



IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, WAKI & AGANYANYA, J.J.A)
CIVIL APPEAL NO. 202 OF 2005

BETWEEN

GRACE WANJIRU MUNYINYI 1ST APPELLANT
MOSES KINYANJUI MUNYINYI 2ND APPELLANT
AND
GEDION WAWERU GITHUNGURI 1ST RESPONDENT
KIMANI NJOROGE 2ND RESPONDENT
JAMES KAMAU MWANGI 3RD RESPONDENT
RACHEL WANJIKU KAMAU 4TH RESPONDENT
MARY WANJIKU KAMAU 5TH RESPONDENT
NAIROBI FRAME INDUSTRIES LIMITED 6TH RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nakuru (Kimaru, J.) dated 17th June, 2005

in

H.C.C.C. NO. 116 OF 2002)

JUDGMENT OF THE COURT

1. **Grace Wanjiru Munyinyi** and **Moses Kinyanjui Munyinyi**, who will be referred to as the “appellants” throughout this judgment, are probably related to one **Moses Munyinyi Mbogo** (Mbogo) and they hold a “General Power of Attorney” executed by Mbogo at Nakuru on 22nd February, 2002 and registered on 18th March, 2002.
2. Under the power of attorney, the appellants were authorised, *inter alia*, “to be true and lawful attorneys and agents with full power and authority for me and in my name, and for my account and benefit to ... commence, prosecute, defend, any action or actions suit or suits at law or equity in any courts of Kenya”
3. Pursuant to the power of attorney the appellants went before the High Court in Nakuru on 19th April, 2002 and filed **HCCC No. 116 of 2002** (amended 3rd September, 2002) against the six respondents herein. The sixth respondent **M/S. Nairobi Frame Industries Ltd** (“the company”) was incorporated in the year 1979 by Mbogo and the first five respondents, (“the Directors”) with the main object of carrying on the business of making, selling, and merchandising pictures and photo frames, glass and glass articles and all sundry glass and wood items. All six of them took one share in the company and became

Directors, and Mbogo became the first Managing Director of the Company.

4. About 10 years later in 1989, so the appellants say, the Directors unlawfully removed Mbogo from the position of Managing Director and took over the management of the Company in an oppressive manner by completely sidelining and barring him from participating in the management and/or profits of the company or in any other affairs of the Company although he remained a shareholder of the Company. Matters came to a head in 1997 when the directors closed down the business premises of the Company, dismissed all the workers, removed and took plant and machinery from the business premises to unknown destination, and evinced an intention of converting the business premises into a nursery school and other uses inconsistent with the objects of the company.

The directors had also failed and refused to produce any Accounts and other records on the earnings, profits and business of the company for Mbogo's information despite requests to do so.

5. The appellants therefore sought the following orders from the court: -

“(a) A permanent injunction barring the defendants herein from closing or terminating the operations of the 6th defendant herein in an unprocedural or illegal manner or alienating or removing the machines or property of the 6th defendant from its premises situated on BAHATI/KABATINI BLOCK 1/2040 or converting the 6th defendants premises or business to other uses or operations contrary to the objects of the 6th defendant.

(b) A declaration that MOSES MUNYINYI MBOGO is entitled either by himself or his agent to participate in the management of the affairs of the 6th defendant company with an order that the defendants herein do render to the plaintiffs a true and fair account of the Assets and liabilities of the 6th defendant and of the profits or losses thereof since 1989 to the date of judgment.

(c) Costs of this suit.

(d) Further or other relief as the court will in its discretion deem fit.”

6. Contemporaneously with the filing of the suit, the appellants sought a temporary injunction to restrain the removal of the Company's property and machinery or the disposal thereof; and to stop the conversion of the company's business from its stated objects.

7. In their defence, the directors did not deny that Mbogo was the first Managing Director of the Company but averred that he had been removed from directorship after suffering grave mental incapacity in 1984. They otherwise contended that they had thereafter conducted the affairs of the company in accordance with the law and put the appellants to strict proof of all the other averments in their suit. They also contended that the appellants had no *locus standi* to bring the suit and that the court had no jurisdiction to try it.

8. In responding to the interlocutory application, the directors acknowledged that Mbogo was a shareholder of the Company but asserted that he could not participate in the affairs of the company due to mental incapacity. The power of attorney was not acknowledged and the closure of the business premises was blamed on the appellants' interference in the affairs of the Company whilst they were strangers to it.

9. Before the interlocutory application could be heard the directors filed a Chamber Summons on 22nd September, 2004 seeking to strike out the suit under **Order VI r 13(1)(a)** and **(d)** of the Civil Procedure Rules for the reasons: -

“(a) That the Plaintiff raises no reasonable cause of action against the defendant/applicants since: -

i. The matters complained of principally concern the affairs and management of the 6th defendant, a limited liability company incorporated under the Companies Act Cap 486 and the plaintiff ought to have

availed to themselves of and complied with the provisions of section 211 of the Companies Act and approach the court by way of a petition and not filing a plaint.

ii. That the suit as instituted by the purported donees of MOSES MUNYINYI MBOGO in their personal names and capacities is fundamentally and incurably irregular.

iii. That the suit has been filed in express and flagrant breach of the mandatory provisions of the law in relation to suits by persons of unsound mind.

iv. That the suit is otherwise an abuse of the process of the court.”

10. The affidavit in support of that application, (although none is required in applications under **rule 13 (1) (a)**), deposed in part as follows: -

“3. That Nairobi Frames Industries Limited is a limited company incorporated under the Companies Act cap 486 laws of Kenya.....

4. That at the time of its inception there were six Directors and Moses Munyinyi Mbogo was one of them.

5. That however the mental status of the said Moses Munyinyi Mbogo progressively irreversibly began to deteriorate such that he was no longer able to meaningfully participate in the affairs of the company and as such he was no longer in a position to discharge his duties as a director.

6. That indeed as at the time of the power of attorney was purported to have been signed by him 22nd February, 2002 he was of such state of mind that he was unable to comprehend his actions.

7. That indeed having been involved with the true plaintiff herein for a quite a long period I know his signature and I honestly believe (sic) that the one appended to the power of attorney is not his.

8. That the company has always conducted its affairs pursuant to and in accordance with both the Articles and Memorandum of Association as well as the relevant laws and the issues raised by the nominal plaintiffs originate from their imaginations.

9. That there was no reason whatsoever to have this suit sustained since I honestly believe that there are no triable issues.”

11. The appellants objected to the application on the grounds, *inter alia*: -

“1. That the application is brought in bad faith and is an afterthought merely meant to delay expeditious resolution of matter herein.

2. That the application is itself bad in law, misconceived as the same contravenes the provisions of the Civil Procedure Rules and the same ought to be struck out and/or dismissed with costs.

3. That section 211 of the companies Act Cap 486 relied on merely offers an alternative remedy to winding up, and is permissive only being mandatory when the relief sought is to wind up the company.

4. That defect if any is only in form and not substance which does not affect the jurisdiction of this honourable court to entertain the suit herein.

5. That the application is otherwise an abuse of court process as it is speculative, this honourable court having ordered personal attendance before it of MOSES MUNYINYI MBOGO at the defendant's expense, which order has not been complied with by the defendants.”

12. The application by the directors came up for hearing before Apondi J on 10th February, 2004 but counsel for the directors sought an adjournment. We reproduce verbatim what transpired that day as it

will feature later in this judgment:

“Karanja

We have filed a replying affidavit in the year 2002 and we gave notice that we would wish to have Moses Munyinyi Mbogo to appear in court for you to assess his mental ability. He could not have signed any document. My clients are ready to pay for the costs to bring him to the court.

If necessary for the applicant to be examined by a doctor, then we are ready to pay the costs. We want the person who gave the power of attorney to appear in court.

It is for the above reason that I apply for an adjournment.

Mrs. Odhiambo

No objections for the adjournment. However, the allegations are very wild. We have not been told that when he signed the Power of Attorney, he was mentally incapable of signing the document. This matter has dragged on since the year 2002. We are demanding for today’s costs.

Karanja

Immediately that suit was filed, my client stated that the Plaintiff is mentally sick.

Court

In view of the above, the court hereby fixes the case for mention on 1st March, 2004, to enable the applicant/plaintiff to appear here. Consequently, the court will make further orders. Respondent to pay today’s costs and court adjournment fees. Respondent to pay Kshs.3,000/= for transport.”

13. There is no record about what transpired on 1st March, 2004 but the application was subsequently set down for hearing and was argued one year later on 1st March, 2005 before Kimaru J. No reference was made by the directors about the earlier order for production of Mbogo and his examination by a doctor at the expense of the directors.

14. In his ruling made on 17th June, 2005, Kimaru J framed two issues: **firstly**, whether the appellants had legal capacity to file the suit, and he answered that issue in the negative, reasoning as follows: -

“In their pleading filed in court and especially the affidavit of Gideon Waweru Gathunguri, the 1st defendant, it has been stated that the said Moses Munyinyi Waweru has suffered from mental illness to the extent that he was not in a position to manage his own affairs, including the affairs of the 6th defendant company. This statement of fact by the defendants has been denied by the plaintiffs. However their denial was made in court when Mr. Oduor, learned counsel for the plaintiffs argued the plaintiffs response to the application filed by the defendants. No affidavit was filed by the plaintiffs to dispute the allegation as regard the mental status of the said Moses Munyinyi Mbogo. As it were, the said statement stood unchallenged and this court has no other option but to hold that the said Moses Munyinyi Mbogo was a person of unsound mind.

Having made this finding that the said Moses Munyinyi Mbogo is a person of unsound mind, could he donate the power of attorney to the plaintiff? In law, he could not. The power of attorney which the plaintiffs have exhibited and annexed to their pleadings state that the donor, Moses Munyinyi Mbogo appointed the plaintiffs “to manage and transact all (his) affairs in Kenya and execute such deeds or instruments as may be necessary or must to my advantage, and use all lawful ways and means thereto, as fully and effectively to all intents and purposes as I might or could to if personally present and acting herein...” (Underlining mine). A power of attorney presupposes that the person donating it has capacity. In the instant case it has been established that Moses Munyinyi Mbogo is

of unsound mind and could not therefore have capacity to donate a power of attorney to anyone. What the plaintiffs should have done was to petition the court under *Section 26 and 27 of the Mental Health Act (Cap 248 of the Laws of Kenya)* to be appointed to be the administrator of the estate such a person of unsound mind. In the circumstances of this case, the plaintiff lacked capacity to file this suit on behalf of Moses Munyinyi Mbogo. The power of attorney that they have purported to rely on to file this suit has no legal effect since the person who purported to have donated the power of attorney did not have mental capacity in the first place to donate such powers.”

15. **Secondly**; whether the issues raised by the appellant were justifiable or lay in the realm of the company for resolution within its internal management. The learned Judge answered the issue in the negative stating in part as follows: -

“The plaintiffs are aggrieved that the directors of the 6th defendant company have made a decision to close its operations at Bahati and relocate to Nairobi. I suppose the said decision was made by the directors for some business reason. I do not know. But be it as it may, this is an issue which the plaintiffs would have raised in a meeting of shareholders. This they did not do. They instead came to court. Unfortunately this court cannot enter into the fray and make decision on behalf of the 6th defendant company. To do so would be interfering with internal management of the 6th defendant, a role which this court is ill-equipped to undertake. If the plaintiffs were dissatisfied with the way of the affairs of the 6th defendant were being managed, the right procedure they would have followed was to file a petition as provided by section 211 of the Companies Act. They were not at liberty to file a plaint to ventilate what they perceived to be the mismanagement of the 6th defendant company. A litigant is not at liberty to choose the form in which to approach the court. He had to approach the court by the duly established procedure. By filing a plaint, the plaintiffs were not only abusing form, they were also abusing the established procedure.”

And with that the plaintiff’s suit was struck out as disclosing no reasonable cause of action, thus provoking the appeal before us.

16. The appeal raises ten grounds of appeal but learned counsel for the appellants, Ms. Nyawira Mureithi (Ms. Mureithi), properly argued them in two tranches in line with the two issues framed and decided on by the High Court. She submitted, firstly, that the High Court fell in error in making a finding of fact that Mbogo was of unsound mind when there was no evidence to support the finding. In her submission, there is always a presumption that every person is of sound mind until the contrary is proved, and the onus of proof was on the person who alleges the contrary. To buttress that argument, Ms. Mureithi cited a persuasive authority: **Wiltshire v Cain [1958 – 60] 2 Barb. L. R149**, a decision by the Supreme Court of Barbados. The contention made by the defendants in that case, was that an 83 year old seller of land was incapacitated by mental infirmity from entering into a binding contract. The allegation was that the seller “*for at least one year prior to the signing of the contract was suffering from loss of memory, mental debility and senile decay and was incapable of understanding the meaning and effect of the agreement as (the buyer) knew at the time.*”

It was held: -

“**...for the defence to succeed it must show (a) the incapacity of the defendant due to mental illness in one form or another, and (b) that the plaintiff knew of the condition of the defendant. The burden in respect of both of these matters rests on the defence – see Imperial Loan Co. v. Stone Lord Eastern [1892] IQB 599.** The fact that the plaintiff had knowledge of the defendant’s condition must be brought home to entitle the defendant to succeed. In that case Lord Justice Lopes stated that:

“**a defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff’s knowledge of that fact, and unless he proves these two things he cannot succeed.**”

Emphasis is added.

17. Ms. Mureithi further submitted that there were different levels of unsound minds and there were lucid moments even where one is established. The assertion by the appellants was that Mbogo was of sound mind when he gave them the power of attorney and thus conferred full capacity and authority to institute the suit but that assertion was not displaced.

18. For his part, learned counsel for the directors Mr. Kahiga Waitindi (Mr. Waitindi) submitted that one of the directors had sworn an affidavit in support of the application for striking out the suit asserting that the signature on the Power of Attorney did not belong to Mbogo and that Mbogo was discharged from his office because of mental illness but those averments had not been controverted. He conceded, however, that there was a court order for production of Mbogo in court at the directors' expense which was not followed up, but submitted that the order was not binding on the Directors since they subsequently filed an application for striking out. Furthermore, Mr. Waitindi submitted, even if the Power of Attorney was valid, it required that the suit be instituted in the name of the donor but the appellants used their own names and, therefore, the suit was incompetent.

19. We have considered the submissions of counsel on the first issue and have in the end come to the conclusion that the learned Judge of the High Court fell in error by declaring the donor of the Power of Attorney of unsound mind and the Power of Attorney as a nullity.

The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law, and we find persuasive authority for it in the *Wiltshire Case* (supra), that the burden of proof lies on the person who asserts the incapacity. In the *Wiltshire Case*, those who were asserting mental incapacity as cited in paragraph (6) above, called a medical practitioner who had been attending to the defendant for forty years, and testified that he examined the defendant three months after the sale agreement and “*found symptoms of senile degeneration in that he was delusional, confused, and incoherent*” and in his opinion the defendant was “*incapable of managing his own affairs by reason of mental infirmity*”. A neighbour of the defendant was also called to testify that she saw him “*doing stupid things*”, while the defendant's married daughter also testified that “*he stayed away from home one full day,*” “*talked and walked about and loosed other peoples animals*” and “*tore up dollar bills*”. All that evidence was rejected by the court as insufficient to avoid the transaction. The Supreme Court stated:

“A person may be or become of sound mind because he has lost the ability to reason by disease, grief or other accident. Where a person in such condition can be shown not to have understood because of his mental condition, what he was doing and further that the other party was aware of this incapacity, then any contract, other than a contract for necessities, made by such a person is not binding on him.”

20. That decision followed other decisions of the Commonwealth among them *Molton v Camroux* (1849) 4 Exch. 17, *Imperial Loan Co. v Stone* [1892] 1 QBD 599 and *York Glass Co. V Jubb* (1925) 42 TLR 1. The High Court in the case of *Patrick Machira v Patrick Kahiaru*, HCCC 113/1999 (ur) also reviewed those decisions and summarized the law as follows:

“It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be of unsound mind one must always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one's own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering. The validity of ordinary contracts entered into by persons of unsound mind depends mainly on the circumstances which accompany the act. If there is nothing unreasonable in the conduct of the person of unsound mind and the party with whom he contracts has no knowledge or suspicion of his mental disorder, the contract will be binding on the person of unsound mind and his representatives.

A contract with a person of unsound mind is valid and enforceable against him if at the time when the agreement was made he was not of unsound mind; and soundness of mind may be presumed if it appears that the negotiation of the agreement was conducted by him with apparent prudence, sanity, and judgment, although in fact he was insane both before and after the transaction. The general rule is that when a person of apparently sound intellect enters into an ordinary contract, and the parties cannot be restored to their former condition, the mere fact that one of them was at the time *non compos mentis* is no ground for setting aside the contract. But contracts of a person who is *non compos mentis* may be avoided when there is proof that his condition was known to the other party. There is no right to avoid a contract made with a person of unsound mind unless it is proved that the other party either knew that he was of unsound mind or knew such facts about him that the other party must be taken to have been aware that he was of unsound mind. Moreover, supervening mental disorder does not release a person from his obligations under a contract unless the nature of the mental disorder renders the performance of the contract impossible.”

We respectfully agree with that summary.

21. In the case before us, the directors expressly sought an order of personal appearance in court by Mbogo and for his examination by a doctor of their choice to establish their assertion in pleadings that he was of unsound mind. The court order is reproduced above but it was never followed up or set aside. There was thus no medical or other evidence to establish the mental incapacity of Mbogo. All that there was was an affidavit sworn by one of the directors which was not tested in cross-examination. The basis for affixing the label of “*unsound mind*” on Mbogo was therefore not established and boiled down to an opinion by one director based probably on observations of unusual behavior by Mbogo. In our view, it was not sufficient to establish the mental incapacity of Mbogo or the knowledge of such incapacity by the appellants when the Power of attorney was executed. Both required proof but there was none. The presumption is therefore that Mbogo was in control of his faculties when he appeared before an Advocate & Commissioner for oaths, one **Githiru N.M.** on 22nd February, 2002 and executed the Power of Attorney.

As stated earlier, there was no basis for making the finding of fact on incapacity or the consequential invalidity of the Power of attorney. The first ground of appeal succeeds and we so find.

22. The second ground of appeal challenged the finding that the case was about the internal affairs of the company and therefore an ordinary suit against the company and/or the directors would be incompetent. Ms. Mureithi cited the case of **Rai and others v. Rai and others** [2002] 2 EA 537 which summarized the principle of Company Law established in **Foss v Harbottle** [1843] 2 Hare 461, 67 ER 189 as follows: -

“The classic definition of the rule in Foss v Harbottle is stated in the judgment of Jenkin LJ in Edwards v Halliwell [1950] 2 All ER 1064 at 1066 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation (2) where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter, because, if the majority confirms the transaction, *caditquaestio*; or, if the simple majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot confirm the transaction (4) There is also no room for the operation of the rule if the transaction complained of could be validly sanctioned only by a special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue”.

The rule in Foss v Harbottle still stands in Kenya. The exception to the rule referred to above may be taken advantage of by minority shareholders if they can show fraud but they cannot do so by way of a petition. They can only do so as plaintiffs in a derivative action.”

Emphasis added

23. In line with the exception (5) emphasized above, Ms. Mureithi submitted that the applicants had every right to file a derivative suit for a minority shareholder because the majority were in control of the company and were disposing of the company in a fraudulent manner. The company itself was incapable of filing a petition and **section 211** of the Companies Act was only an alternative remedy to winding up, she submitted. It was erroneous therefore to hold, as the High Court did, that a court action which was not made through a “*petition*” was incompetent.

24. In response, Mr. Waitindi submitted that the nature of the complaint made by the appellants was that the majority were oppressing Mbogo in their conduct of the affairs of the Company and therefore their only recourse was to file a petition under **section 211** of the Companies Act. The other remedy was to bring winding up proceedings. An ordinary suit or derivative suit was therefore inappropriate and the High Court was right to strike out the suit.

25. We have anxiously considered this ground of appeal. The law is very clear that a company has its own legal personality and is capable of regulating itself through its internal organs. Ordinarily, a wrong done to the company may be vindicated by the company alone, and if the alleged wrong can be confirmed or ratified by a simple majority in a general meeting then the courts would not interfere. We can therefore understand the reluctance of the learned Judge of the High Court to interfere with events which on the face of it were approved by the majority directors/shareholders in their meetings.

26. Nevertheless, the law realizes that the majority may behave in such oppressive manner to one or a section of the members that such member or members may petition the court and the court may bring an end to the matters complained of, by making “*such orders as it thinks fit, whether for regulating the conduct of Company’s affairs in future, or for the purchase of the shares of any members of the company or by the company.*” That is **section 211** of the **Companies Act, Cap 486**.

27. There is also another remedy arising from the leading English legal precedent on Corporate Law which continues to apply in Kenya more than 160 years since it was decided: **Foss v Harbottle** (supra). As stated earlier, in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. This is the rule in **Foss v Harbottle**. But there are four exceptions to that rule which appear in the leading case itself but also in subsequent decisions on the subject. Firstly, where the directors or a shareholding majority use their control of the company to paper over actions which would be *ultra vires* the company or illegal. Secondly, if some special voting procedure would be necessary under the Company’s constitution or under the companies Act, it would defeat both if they could be sidestepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed (**Edwards v Halliwell [1950] 2 ALL ER 1064**). Thirdly, where there is invasion of individual rights, such as voting rights (**Pender v Lushington (1877) 6 Ch D 70**). Fourthly, where a fraud on the minority is being committed. In all those cases, a “derivative action” could be brought before the court on behalf of the company where the wrongdoer is in control of the company or by the individual shareholder where his personal right is violated.

28. The appellants in this matter do not simply complain that the directors, who are in majority, were acting in a manner oppressive to him personally, but claims in truth that they were acting in a manner *ultra vires* the objects of the company by converting its assets and operations into a nursery school and alienating other properties of the Company. That is tantamount to committing fraud on the Company and therefore are matters that cannot be ratified by simple majority. They also complain specifically that the directors have sidelined him from participating in all affairs of the company despite acknowledgement that he was a valid shareholder. In that event we would say with **Jessel MR** in **Pender v Lushington** (supra) thus: -

“This is an action by Mr. Pender for himself. He is a member of the company, and whether he votes

with the majority or the minority he is entitled to have his vote recorded – an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss v Harbottle*^[3] and that line of cases. He has a right to say, “Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you.” What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it.”

29. Whether, in this case it be “*derivative action*” or direct suit on any of the grounds, it was in our view a sustainable suit and it was for the High Court to consider it on its merits. We find and hold in the circumstances that the High Court fell in error when it struck out the suit as an abuse of court process, and disclosing no reasonable cause of action.

30. The upshot is that the appeal succeeds. The ruling of the High Court made on 17th June, 2005 and all consequential orders are set aside and substituted with an order dismissing the Chamber Summons dated 16th September, 2004. The main suit is reinstated for hearing before a Judge of the High Court, other than Kimaru J. Costs of the appeal, and of the chamber summons before the High Court, shall be borne personally by the respondents 1 – 5.

Orders accordingly.

Dated and delivered at Nakuru this 11th day of November, 2011.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

D.K.S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR