved at a rather hectic pace. Fresh summons was issued on 30th May, 2007. By an affidavit of service lodged in the court on 7th June, 2007, one Harun Odhiambo Okello, who swore he was a High Court Process-Server licensed to serve civil processes stated he visited the premises of Miwani Sugar Mills Ltd., in a bid to serve the summons but his visit was in vain as he was informed that the person in charge and who was the only one authorized to deal with court matters was away until 4th June, 2007. He returned to the same premises on 4th June 2007 at 2.30 p.m. but found that the authorized person was still away. So on the same day after receiving instructions from the appellant's advocates he enclosed the documents in an A5 envelope which he then served by registered mail at Miwani Post Office. The same day at about 5.15 p.m. he also sent via M/s G4S the said documents. Okello attached a receipt from G4S Courier Services and a certificate of posting. On 20th June, 2007, the advocates for the appellant applied to the Deputy Registrar for an ex parte judgment on the basis that Miwani Sugar Mills Ltd. had failed to file a defence within the prescribed time. The request for judgment was for the sum claimed in the plaint of US $400,000/- together with costs and interest at 20% per annum as prayed in the plaint. On the very same day, Mr. El-Kindy entered judgment for the appellant. The appellant's bill of costs was filed on 21st June, 2007 with a request that the case be mentioned on 28th June, 2007. The bill was for a total of Kshs.542,182/- ,but did not show that it was to be served on anyone. Once again, Harun Odhiambo Okello swore that upon receipt of the bill of costs, he again sent it by registered post and by the same courier service provider to the 1st respondent. He did so on 22nd June, 2007. The record next shows that on 29th June, 2007, two advocates were before Mr. EL-Kindy. One Ayodo, was for Mr. Gakoi while the other one Maina was for the plaintiff. Mr. Ayodo told the Deputy Registrar:-

"Bill is dated 21/6/2007. The same has been drawn to scale and we pray that it be taxed as drawn.

COURT: Bill taxed at K.Shs.542,182/-

ABDUL EL-KINDY/PM."

A decree was thereafter drawn and issued on 2nd July, 2007. On 3rd July, 2007 , a notice of motion, under a certificate of urgency, was lodged by the appellant under ***section 3A*** of the Civil Procedure Act and under ***Order 21 Rule 49*** of the Civil Procedure Rules. The motion requested that it be heard ex parte in the first instance. The substantive orders sought were:-

"2 . That pending the hearing and determination of this application there be an order prohibiting the judgment – debtor from transferring or charging land parcel Nos. I.R 21038 and I.R. 21039 either by

themselves, their agents and in any way from dealing in, advertising, selling by auction or otherwise and any person from taking any benefit from such purported transfer or charge.

3. That there be an order prohibiting the judgment debtor from transferring or charging land parcel Nos. IR 21039 and I.R. 21038 either by themselves, their agents and in any way from dealing in advertising, selling by auction or otherwise, and any person from taking any benefit from such purported transfer or charge.

4. That the said properties be sold in settlement of the decree herein.

5. ----------.”

The application was made upon four grounds, namely:-
“(i) That decree was issued in favour of the decree-holder/applicant herein which decree is still effectual.

(ii) That the judgment debtor herein has not settled the said decree.

(iii) That the judgment debtor intends to dispose of its properties in a manner intended to defeat the decree-holder’s right to enjoy the fruits of the said judgment.

(iv) That apart from the said properties the judgment debtor’s assets which may satisfy the said decree are unknown.”

This time round the motion was supported by the affidavit of the appellant in which he averred that he filed the case in 1993, that on 20th June, 2007 he obtained judgment, that the said judgment had not been satisfied and that unless the 1st respondent was restrained from disposing of its assets, the 1st respondent would proceed to do so to third parties in ignorance of the obligations owed to him in which event he stood to lose the benefit of his decree and would suffer irreparable loss as he did not know any other assets owned by the 1st respondent. As in the previous applications, the appellant did not indicate if his motion was to be served on anyone and if so who was to be served. The motion came before Mwera, J on 4th July, 2007 when Mr. Menezes represented Mr. Gakoi Maina. The 1st respondent was not represented but even then the learned Judge asked Mr. Menezes if there was any evidence showing an intention to dispose of the two pieces of land. Mr. Menezes conceded there was no such evidence but asked for leave to file a further affidavit containing such evidence. The Judge ordered that the matter be mentioned on 11th July, 2007 and that the appellant was at liberty to file and serve a further affidavit. On 11th July, 2007, Mr. El-Kindy ordered that the matter be mentioned on 12th July, 2007 for direction.
On 12th July, 2007 the matter was placed before Mugo, J. Mr. Menezes told the Judge that they had filed and served a further affidavit and he asked that they be heard. There was no one present on behalf of the 1st respondent. Mugo, J adjourned the matter to 10.42 a.m. when Mr. Menezes reappeared; there was still no appearance for the 1st respondent, and once again it was adjourned to 12.00 noon. When that time arrived there was still no appearance for the 1st respondent and the learned Judge heard Mr. Menezes, certified the matter urgent but reserved her ruling on the other issues, i.e. whether to issue the prohibitory orders which had been sought in the motion. The ruling was reserved to 4th October, 2007, but the Judge granted interim orders until the date of her ruling. On 4th October, 2007, the learned Judge dismissed the motion with costs. The effect of that order was that the prohibitory orders sought by the appellant were rejected.

It would appear that after the orders of Mugo, J. the appellant nevertheless proceeded to levy execution. This is evident from the fact that on 6th November, 2007, Mr. David Otieno, Advocate of M/s Otieno, Ragot and Company Advocates, wrote to the Deputy Registrar saying they had been instructed by an interested party to verify the position in the matter. The advocates asked to be supplied with copies of the pleadings and other documents filed to enable them take instructions. On 12th November, 2007 the

said advocates filed a memorandum of appearance on behalf of the 1st respondent and on 10th December, 2007 they filed a summons in chambers, under a certificate of urgency, praying for various orders. The summons was filed under ***Order 9A Rule 10*** of Civil Procedure Rules and under ***section 3A*** of the Civil Procedure Act. The prayers sought in the summons were:-

"1. ---------- (certifying the application urgent).

2. The default judgment entered herein against the Defendant be set aside.

3. Leave be granted to the Defendant to defend this suit and the annexed draft defence be deemed duly filed subject only to the payment of filing fees.

4. The process of execution commenced by the Plaintiff against the Defendant be set aside unconditionally.

5. Costs of this application be provided for."

The grounds cited in support of these prayers were:-

"1. The Defendant, though wrongly named, was not served with summons to enter appearance.

2. The Defendant has a good defence to this suit.

3. The process of execution commenced against the Defendant is skewed both as a matter of procedure and as a matter of substance.

4. It is in the interest of justice that this application be allowed."

The summons was supported by the affidavit of one Joseph Odidi who described himself as the General Manager of Miwani Sugar Company (1989) Ltd. and that that company had been served with various documents by M/s Jogi Auctioneers but wrongly described in the suit as Miwani Sugar Mills Ltd. The salient points in Odidi's affidavit were that Miwani Sugar Company (1989) Ltd. who was the applicant in receivership; it appears that at some stage, the 1st respondent Miwani Sugar Mills Ltd had been wholly taken over by Miwani Sugar Company (1989) Ltd. which appears to have been some kind of a state corporation formed to take over the affairs of the 1st respondent and run the 1st respondent's affairs for the benefit of the public. The Kenya Government was apparently a share-holder in the 1st respondent. Odidi swore that on 2nd November, 2007 Miwani Sugar Company (1989) Ltd. had been served with a 45-day redemption notice issued by Jogi Auctioneers and a notification of sale issued by the High Court demanding payment of K.Shs.28,542,182/- failing which its property known as I.R. No. 21038 (L.R. 7545/3) would be sold to recover the decretal sum. It was then that Mr. David Otieno, Advocate, was instructed to find out what the claim was all about and Mr. Otieno discovered the filing of the suit in 1993 the reissue of summons in 2007 and matters along those lines, i.e. the history of the litigation. The affidavit then ran on:-

"7 THAT I am informed by the Applicant's advocates on record which information I verily believe to be true that the Respondent subsequently obtained a notification of sale for the two properties aforementioned without an application for that purpose.

8. THAT I am informed by the Applicant's advocates on record which information I verily believe to be true that the purported attachment of the Applicant's properties in execution of the decree is highly irregular.

9. THAT the Applicant has never been served with summons to enter appearance in this suit.

10. THAT I am informed by the Applicant's advocates on record which information I verily believe to

be true that by the time the Respondent was making the application for extension of time to reissue summons, the subject summons had long expired and there was nothing capable of being reissued.

11. THAT I am informed by the Applicant's advocates on record which information I verily believe to be true that the Deputy Registrar had no jurisdiction to hear and determine the chamber summons dated 28.5.2007 and the orders made on 29/5/2007 were therefore null and void as were all subsequent proceedings based on such order.

12. THAT the decree issued on 2.7.2007 against the Applicant is for US $400,000/- (K.Shs.28,542,182.00) with interest at 20% p. 9 from December, 1987 until payment in full which to date amounts to a staggering K.Shs.114,168,728/- or thereabouts. If the judgment is allowed to stand, the Defendant will suffer grave prejudice, disruption in its business and damage."

We must at this stage point out that the alleged agreement between the appellant and the 1st respondent was entered into in 1987. The suit itself was filed in 1993 but after its filing the suit remained dormant until 2007 when the appellant revived it. Apparently interest at the rate of 20% per annum was being claimed even over the period when the case remained dormant and had not even been served on anyone. The appellant was clearly to blame for the dormancy of the case and yet he was being allowed interest even for the period during which he was at fault.!!

Again on 3rd July, 2007 the appellant had made an application seeking orders to attach, and sell the 1st respondent's lands, i.e. I.R. Nos. 21038 and 21039, and according to the affidavit of Joseph Odidi, that application was dismissed on 4th October, 2007.

The process of sale of the lands, however, continued apace and on 19th October, 2007, the Deputy Registrar issued a notification of sale. On 22nd October, 2007 M/s Jogi Auctioneers, the 3rd respondent issued their 45-day redemption notice which was addressed to the Company Secretary, Miwani Sugar Mills Ltd. It is not clear if the appellant and his legal advisors were ever aware of the existence of Miwani Sugar Company (1989) Ltd. Miwani Sugar Company (1989) Ltd. is now the 2nd respondent and it was the 2nd respondent who instructed Mr. David Otieno, Advocate, after service of the redemption notice. Both the 2nd and 3rd respondents were thereafter brought on record as parties.

The sale of the lands took place on 24th December, 2007 and the lands were sold to Crossley Holdings Limited; they are now the 4th respondent. On the very day of the sale, i.e. 24th December, 2007 the appellant filed a chamber summons under ***section 65*** of the Registration of Titles Act (Cap 281 Laws of Kenya) and under Order 21 Rules 72, 81, 83, 84 & 85 Civil Procedure Rules and also under Order 48 Rule 5 of the same Rules. The prayers made in the summons were many:-

"1. THAT the sale of Land Parcel Number LR 7545/3 by public auction held on 24/12/2007 by M/s Jogi Auctioneers be confirmed and the same be made absolute in favour of the purchaser M/s CROSSLEY HOLDINGS LIMITED absolutely and free from any encumbrances.

2. THAT the property obtaining in Land Parcel Number LR. 7545/3 (I.R. 21038) be vested in the name of the purchaser M/s CROSSLEY HOLDINGS LIMITED free from any encumbrances.

3. THAT any restrictions, charges, encumbrances and inhibitions obtaining in Land Parcel number LR 7545/3 (I.R 21038) be discharged absolutely and the same be registered in the name of the purchaser M/s CROSSLEY HOLDINGS LTD absolutely and free from any encumbrances.

4. THAT the Registrar of Titles do transfer the title pertaining to Land Parcel Number LR 7545/3 (IR 21038) into the name of M/S CROSSLEY HOLDINGS LIMITED which is the bona fide purchaser by way of public auction.

5. THAT the physical possession of Land Parcel Number L.R. 7545/3 (I.R 21038) do immediately vest

upon M/S CORSSLEY HOLDINGS LIMTIED the bona fide purchaser by way of public auction.

6. THAT the Registrar of Title do issue a fresh title in respect to land parcel number LR 7545/3 (IR 21038) and thereupon transfer the said parcel of land unto M/S CROSSLEY HOLDINGS LIMITED the bona fide purchaser by way of a public auction without the need for Gazettement.

7. THAT all costs pertaining to be borne by the applicant.

8. THAT costs of this application be provided for."

It is pertinent to set out the grounds stated on the face of the summons:-
"THAT a decree dated 2nd July, 2007 was issued herein in favour of the plaintiff/applicant and against the defendant.

THAT land parcel number L.R. 7545/3 (IR 21038) was sold by way of public auction to M/S CROSSLEY HOLDINGS LIMITED in execution of the said decree by M/s Jogi Auctioneers on the 24th December, 2007.

THAT the purchaser M/s CROSSLEY HOLDINGS LIMITED has complied with all the terms and conditions of the auction sale and has paid the purchase price arising from the said auction sale to the auctioneer.

THAT no application seeking to set aside the auction sale aforesaid has been fled by any person or entity.

THAT it is therefore in the interest of justice and equity that the orders sought herein be granted."

The application was supported by the affidavit of one John Kimani who was the proprietor of Jogi Auctioneers. He swore that pursuant to the decree of 2nd July, 2007, warrants of execution were issued to him and that his firm had held a public auction at which M/s Crossley Holdings Ltd. were the highest bidders at K.Shs.752,000,000/- and that the instructing advocates M/s Gakoi Maina & Co. Advocates had confirmed to him the satisfaction of the purchase price. The Deputy Registrar was therefore asked to confirm the sale of the land and to vest the land in M/s Crossley Holdings Ltd. A certificate of sale dated 24th December, 2007 was annexed to the affidavit. On the very same day, 24th December, 2007, the Deputy Registrar granted all the orders asked for in the appellant's chamber summons . A penal notice was appended to the Deputy Registrar's order. The notice ran thus:-

"TO
THE LAND REGISTRAR,
ARDHI HOUSE,
NAIROBI.

PENAL NOTICE:

This is a valid court order which must be obeyed. Any party or person served herewith and who is in breach of the same shall be liable to be arrested and jailed for a period not exceeding six months and/or have his property attached and sold for contempt of court.

SIGNED
DEPUTY REGISTRAR,
HIGH COURT OF KENYA – KISUMU."

Attachment and sale of immovable property were, at the time the disputed sale took place, provided for under **Order 21**. **Rule 72** provides that sale of immovable property in execution of decrees may be ordered by the court. If such an order has been made and a sale has taken place, then under ***Rule 78 (1)*** the owner of the property sold may apply to have the sale set aside and if he makes such an application he

must deposit in court –

(a)for payment to the purchaser, a sum equal to ten percent (10%) of the purchase money, and

(b) for payment to the decree-holder, the amount specified in the public notification of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such public notification of sale have been received by the decree-holder.

Under ***Rule 79*** the decree-holder can also apply to have the sale set aside on the ground of a material irregularity or fraud in publishing or conducting that sale. Under ***Rule 80***, the purchaser may also ask the court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property. Rule 81 then provides that where no application is made under ***Rules 78, 79*** or ***80***, or where such an application is made and disallowed,

"---the court shall make an order confirming the sale and thereupon the sale shall become absolute in so far as the interest of the judgment – debtor in the property sold is concerned."

Rule 81 (2) provides:-

"Where such an application is made and allowed and where, in the case of an application under rule 78, the deposit required by that rule has been made within 30 days from the date of sale, the court shall make an order setting aside the sale.

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby."

Rule 83 then provides that:-

"Where a sale of immovable property has become absolute, the court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser, and such certificate shall bear the date of the day on which the sale became absolute."

It is clear from these provisions that after a sale of immovable property has taken place the parties involved must be given a reasonable opportunity to apply to the court for the sale to be set aside. Under ***Rule 78*** the 1st or the 2nd respondents or both of them were entitled to be given an opportunity to challenge the sale and if they met the conditions set out in the rule, it is just possible that the sale could have been set aside. We note that had an opportunity been given to them to challenge the sale, they would have been entitled to a period of thirty (30) days within which to make the deposit of money required in court. Then the sale could only be confirmed and made absolute where no applications were made under ***Rules 78, 79*** and ***80***, or where such an application had been made and disallowed. In the circumstances obtaining in the appeal before us, no such application could have been made because the appellant applied for and obtained confirmation of the sale and a certificate of sale on the very same day the sale took place.

Following the sale, various applications were made, among them the 1st respondent's application to set aside the ex parte judgment and be granted leave to defend the claim. These pending applications eventually came before Mwera, J on 7th May, 2008 when Mr. Nowrojee, M/s Gadhia and Mr. Gakoi appeared on behalf of the appellant and Mr. Ragot and Mr. David Otieno appeared for the 1st & 2nd respondents. The Judge's attention was drawn to the three pending applications, namely:-

Mr. Otieno's application dated 27th March, 2008; the appellant's review application by way of notice of motion dated 23rd April, 2008 and the 1st and 2nd respondent's notice of motion dated 22nd April, 2008.

All these applications were apparently listed for hearing before the Judge on the same day. After listening to counsel on various suggested modes of dealing with the applications, the Judge directed:-

"(I) Notice of motion dated 27/3/2008: Mr. Otieno to file and serve a supplementary affidavit in 7 days while Mr. Nowrojee for the Plaintiff has 14 days. Thereafter the application be listed for hearing in 14 days.

(II) Notice of Motion dated 23/4/2008 (Review): to be listed for hearing before Karanja,Jj in June 2008 when His Lordship is doing civil work.

(III) Notice of motion dated 22/4/2008: to be heard today."

Then the learned Judge proceeded as follows:

"COURT: But before proceeding from here the following points are raised to be answered first:-

Was the plaint filed on 28/6/1993 assessed as to fees and the same paid?

Was the re-issue/renewal of summons to enter appearance by the Deputy Registrar within the law?

Are the two Miwani's one and the same entity and which one is under receivership? (See section 228 Company's Act).

Is one and the same title of land in issue?

Which sale is in question here by execution of decree or by the receivers?"

These questions were framed "***suo moto***" by the learned Judge. The court then adjourned for sometime and when it resumed, Mr. Otieno told the Judge:-
"The plaintiff to answer whether fees were assessed and paid when the plaint was filed.

Even the issue of summons long later (sic) again the plaintiff will explain. We have some of these in our application. Our view is that the suit never was . Both issues are pertinent. We can look at the 3rd issue. Miwani Sugar Mills Ltd. And Miwani Sugar Co. (1989) Ltd. (See our notice of Motion dated 27th March, 2008, notice of Motion Dated 25th April, 2008).

The two Miwani's are not the same. Miwani Sugar Co. (1989) Ltd.------. The government incorporated it in 1989 to take over and run Miwani Sugar Mills Ltd. 2 financiers: Chase Manhattan and Bank of Baroda held debentures over the assets of Miwani Sugar Ltd. The government issued promissory notes to the financiers the last maturing in 2007.
NOWROJEE: There is no evidence laid before court.

<u>COURT</u>: Sustained."

Mr. Otieno then proceeded on the other issues until in the end when he told the Judge that it was the defendant Miwani Sugar Mills Ltd. which was put under receivership in 1993, but that the receivers had not sold its assets yet. Mr. Nowrojee then took over and we think we should quote him verbatim where pertinent:-

"NOWROJEE: We begin by clarifying that neither of us should submit on issues not in the applications. No evidence to be led either. No determination of pending issues will arise from the 5 issues that the court raised.

They have not been heard on evidence.

To those issues only factual answers are required. Neither party is forfeiting its right to submit or position to take.

This court is entitled to raise those issues but will not make any ruling or determination. Such would prejudice the pending matters before court. We are still filing affidavits.

Thus questions number 3, 4, 5 are directly in issue and factual aspects of them are contested along with legal consequences.

This court can only note what has been said in those 3 questions. All I can say is that no interest of Miwani (1989) Ltd. is registered on the title (pages 125 – 129) - Notice of motion dated 27/3/2008).

Miwani Sugar Mills Ltd. – I can say is not in receivership at the moment.

But on the 2 other questions:-

"Was due fee assessed and paid when the plaint was filed in 1993?

I will take instructions from counsel on record and EO I cannot give an answer now.

Similarly Q2 - Re- issue of summons , I cannot say much until I have consulted.

COURT: But Q1 and 2 are vital in considering whether the pleading (plaint) and later proceedings are valid before going further with anything on this file.

NOWROJEE: I agree absolutely – But I have no answers to those two questions now.

OTIENO: I humbly submit much as this court will not make ruling determination on the last 3 questions, there must be answers to questions 1 and 2."

Mr. Otieno then made other remarks and then concluded :-

"But if my learned friend wants to consult on these two questions before going further, we will allow it.

NOWROJEE: May I have Monday 19/5/2008.

COURT: By consent Mr. Nowrojee has upto 19/5/2008 to answer questions 1, 2 (fee, summons) before a ruling. Interim orders extended. Notice of motion dated 24/4/2008 to be heard if it will be possible."

On 19th May, 2008 when the hearing resumed , Mr. Nowrojee was still not in a position to answer the first two questions. The Judge adjourned the hearing to 26th May, 2008 and directed again:-

"***COURT: Matters to come up to hear Mr. Nowrojee on Monday 26/5/2008. To-days costs to the applicants. Mr. Nowrojee to address court on the issue of the court fee receipt which in all circumstances should be in the plaintiff's advocate's file and on the re-issue of summons. There will be no more adjournments on these matters which the court itself raised after perusal of file."***

On the 26th May, the hearing proceeded and the parties addressed the Judge on the two issues the Judge had himself raised . On the question of the court fee receipt, Mr. Nowrojee informed the Judge that enquiries had been made with the widow of the late Hawala about the file but that no receipt could be found. The copies of the receipt could also not be traced with the court registry. The register of cases for the relevant period could not be traced either and in those circumstances it could not be asserted one way or the other that the court fee on the plaint had not been assessed and paid. If the court was of the view that fees had not been paid it could order that they be paid. Mr. Nowrojee asked the court to assume that all aspects of the litigation must have been conducted rightly and regularly.

On re-issue of the summons, Mr. Nowrojee basically submitted that since judgment had been entered and

in fact executed the question of summons had been subsumed in the judgment and which had not been set aside. Mr. Nowrojee submitted that while the Judge could note and raise the issues in Questions 1 and 2, he could not use them to set aside the judgment and the orders resulting form the judgment. In the criminal process, the Judge could on his own motion, make orders on revision, but in the civil process an application had to be made. In the case before the Judge, there was an application to set aside the judgment, i.e. the one dated 27th March, 2007 and the parties would be heard on that application if and when it came up for hearing.

In reply Mr. Otieno submitted that it could not be assumed that fees had been paid as there was no evidence of such payment either with the appellant or in the court record. The case had been allowed to remain dead for fourteen years and it was not right to assume that fees must have been paid. On the re-issue of the summons, Mr. Otieno had submitted that after the expiry of twenty-four months, the Deputy Registrar did not have power to re-issue summons and in effect to bring back to life a case which had been left dead for fourteen years.

Mwera, J considered the issues raised and the submissions of counsel thereon. He was fully cognizant of the fact that he himself had raised the issues and fully considered that aspect of the matter . Relying on writings such as that to be found in the TENNESSEE LAW REVIEW [Vol. 69 XXX 2002] by Associate Professors, Adam Milan and Michael Smith: PLAYING GOD: A CRITICAL LOOK AT SUA SPONTE DECISIONS BY APPELLATE COURTS] and the Nigerian case of HABIG NIG LTD. VS. NASHTEX INTERNATIONAL NIG LTD., Court of Appeal /K/13/04 (KADUNA), the Judge concluded that he was not precluded from raising the questions he did raise so long as he gave the parties opportunity to make their submissions on the issues. In the end the Judge held that no fees had been paid when the plaint was originally filed in 1993 and that the Deputy Registrar had no jurisdiction to re-issue the summons after the expiry of twenty four months. The appellant needed leave to do so and under ***Order 49 Rule 5***, the Deputy Registrar had no jurisdiction to hear an application for leave and to grant the leave. The Judge concluded:-

"So this court acting suo moto or sua sponte, both terms meaning the same thing, declares a nullity the re-issue of the summons on 30th May, 2007 and whatever followed thereafter. It will be a waste of money, time etc. to adopt the plaintiff's stand that in the circumstances of this case formal applications be filed and argued."

Earlier, the Judge had said:-

"----------That issue [re-issue?) of the summons was thus invalid and all consequential acts, orders etc. to it equally of no validity."

By this we understand the learned Judge to mean that the re-issue of the summons by the Deputy Registrar was null and void and since the judgment and the orders consequent thereon were based on the re-issued summons, the judgment itself was null and void and any acts based on the judgment must be equally void. The appellant is aggrieved by that finding and now appeals to this Court on a total of 105 grounds . We cannot and we will not deal with each of those grounds. Even Mr. Nowrojee who argued the appeal before us did not do so. Mr. Nowrojee argued the appeal globally.
The first point taken by Mr. Nowrojee was that the Judge had no jurisdiction to nullify all the processes which followed his conclusion that the re-issue of the summons by the Deputy Registrar as a nullity and that in doing so, the Judge denied the appellant the right to a fair hearing. The application to set aside the ex parte judgment had been filed and the learned Judge ought to have allowed the parties to argue that application. According to Mr. Nowrojee, the result of the Judge's order was to set aside an existing judgment, a completed auction sale and a registered title. There was no jurisdiction in the Judge to do any of those things on an issue raised ***suo moto*** by the Judge himself. Even under ***section 3A*** of the Civil Procedure Act under which a court has discretion to prevent any abuse of its processes the Judge could not do what he purported to do because the discretion exercisable under ***section 3A*** can only be exercised where there are no other statutory provisions to deal with a particular situation. In this case, submitted Mr. Nowrojee, there were relevant provisions for setting aside an ex parte judgment and also for setting aside an auction sale.

We have already set out the rules under which an auction sale can be set aside. Relying on MULLA's text on Civil Procedure, Mr. Nowrojee, said the matters upon which the Judge relied upon to set aside the judgment and all orders and actions flowing from the judgment were not within the Judge's discretion because ***Rules 78*** of ***Order 21*** provided the process for dealing with such issues and an application to set aside the judgment was already pending before the Judge. The auction sale had been confirmed and a certificate of sale issued. The land had already been transferred and registered in the name of the purchaser at the auction sale, Crossley Holdings Ltd., the 4th respondent in the appeal . The land was in fact transferred and registered in the name of the 4th respondent soon after the auction sale. Such registration, submitted Mr. Nowrojee, could only be set aside in accordance with the provisions of the Registration of Titles Act under which the land was registered. The case of MULIRO VS. OCHIENG' [1981], KLR 541 was relied on and it was contended that since allegations of fraud were made, ***section 3A*** Civil Procedure Act could not be relied on to set aside the sale.

To these submissions, Mr. Otieno's answer was that the Deputy Registrar had no jurisdiction to re-issue the summons after fourteen years. Under ***Order 49 Rule 5***, the Deputy Registrar had no jurisdiction to extend the time within which to apply for extension for re-issue of the summons. Only a Judge could have done that and since there was no valid summons which could have been served upon either the 1st or the 2nd respondent, it followed that the suit had never been properly served upon any of the two respondents and as such the ex parte judgment entered by the same Deputy Registrar was a nullity in law and everything else based on that judgment could only be a nullity. Mr. Otieno submitted that the extension of the period for the re- issue of the summons by the Deputy Registrar and the re-issue of the summons by him were an abuse of the process of the court and the Judge was entitled to take that issue ***suo moto*** because the processes of his court had been abused.

For our part, we must consider the issue on the basis that every court is entitled to ensure that its processes are not abused in the sense that those who seek the assistance of courts must do so in conformity with the existing law. The appellant had filed its suit in 1993 and for some fourteen years he did nothing to prosecute that case. He did not even serve the summons and the plaint on the 1st respondent. The reason given for that delay was that Mr. J. B. Hawala, Advocate who had acted for the appellant in the first instance had died. The date on which the said advocate died was not disclosed; nor did the appellant himself say what he did to find out the prosecution of his case. He did not even disclose when he came to know that Mr. Hawala had died. Under ***rule 7*** of ***Order 5***:-

"Where no application has been made under sub-rule (2) [for the court to extend the validity of the summons] the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons."

The appellant's suit was, accordingly, liable to be dismissed after twenty-four months from the date when the first summons was issued, i.e. on 28th June, 1993. The suit was not dismissed under that rule but instead of going to the High Court to ask for the extension of the period for applying for extension of the validity of the summons the appellant who had legal counsel chose to go before a Deputy Registrar and he did so ex parte, i.e. without giving the 1st respondent an opportunity to be heard on the question of whether or not the validity of the summons ought to be extended. The Deputy Registrar was either totally unaware of all these requirements or for some reason chose to totally ignore them. He had no jurisdiction to extend the time and the appellant's advocates must have known that; if they did not know it they ought to have known it. The Deputy Registrar extended the time and immediately thereafter, i.e. in 2007, the summons with a copy of the plaint was sent by registered mail and by courier service to the officers of the 1st respondent. By then the 2nd respondent had taken over the operations of the 1st respondent. Immediately thereafter, ex parte judgment was applied for and was entered for the appellant on the very same day of the application. A bill of costs was filed thereafter and the same Deputy Registrar was asked to tax it. It was taxed ex parte. Then followed the processes of execution by way of a public auction and after the auction sale the application for confirmation of the sale and for a certificate of sale were filed on the very same day of the sale and orders granted on the same day by the same Deputy Registrar. This was done in total violation of the rules of procedure which we have set down earlier in the judgment.

We accept that it was a strong thing for the learned Judge to take up these matters ***suo moto*** or ***sua sponte***. But as we have seen, the learned Judge expressly recognized that fact and having done so gave the parties an opportunity to address him on the issues he raised. If we understood Mr. Nowrojee correctly, he did not contend that the Judge had no jurisdiction to raise the issues ***suo moto***. Mr. Nowrojee, when asked by the Judge whether a consideration of questions 1 and 2 were vital on the issue whether the proceedings could go on, if the two questions were not answered, stated:-

"I agree absolutely. But I have no answers to those two questions."

If the Judge had raised those questions and proceeded to answer them without giving the parties an opportunity to be heard on them, we would have agreed with the appellant that he was denied a fair hearing. But the Judge fully heard the parties on the two issues and we do not understand the complaint that the Judge had no jurisdiction to raise the questions on his own. It was his duty to ensure that the processes of his court had not been abused. The order sent to the Land Registrar warned that officer that it was a valid order of the court and that its disobedience would result in penal consequences. Clearly the orders were not valid at all as they were made by a person or persons who did not have jurisdiction to make them and who made them in total violation of the laid down procedures under the rules of the civil procedure. It is clear to us that the appellant through his advocate's M/s Gakoi Maina & Company Advocates were bent upon stealing a match on his opponents; otherwise how does one explain the fact that on the very same day on which the auction sale took place, the appellant applied for and obtained the orders confirming the sale and a certificate of sale in total disregard of the provisions of ***Order 21*** and the relevant rules made thereunder?

For our part we agree with the learned Judge that the purported extension of the validity of the summons by the Deputy Registrar was done without any jurisdiction and was therefore, ***void ab initio***. The exparte judgment was entered on the basis that a valid summons had been served on either the 1st or the 2nd respondents or on both of them. There was no valid summons which could have been served upon anybody and the purported service was itself ***void ab initio***. The ex parte judgment as a consequence of the foregoing was itself ***void ab initio*** and the Judge was entitled to set it aside ***ex debito justitiae***, having heard the parties on that issue. The transfer of the land by the Registrar of Titles to the 4th respondent was based solely on the void judgment of the Deputy Registrar. The appellant did not claim that apart from the purported judgment, he had any other authority, statutory or otherwise upon which he could have transferred the land to anyone else. The sale of the land to the 4th respondent by way of public auction was based solely upon the void judgment and could not have passed any title to anyone. In view of this finding we do not think that the question of whether fees had been assessed and paid on the plaint was really relevant and we note that the learned Judge did not put much emphasis on that issue.

Like all the Judges who had occasion to deal with the matter, i.e. Mwera, Mugo, Ibrahim and Karanja, JJ, we must also express our disapproval of the manner in which the appellant and his advocates on record M/s Gakoi Maina & Co. Advocates, attempted to short-circuit every legal procedure provided for in the rules of procedure as to the extension of time to validate an expired summons and procedure for attachment and sale of immovable property. On top of all these, the advocates issued a penal warning to the Land Registrar purporting that the court order(s) had been properly obtained and that if the Land Registrar did not comply he would be liable to imprisonment for six months or have his property attached for contempt of court. That warning was totally unnecessary and it was clearly aimed at cowing the Land Registrar into complying with void orders so as to steal a match on the 1st and 2nd respondents. The law did catch up with them when Mwera, J ruled that the exparte judgment was ***void ab initio*** and all orders and acts based on the void order were themselves ***void ab initio***. We see no reason at all to disagree with Mwera, J. with the result that this appeal fails and must be dismissed.

Our order on the appeal shall, accordingly, be that the appeal be and is hereby dismissed with costs to the 1st and the 2nd respondents against the appellant.

Dated and delivered at Kisumu this 29th day of July 2011.

R.S.C. OMOLO
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JUDGE OF APPEAL

P. K. TUNOI
……
JUDGE OF APPEAL

D.K. S. AGANYANYA
……
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR