



Iganjo & another v Muriithi (Acting as the administrator and legal representative of the Estate of Mwangi Stephen Muriithi) & 6 others (Environment & Land Case 901 of 2014) [2023] KEELC 20015 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 901 OF 2014
LC KOMINGOI, J
SEPTEMBER 21, 2023**

BETWEEN

RUTH MUTHONI IGANJO 1ST PLAINTIFF

**RUTH MUTHONI IGANJO (SUING AS AN ADMINISTRATOR OF THE
ESTATE OF FRANCIS IGANJO MUTAHI (DECEASED) 2ND PLAINTIFF**

AND

**GITONGA MWANGI MURIITHI (ACTING AS THE ADMINISTRATOR
AND LEGAL REPRESENTATIVE OF THE ESTATE OF MWANGI STEPHEN
MURIITHI) 1ST DEFENDANT**

GITONGA MWANGI MURIITHI 2ND DEFENDANT

JANE GATHONI KANYOTU 3RD DEFENDANT

MARGARET NYAKINYUA MURIGU 4TH DEFENDANT

JAMES KANYOTU (DECEASED) 5TH DEFENDANT

THE REGISTRAR OF COMPANIES 6TH DEFENDANT

KAMUTA LTD 7TH DEFENDANT

JUDGMENT

1. The Plaintiffs *vide* a plaint dated 7th July 2014 claim that the late Francis Iganjo Mutahi (herein after referred to as Mutahi represented by the Plaintiffs) together with the late James Kanyotu (herein after referred to as Kanyotu represented by the 3rd, 4th and 5th Defendants) and the late Mwangi Stephen Muriithi (herein after referred to as Muriithi represented by the 1st and 2nd Defendants) were Directors of the 7th Defendant which was incorporated on or about 4th December 1976 through Certificate of



- Incorporation number C.15146 with each director holding 1 share of the company. The late Mutahi, Kanyotu and Muriithi passed away in 2000, 2008 and 2018 respectively.
2. The company went on to purchase two properties in Naivasha referred to as LR No. 398/7 and LR No. 398/8 measuring 131.5 acres and 101 acres respectively and it was agreed that since Mr. Mutahi was a businessman and Mr. Kanyotu and Mr. Muriithi were in formal employment, it would be prudent if Mr. Mutahi became the farm manager. To that effect, it was agreed that he could occupy and reside on a portion of the said properties where he settled with his family.
 3. The Plaintiffs claim that upon the demise of Francis Iganjo Mutahi in 2000, they applied for letters of administration as well as sought from the Registrar of Companies (the 6th Defendant) confirmation of the status of Kamuta Limited (the 7th Defendant) whereby the 6th Defendant through a letter dated 29th January 2002 indicated that according to a notice of change of Directors dated 4th October 2000 Mutahi had ceased to be a Director of the company but continued to be a shareholder. In the confirmation of grant, the court ordered that the late Mutahi's share in the company be held in trust by the Plaintiffs for Mutahi's children upon subdivision.
 4. However, the Defendants were not forthcoming with information about the company and went on to interfere with its shareholding by forging documents to reflect that the late Kanyotu had 98 shares while the late Mutahi and Muriithi had one share each. The Plaintiff further averred that they sought services of a forensic document examiner who reported that entries in company documents between January 1977 and December 2006 had been digitally manipulated, altered and therefore fraudulent.
 5. As such they sought:
 - a. A permanent injunction do issue restraining 1st, 2nd, 3rd, 4th and 5th Defendants whether by themselves, their agents, servants, assigns, employees, persons claiming through them or otherwise howsoever from doing the following acts or any of them that is to say from offering for sale, selling, disposing of, transferring, charging, pledging, diluting, dealing, interfering with and/or intermeddling in any manner whatsoever with:
 - i. The shares and shareholding in and of the company which shares and shareholding is one share each for the estate of the late Francis Iganjo Mutahi, the estate of James Kanyotu and Mwangi Stephen Muriithi the 1st Defendant herein.
 - ii. All those properties situate in Naivasha known as Land Reference No. 398/7 measuring 131.5 acres or thereabout and Land Reference No. 398/8/ measuring 101 acres or thereabout.
 - b. A declaration that 1st, 2nd, 3rd, 4th and 5th Defendants have whether by themselves, their agents, servants, employees or persons claiming through them unlawfully interfered with the shareholding, running and management of the company and an order do issue directing the said Defendants to restore all documents or any other property unlawfully taken from the company by the Defendants and the shareholding of the company be restored to one share each in favour of the estate of Francis Iganjo Mutahi, the estate of the late James Kanyotu and Mwangi Stephen Muriithi.
 - c. An order directing the Defendants to effect the necessary share transfer in favour of the Plaintiffs as the administrators of the estate of the late Francis Iganjo Mutahi.
 - d. A declaration that the Board meeting purportedly held on 13th June 2013 and the subsequent appointments of Gitonga Mwangi Muriithi as Director of the company and one Zachariah



Kamau Ngugi as the company secretary and any other Board meeting held contrary to the law was unlawful, null and void and of no legal consequence.

- e. An order compelling the 1st and 2nd Defendants to produce and show to the court and the Plaintiffs the books of accounts, share certificates and records of the company and to account for all the monies, records or assets of the company in their possession.
 - f. That the parcels of land known as Land Reference No. 398/7 and 398/8 be amalgamated into one parcel and thereafter be divided equally among the Estate of the late Francis Iganjo Mutahi, James Kanyotu and Mwangi Stephen Muriithi with the estate of the late Francis Iganjo Mutahi acquiring the portion on which they reside and have developed.
 - g. Damages for fraud and breach of trust.
 - h. Costs of the suit plus interest.
 - i. Such other relief that the court may deem just to grant in the circumstances.
6. The 1st and 2nd Defendants in their Statement of Defence dated 13th July 2015, denied that Mutahi was a Director/ shareholder of the 7th Defendant indicating that the shareholders were Kanyotu and Muriithi with one share each and Mutahi was only an employee of the late Kanyotu overseeing his farm in Olbanata Solai- Nakuru. Therefore, the allegation that Kanyotu held 98 shares was false. They stated that property in issue was purchased through a mortgage facility financed by the National Bank of Kenya Limited. They also contested the claim that Mutahi and his family had settled on the suit property and sought for dismissal of the suit with costs.
7. The 7th Defendant through its Director the late Muriithi (initially the 1st Defendant) in its Statement of Defence and Counterclaim dated 7th October 2014, also denied the Plaintiffs' allegations and in a counter claim stated that the Plaintiffs had invaded the suit properties, collected rental income and converted it for personal use without accounting to the 7th Defendant. They thus sought for:
- a. A permanent injunction to restrain the Plaintiffs, the agents or employees, from trespassing, interfering, claiming or dealing in any way with the 7th Defendant's properties there to wit LR No. 398/7 and 398/8 Naivasha.
 - b. An order to evict the Plaintiffs, their servants and agents from LR No. 398/7 and 398/8 Naivasha.
 - c. The OCS Naivasha Police Station to ensure compliance with the court orders.
 - d. An order compelling the Plaintiffs to furnish a comprehensive account of the income derived from LR No. 398/7 and 398/8 Naivasha during their occupation and the handing over of the said income to the 7th Defendant.
 - e. Mesne profits.
 - f. General damages for trespass and loss.
 - g. Costs of the suit.
 - h. Any other relief that this court may deem fit to grant.
8. The 4th and 5th Defendants in their Statement of Defence dated 12th November 2014 prayed for dismissal of the suit and also denied that the late Mutahi was a shareholder of the 7th Defendant indicating that he only held one share as a nominee of the late Kanyotu who held 98 shares and Muriithi



1 share. They however affirmed that the properties LR No. 398/7 and 398/8 Naivasha were purchased by Kanyotu and Muriithi.

9. The 6th Defendant in the Statement of Defence dated 9th March 2009 denied the Plaintiffs' allegations but acknowledged the loss of the original 7th Defendant's file and that another file had been reconstructed. The 6th Defendant went on to ask the court to make necessary orders deemed fit in the interest of justice.

Evidence of the Plaintiffs.

10. Ruth Muthoni Iganjo the wife of the late Francis Iganjo Mutahi testifying as (PW1) stated that Mutahi was a farm manager at Kamuta farm where he resided and was an equal shareholder of the 7th Defendant. She affirmed that Kamuta Limited was incorporated on 4th December 1976 as per the documents obtained from the Registrar of Companies in 2002 adduced as evidence. She stated that the said farm was purchased by way of mortgage and by 1985 the loan had been repaid through proceeds of the farm as evidenced by a letter from Mutahi to Kanyotu and he wanted to be shown where to settle his family.
11. She stated that Mutahi started residing on the suit property in the 1980s but currently it was her children who were residing there on the portion of land identified by Mutahi during his lifetime. She disputed documents that indicated that Kanyotu held 98 shares of the 7th Defendant.
12. On cross examination PW1 stated that the late Mutahi started working for Kanyotu in 1972 at his Ol-Banata Farm in Nakuru as a farm manager but was not a farm manager at Mokamu farm. She stated that when he was working at Ol Banata farm, they too lived there. But when he moved to Kamuta farm between 1982- 1984 she did not move with him but their children did. She stated that Mutahi was buried in Kinangop where she resides because Kamuta farm was not their matrimonial home.
13. She stated that she knew Mary Wanjiku and Jane Kanyotu who were Kanyotu's wives but did not know the family of Muriithi. She added that whereas her husband Mutahi and Kanyotu were childhood friends he did not have any common interests with Muriithi. She also stated that she knew John Mutitika who was the first farm manager at Kamuta Farm.
14. She confirmed that although the mortgage application form was signed by only Kanyotu and Muriithi and Mutahi's name was also not on the correspondence documents between the bank, Kanyotu and Muriithi, he was an equal shareholder. She pointed that by 2003 when apparently Kanyotu's shares were increased to 98 as stated by Dominic Kirii, her husband had already passed on and that increment was done fraudulently.
15. She testified that there was correspondences between her husband and Kanyotu about subdivision of the land in which Kanyotu did not object to and they lived on a portion of land shown to them by Kanyotu. She went on to state that her children were on the suit property growing crops and running the hotel, cottages, houses, camp hotels and greenhouses thereon and confirmed that those proceeds do not go to Kamuta Limited but to themselves.
16. PW2 Antipas Nyanjwa stated that he was a forensic document examiner who initially worked with CID department of the Kenya Police as a forensic examiner. He testified that he was requested by the Plaintiffs to examine some documents which he did and the report he submitted had been tabled in court as evidence. He highlighted that there were discrepancies identified in the documents such as use of postal codes in some documents for early 1990s while it came into existence in 2002. He also stated that some documents between the years 1978 and 2003 had been altered using different typewriters



indicating that the signatures of Francis Iganjo Mutahi had been recanted through manipulation and some company returns bore different dates.

17. On cross examination he stated that he was neither an auditor nor had he worked at the Companies' Registry and/or conversant with filing of annual returns. He testified that the documents given to him for examination were copies which he examined against original documents such as signatures appended on the documents versus known signatures of the people. He indicated that when it came to examination of documents a copy was as good as the original. He noted that he did not find any manipulation on the Memorandum of Articles of Association of Kamuta Limited dated 30th November 1976 containing three directors. However, the one containing two directors had been manipulated and one signature removed through photocopying although he could not tell when that was done.
18. He stated that as much as he had not been asked to authenticate the age of the documents, he had expertise to determine which documents had been developed using manual or electric typewriters and that could denote whether the documents had been manipulated or not.

Evidence of the Defendants.

19. The late Mwangi Stephen Muriithi (initially 1st Defendant) testified in court as DW 1 on 18th December 2015. He adopted his witness statement as his evidence in chief and produced their bundle of documents as exhibits.
20. He confirmed that the 7th Defendant was incorporated by himself and Kanyotu each of them holding one share each. He gave a history of how he got to know of the late Mutahi stating that Mutahi was Kanyotu's farm manager at his Ol-banata farm in Nakuru. He stated that they (the late Kanyotu, the late President Moi and him) had another piece of land in Nakuru under Mokamu Limited which was managed by a Mr. Otela. But due to Otela's misappropriation of the farm's records and cases of theft of livestock, they deemed it fit to have someone supervising him. By this time the late Mutahi had been working for Kanyotu and due to his experience they asked him to oversee Otela's work. The late DW1 confirmed and adduced as evidence of a letter to the Company Secretary of Mokamu Limited indicating payment terms for the late Mutahi. He went on to state that at some point they also requested the late Mutahi to visit the suit property in Naivasha to oversee management of the cattle there but they never employed him and this agreement was never put in writing.
21. He testified that between May 1982 and September 1985 he was in detention and was not involved in the management of the company. However, he had given authority to his then Lawyer Mr. Khaminwa to continue the management and running of his companies in his absence but Kanyotu wielded a gun at Mr. Khaminwa during a meeting which led Mr. Khaminwa to never attend any other meeting or get involved in the company business. He added that he had a fallout with Kanyotu following his detention and the last time they spoke was in 1981 before he was sacked from the Special Branch. Therefore, the allegation that there was a meeting where Kanyotu was allocated 98 shares was incorrect and the correct status was that the late Kanyotu and DW1 held one share each in the 7th Defendant.
22. He stated that he was aware that the Plaintiffs had trespassed on the suit property and were running it as their personal property and was also aware that Kanyotu had made it clear that he did not want them on the farm.
23. On cross examination DW1 stated that in 2013 he was given the 7th Defendant's documents and other information that had been kept away from him including the fact that Mutahi was claiming to be a shareholder by Mr. Kimani Kairu (who was Kanyotu's lawyer). He stated that following the demise of Kanyotu in 2008 he was left as the sole director and it was necessary to appoint another director as per



- the Law. As such he appointed Zachariah Ngugi as the Company Secretary and the 2nd Defendant as a Director. He also stated that Kanyotu's one share in the Company was intact and he was not aware that Mutahi was Kanyotu's nominee.
24. He testified that the Memorandum of Articles produced as his evidence had his and Kanyotu's name written on it using a typewriter but had not been signed by hand. He handed over the said document to Kanyotu for incorporation of the 7th Defendant and that he was no sure where the Annual returns produced by the Plaintiffs bearing his, Kanyotu's and Mutahi's signature came from. He maintained that he only got to know Mutahi after the 7th Defendant had been incorporated and any document reflecting him as a shareholder was untrue.
 25. He indicated that after learning that Mutahi was claiming to be a shareholder he did not seek confirmation of the 7th Defendant's status from the Companies' registry. However, after appointing the 2nd Defendant as a Director he asked the Company Secretary to notify the Registrar of Companies of the change but he could not confirm whether there were any documents filed at the Companies Registry. He also stated that Kanyotu's lawyer informed him that the 7th Defendant had not been filing annual returns. As such, he authorised the Company Secretary to file returns from the year 1980. He added that upon learning that Kanyotu had claimed to hold 98 shares in the 7th Defendant he also asked the Company Secretary to file another set of documents showing that he and Kanyotu each held one share in the company. He further stated that all company documents were in Kanyotu's custody prior to his demise because he is the one who was dealing with the lawyers.
 26. It was his testimony that the suit property being Agricultural Land consent from the Land Control Board was required. He confirmed that he did not have the said application for consent and other documents and neither did he go to the Lands office to get the said documents hence the consent in the Plaintiffs bundle purportedly originating from the Lands office and bearing three signatures was falsified.
 27. He also stated that Mutahi was brought on board to occasionally supervise the former manager at Kamuta farm but he was never in charge. He contested the document adduced by the Plaintiffs dated 15th March 1985 on repayment of the loan stating that although he did not have any evidence to show that the loan facility from National Bank had been repaid by 1981 that was the correct position adding that he could not understand why the letter from Africa Registrars in 1985 was also addressed to Mutahi.
 28. He went on to state that he was not aware that there was any agreement for the three of them to subdivide the suit property noting that as of 30th May 1985 he was still in detention and Kamuta Limited was a company limited by shares as such there was no way agreements would be made without a resolution of all the directors. The issue of subdivision was in his words theft.
 29. On Re- examination he stated that Mr. Kairu (Kanyotu's lawyer) informed him that Kanyotu had been using one Dominic Kirii as the Company Secretary but he no longer worked for Kamuta Limited. That is when he appointed Zachariah Ngugi as the Company Secretary. He stated that by the time he was detained the correct position was that the 7th Defendant only had two directors and shareholders as per the documents adduced by him.
 30. DW 2 John Nginyu Gitau while adopting his witness statement dated 13th July 2015 stated that he was hired by one John Mutitika and started working at Kamuta farm on 21st January 1977 until 2006 when he was chased away from the farm by Mutahi's son in law. He stated that he knew most of the managers who worked on the farm during his tenure and the late Mutahi started residing on the farm in 1992 although prior to that he would visit the farm occasionally. He stated that payments from the farm



proceeds (crops and the leased houses) were made in form of cheques which he would collect and take to Mutahi at Ol Banata farm in Nakuru where he was working. He stated that Mutahi claimed that he was the General Manager for Kanyotu's farms and that he owned the suit land together with Kanyotu and Muriithi adding that sometime between 1998 and 1999 Mutahi even tried to subdivide the land into three portions. However, upon Mutahi's demise in 2000 Kanyotu was shocked to learn about the alleged subdivision and categorically stated that the farm was only owned by Mr. Muriithi and him.

31. He went on to state that after Mutahi's demise, his daughter Wangeci took away the house keys and stayed with them until Samuel Gichure Ng'ang'a was appointed the new farm manager sometime in 2000. However, from 2003 Wangeci's husband Maina wa Kung'u together with Wangeci's mother and brother would violently invade the farm, harass the residents and labourers and eventually chased Mr. Gichure away in 2004. They then took over the running of the farm. During this time, the farm's financial performance declined and workers would go for months without pay until 2006 when their services were discontinued.
32. On cross examination he stated that he neither had evidence of the crops sold, leased houses nor register of workers on the farm during his tenure but was sure that Maina Wa Kung'u was not the owner of the farm and that the owners were Kanyotu and Muriithi, and Mutahi was only the manager. This was also echoed by Kanyotu in his speech at Mutahi's burial.
33. On re-examination he stated that when he left the farm he did not carry any documents and when he went back to ask for payment, Maina wa Kung'u once again chased him away.
34. DW3, Samuel Gichure Ng'ang'a while adopting his Witness Statement dated 13th July 2015 stated that he was employed at Kamuta farm by Kanyotu between August 2000 and 2005 after the demise of the former manager Mutahi and that before this, he worked at Kanyotu's farm in Limuru. He testified that at the time of his employment the farm had 40 heads of cattle and three houses which had been leased to people of European descent and that he would deposit income from the farm and leased houses in Kanyotu's personal bank account. He went on to state that from the farm records, he was aware that the farm was owned by Kanyotu and Muriithi although on several occasions Kanyotu mentioned that he would grant Mutahi a share in Kamuta Limited. However, he could not state with certainty whether this was ever done or whether it was approved by other directors but that during Mutahi's burial Mr. Kanyotu's speech was categorical that Mutahi was his employee.
35. He further stated that between the years 2000 and 2004 none of Mutahi's relatives resided on the farm. But sometime in 2003 Mutahi's son in law Maina wa Kung'u started harassing him and other staff members and even attempted to kill him using a motor vehicle. He reported these incidents at Karagita Police Post and Naivasha Police Station. Finally, Maina wa Kung'u chased him away from the farm in 2004 whereby Kanyotu relocated him to his other farm in Kipipiri. He added that Maina wa Kung'u vandalised the farm's equipment and also took away ten (10) heads of cattle. He stated that during this time Kanyotu was not visiting the farm due to proceedings at the Goldenberg Commission of inquiry where he was adversely mentioned.
36. On cross examination he stated that he had known Kanyotu from 1998 and while he worked at Kamuta farm it was not divided into three portions. There was a barbed fence surrounding the entire farm which marked the farm's boundary. He stated that it was until 2003 when Mutahi's family began claiming that their father was a shareholder of the farm and even carried away documents from the farm. He stated that Mutahi's family was not involved in the running of the farm but was not aware of the happenings in the 1980's because by then he was not an employee of Kanyotu.
37. He also indicated that he was not aware when Mutahi started living on the farm but Kanyotu did not try to evict him adding that he could not conclusively say whether Mutahi was a shareholder of the



company or not. On the issue of the Goldenberg inquiry he stated that it is Kanyotu who informed him about it.

38. DW3, Martin Esakina Papa a forensic investigator and founder of Global Forensic Security Services. He stated that he was requested by the 1st and 2nd Defendants to examine and verify signatures in the following documents: Consent by Lands Control Board dated 7th December 1976; Cheque leaf from National Bank of Kenya dated 11th December 1974; Copy of audit report dated 1st July 1976; copy of letter by James Kanyotu dated 22nd April 1986; Letter by Mwangi Stephen Muriithi dated 10th June 1978; copy of conveyance dated 31st December 1976. And as per his report tabled in court as evidence he testified that the documents examined bore different signatures and others were made using different printers. He stated that as at 1976, documents prepared used manual typewriters which made the document examined unlikely to have been prepared in the 1970s. He also stated that the documents and photocopies had been manipulated. He also confirmed that he knew Antipas Nyanjwa who was once his colleague.
39. On cross examination he stated that he had twenty years experience in the field and there were several judgements where his findings had been upheld but he did not have the said judgements in court. He stated that it was possible for examiners to have different reports depending on the kind of examination conducted on samples produced and in this case he stated that the examiners examined different documents and that each examiner was entitled to his opinion.
40. He indicated that he could not accurately tell whether the signatures on the Plaintiffs documents were executed at the same time or made by the same person because the documents adduced were copies. He acknowledged that the documents given to him were all copies save for the uncashed cheque leaf dated 11th December 1974. However, upon being issued with documents for verification, Muriithi pointed out his known signature and disputed other signatures. As such he compared the known signature of Muriithi versus the ones disputed.
41. It is worth noting that DW3 was stood down for further cross examination but he never appeared in court to conclude his testimony.
42. DW4 Gitonga Mwangi Muriithi adopting his Witness Statement dated 13th July 2015 stated that he was a director at the 7th Defendant which was incorporated by his father, Muriithi and Kanyotu as equal shareholders and Kanyotu did not hold 98 shares as claimed. He also stated that he had been informed that Mutahi was never a shareholder in the 7th Defendant and that he moved to Kamuta farm in 1992. He confirmed that the 7th Defendant's file had at some point been missing from the Companies' registry and that they had asked Zachariah Kamau Ngugi to file fresh annual returns in December 2013 which was done electronically. Therefore issues of fraud and manipulation as claimed by the Plaintiffs were false. He also confirmed that there was a meeting held on 13th June 2013 where the late Muriithi (DW1) appointed him as a Director. He stated that he was aware that the late Mutahi was buried at his home in Kipipiri and the claim that LR No. 398/7 and 398/8 were matrimonial property was false.
43. On Cross examination he reiterated that the 7th Defendant had been denied access to the suit property which was only benefitting the Plaintiffs and they ought to be evicted.
44. DW5 Dominic K. Kirii while adopting witness statement dated 13th July 2015 stated that he was a Certified Public Secretary who had worked for Haki Registrars between 1997 and 2010. While working there he was approached by Kanyotu in 2003 who instructed him to amend the annual returns of the 7th Defendant from 1978 to reflect the prevailing shareholding status which was that Kanyotu's shareholding capacity had increased to 98 shares as per the documents adduced by the Plaintiffs. This



- was through a resolution made in an Annual General Meeting in early 1980s signed solely by him as the Company's Chairman. Kanyotu also had audited accounts of the 7th Defendant done by BellHouse Mwangi's firm which later became Ernst & Young Company and AGM Compliance minutes for all the years which had also been solely signed by him.
45. He indicated that they could not trace the file at the companies' registry but nonetheless they filed Amended Returns which were adduced by the Plaintiffs. The amended returns were done using a typewriter and inscribed the words amended using a pen. He could not confirm or deny whether Kanyotu's additional 98 shares had been genuinely allotted at the Annual General Meeting. He stated that he did not have any documents to support his allegations because he had since left Haki Registrars and Kanyotu had also carried away the documents he relied on to make the changes.
 46. He testified that Kanyotu told him that Muriithi was no longer interested in the business and had he known that this was not the correct position he would have included Muriithi in the increased shares.
 47. On cross examination he stated that he met Kanyotu sometime in December 2003 but met Muriithi later on after Kanyotu had already passed away. He indicated that it was Kanyotu who was running the company's business and when amending the returns he required minutes which Kanyotu gave him. And the minutes had been signed by Kanyotu as the company's chairman. On the issue of documents he restated that he had left them at Haki Registrars where he used to work.
 48. He stated that he interacted with Kanyotu for over two years and subsequent annual returns were filed and presented to the Companies' registry but when he asked for the file they did not find it and could not tell whether the file was traced later.
 49. DW 6, Zachariah Kamau Ngugi while adopting his Witness Statement dated 13th July 2015 stated that he is a Certified Public Secretary who used to work with Haki Registrars and was familiar with the 7th Defendant, whose work was his docket. He stated that he was appointed by the 1st Defendant- the late Muriithi as the 7th Defendant's Company Secretary on 13th June 2013 and admitted that he prepared and filed the annual returns adduced by the Plaintiffs. He testified that he was aware as per the Annual returns that the 7th Defendant had two directors and shareholders being the late Kanyotu and Muriithi. He stated that when he sought to know the status of the filing of annual returns of the 7th Defendant at the companies' registry he was informed that the 7th Defendant's file was missing. The file was later traced but annual returns for the years since incorporation were missing. He therefore prepared and filed returns for the years 1978 to 2013 and there was no forgery or fraud involved.
 50. He confirmed that there was a meeting held on 13th June 2013 by Muriithi where the 2nd Defendant was appointed as a director because following the demise of Kanyotu in 2008, the 7th Defendant was left with only one director contrary to the provisions of the *Companies Act*.
 51. On cross examination he stated that he met Muriithi in June 2013 when he advised Muriithi to appoint another director but not as a shareholder. A meeting was then held between him, Muriithi and the 2nd Defendant. He indicated that Muriithi said that Kanyotu's family would appoint someone to represent them. He stated that he was not aware how Kanyotu became a shareholder with 98 shares but at his appointment as the Company Secretary there were only two shareholders each with one share.
 52. He confirmed that he worked with DW5 and indicated that while working at Haki Registrars between 2003 and 2006 he saw Kanyotu in the office but DW5 did not disclose the discussion he had had with Kanyotu. He also confirmed that he was aware that there were three conflicting positions regarding the shareholding of the company.



53. DW7 Margaret Nyakinyua Murigu made reference to her statement of Defence dated 12th November 2014 and stated that she was aware that Kanyotu and Muriithi were the only shareholders of the 7th Defendant and that Mutahi was their employee at Kamuta farm. She indicated that she was also aware that Mutahi had one share in the company but as a nominee of Kanyotu and Muriithi and that she had been informed by Kanyotu that the shareholding of the company had changed whereby he held 98 shares. As such the allegation of fraud and digital manipulation was unknown to her.
54. On cross examination she confirmed that Muriithi and Kanyotu were friends who had invested in several properties together. She stated that Kanyotu had informed her that they also owned a property in Naivasha and was aware that Mutahi was his employee and did not contribute to the purchase of the farm. She confirmed that she was also aware that Mutahi was a nominee shareholder. She also stated that during her conversations with Kanyotu he had mentioned that Mutahi had one share which was not equal to the one share held by Muriithi but he did not mention anything to do with subdivision of the farm. She stated that the documents relating to Kamuta were kept by Mary (the 5th Defendant) and she is the one who took them to Muriithi upon Kanyotu's demise.
55. DW8, the 3rd Defendant Jane Gathoni Muraya Kanyotu adopted her Witness Statement as her evidence in chief and produced her Bundle of Documents as her exhibits. She stated that as the 2nd wife to the late Kanyotu she was aware that the 7th Defendant is the registered proprietor of the suit property and it was incorrect to state that there was an attempt to deprive of the late Mutahi or his family shares in the company adding. She also stated that the Plaintiffs had not been in occupation of the suit property since 1970s. She indicated that the late Mutahi started residing at Kamuta Farm in the 1990s after the other farms in Nakuru were sold off and he resided there with his daughter while his wife stayed at his farm in Kinangop where he was laid to rest after he passed on. As such, Kamuta farm was not his matrimonial home since he was only residing there as the farm manager.
56. She confirmed that the late Mutahi was the farm manager at Kamuta farm which was incorporated on 4th December 1976 by Kanyotu and Muriithi as the shareholders with one share each. And that upon the demise of Kanyotu she handed over the company documents to the only surviving director Muriithi (DW1) through her advocate. She also confirmed that the late Mutahi was also a farm manager at Olbanata and Mokamu farms in Nakuru before taking over management of Kamuta from one Mutitika as evidenced by the letter dated 17th October 1978 adduced by the 1st, 2nd and 7th Defendants signed by Muriithi and Kanyotu. She also stated that the proceedings from Kamuta farm had been benefitting Mutahi's family and not the 7th Defendant as it ought to be.
57. On cross examination, she confirmed that upon the demise of Kanyotu, she handed over the documents to Muriithi through her lawyer and that both of them held equal shares at the 7th Defendant and that Mutahi was only an employee at Kamuta farm and no subdivision was ever done in his favour. She stated that upon Mutahi's demise, the late Kanyotu went to visit the farm and found documents strewn all over the house but there was no one there. She indicated that she knew Samuel Gichure who was the farm manager at Kamuta farm after Mutahi's demise and he had also worked for Kanyotu in his other farm in Kinangop. Adding that Gichure was threatened and chased away from Kamuta farm by Mutahi's family members. She also stated that the Mutahi's family had also denied Kanyotu's family access to the farm but she did not make a formal complaint.
58. She went on to state that she officially got married to Kanyotu in 1990 but had known him from late 1980s when Kamuta Limited had already been incorporated as per the information and documents shared with her by the late Kanyotu adding that she would visit the farm with Kanyotu over the weekends. She stated that she was aware about Mutahi's proposal to subdivide the land but Kanyotu



did not consent to it and that prior to Kanyotu's demise, he tried talking to Mutahi's family but they insulted him.

59. On re-examination she confirmed that she tried to visit the farm but was denied access and that Kanyotu had tried to remove the Mutahi's family from the farm using a lawyer.
60. At the close of oral testimonies, parties tendered final written submissions

The Plaintiffs' Submissions.

61. Counsel for the Plaintiffs submitted that the shareholders for the 7th Defendant which was incorporated on 4th December 1976 were at all times the late Francis Iganjo, James Kanyotu and Stephen Muriithi holding one share each as per the Memorandum of Association adduced by the 1st Plaintiff; correspondence between Mutahi and the Company Secretary in 1985 and the LCB consent documents. And that it had also been confirmed in evidence by DW5 Dominic Kirii that he was instructed by Kanyotu to amend the 7th Defendant's documents to show that he held 98 shares while Iganjo and Muriithi held one share each.
62. On the issue of nominee shareholder, Counsel submitted that there was no evidence adduced to support this. He also submitted that the letter dated 17th September 2003 adduced by the 1st, 2nd and 7th Defendants addressed to the Plaintiffs' advocates the firm of Archer Wilcock & Kairu made reference to the late Mutahi as a nominee shareholder of the late Kanyotu but did not have any legal interest in the company. However, this allegation was also not proved. He pointed out that it was evident that Mr. Kanyotu was in charge of the 7th Defendant's affairs until his demise and as such he needed not have a nominee.
63. Counsel further submitted that the late Mutahi was involved in the payment of the purchase price for Kamuta farm as the farm manager as evidenced by his letter to Kanyotu dated 15th March 1985 and that he would also want to take charge of his portion of the farm to settle his family as agreed. It was thus evident that the late Kanyotu had consented to Mutahi's family settlement on the farm as per Kanyotu's letter dated 17th June 1985 acknowledging Mutahi to settle his family on that farm and that the subdivision would be formalised. Therefore, the decision of two shareholders was binding on the rest and the share of the late Mutahi should be transferred to his estate and the land subdivided equally.
64. Counsel submitted that the fact that the loan facility and bank documents were signed by Kanyotu and Muriithi was not evidence that Mutahi was not a shareholder indicating that it was easier for the late Kanyotu and Muriithi to meet and sign documents since they were both were civil servants working in Nairobi and Mutahi was tasked with managing the farm. He went on to state that the fact that the three did not have any other joint ventures did not negate the existence of their investment in the 7th Defendant.
65. On the issue of fraud and conspiracy by the 6th Defendant Counsel submitted that there was evidence that records at the 6th Defendant were tampered with by both the late Kanyotu and the late Muriithi and the records should be restored to reflect that original position.
66. On the prayers sought by the 7th Defendant's counterclaim, counsel submitted that the same should be dismissed as the Plaintiffs had evidenced that they were entitled to the suit property as shareholders of the 7th Defendant. On the issue of mesne profits that the claim cannot succeed against the Plaintiffs since hit had not been proved citing *Fredrick Korir v Soin United Women Group (sued through Eunice Towett, Jane Mwolomet, Lucio Chebocho* [2018] eKLR and *Peter Mwangi Mbuthia & Another v Samow Edin Osman* [2014] eKLR.



The 1st, 2nd & 7th Defendants' Submissions.

67. The 1st, 2nd and 7th Defendants' submissions on the claim and counterclaim submitted that this court had no jurisdiction to deal with issues of shareholding of the 7th Defendant citing Article 162 and Article 165(3) of the Constitution and Section 13 of the Environment and Land Court Act as well as several authorities on this among them: the Court of Appeal cases of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) and Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others (2013) eKLR and Supreme Court of Kenya in Samuel Macharia & Another v Kenya Commercial Bank Limited & 2 others [2011] eKLR and In the Matter of the Interim Independent Electoral Commission [2011] eKLR that all made pronouncements on importance of jurisdiction. And that the predominant question for determination which was shares and shareholding of the 7th Defendant fell under the jurisdiction of the High Court citing Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another [2018] eKLR and Prudenzio Nicholas Gaitara v Patrick Kariuki Muiruri & 2 others [2019] eKLR on what a predominant issue entails and the Supreme Court case of Republic v Karisa Chengo & 2 others [2017] eKLR on the jurisdiction of the High Court, ELC and ELRC.
68. Counsel submitted that the Plaintiffs could not ask for subdivision of a company's properties which was a distinct entity from its owners and the allegation that he held one share did not make him owner or entitled to the company's property and only the 7th Defendant could move relevant institutions for such measures citing Salmon v salmon & Co. Ltd [2897] ACC, Victor Mabachi & Another v Nurturn Bates Mtd [2013] eKLR and In the matter of the Estate of Gitere Kabura & Another (both deceased) [2018] eKLR.
69. On whether the claim was statute barred, counsel submitted that the suit was against Section 4(1) of the Limitation of Actions Act which provided that actions where a limitation of time was not prescribed in the Act it should be brought within six years. That it took the Plaintiffs 12 years between 2002 when the advocates for the Plaintiff asked the Directors to admit them as shareholders for the Estate of the late Mutahi and 2014 when this suit was instituted. As such the suit could not be sustained citing: Gathoni v Kenya Coopertave Creameries Ltd [1982] KLR 104, Rawal v Rawal [1990] KLR 275, Iga v Makerere University [1972] EA.
70. On whether the late Mutahi was a shareholder of the 7th Defendant, counsel submitted that the said Mutahi did not feature in any of the incorporation documents regarding the 7th Defendant including Bank documents for a loan facility to enable purchase of the suit property. Adding that executing a guarantee was an obligation of all Directors which if Mutahi was indeed a Director ought to have appended his signature. And that the issue of distance between Nairobi and Naivasha as submitted by counsel for the Plaintiffs was a lame excuse and evidence from the bar.
71. Counsel also submitted that the application to the Land Control Board purported by the Plaintiffs was not executed by Mutahi and could not have been the application that gave rise to the LCB consent. In addition, counsel submitted that the correspondence adduced by the Plaintiffs were between Mutahi and Kanyotu which had nothing to do with the 7th Defendant or directed to the 7th Defendant.
72. On the issue of nominee shareholders as claimed by the 3rd and 5th Defendants counsel submitted that any inclusion or amendment of anything relating to the 7th Defendant which was a private company ought to have been done with approval from all the shareholders. As such there is no way Mr. Kanyotu would have included Mutahi as a nominee shareholder without the late Muriithi's consent, more so at a time when he was in detention. Counsel also stated that the concept of nominee shareholder or nominee director was foreign in Kenyan jurisprudence as was held in Housing Finance of Kenya Ltd v Pal Homes Ltd [2002] 2KLR.



73. The allocation of additional 97 shares to Kanyotu as testified by Dominic Kirii was illegally done since there was no meeting or agreement on the same. Adding that the said Dominic had testified that had he known that the increment was unilaterally decided he would not have increased the shares. Counsel also submitted that the 4th Defendant and Plaintiffs claiming this to be the case had not adduced evidence to support this claim.
74. On whether appointment of the 2nd Defendant was lawful, counsel submitted that the need to nominate the 2nd Defendant as a Director and Zachariah as a secretary was a legal requirement as per Section 177 and 178 of the [Companies Act](#) and there was nothing illegal about it.
75. Whether the Plaintiffs occupation of the properties was lawful, counsel submitted that the Plaintiffs could not stake claim on the 7th Defendant's properties and from evidence it was clear that the 7th Defendant had been denied access to the suit properties and was not deriving any income from the economic activities taking place thereon. Therefore, any agreement purported to have taken place between the late Mutahi and the late Kanyotu regarding the 7th Defendant was void because it was not a company resolution. Adding that even if the Plaintiffs were shareholders that would not justify their actions of taking possession of the 7th Defendant's property. Therefore they ought to vacate the 7th Defendant's land.
76. On who was entitled to orders sought, Counsel submitted that the Plaintiffs prayers should be dismissed for want of jurisdiction and being statute barred. And their prayers in the counterclaim granted because the 7th defendant had been denied access to its property and any gainful activity taking place was only benefitting the Plaintiffs who were in occupation of the suit property and was thus entitled to mesne profits as held in [Rajan Shah T/A Trajan S. Shah & Partners v Bipin P. Shah](#) [2016] eKLR.
77. And while acknowledging that mesne profits ought to be actual and disclosed, counsel submitted that they did not have that information since the Plaintiffs were in possession of the suit property and all accounts and that is why they had sought that the Plaintiffs be compelled to give an account of the income derived. In the alternative since both mesne profits and damages cannot be awarded together they sought grant of general damages citing [Christine Nyanchari Oanda v Catholic Diocese of Homa Bay Registered Trustees](#) [2020] eKLR adding that since they had evidenced trespass they were entitled to damages [Park Towers Ltd v John Mithamo Njika & 7 others](#) [2014] eKLR as well as costs for the suit.

The 3rd Defendants' Submissions.

78. The 3rd Defendant in their submissions highlighted six issues for determination as summarised below. The first issue for determination was whether this court has jurisdiction to determine the suit. Without rehashing what has already been summarised here above, counsel submitted that this court did not have jurisdiction. Adding that this court could not determine whether the Plaintiffs had locus to claim the 7th Defendant's land without determining the issue of shareholders. And that not the case, subdividing the 7th Defendant property would mean dissolving and liquidating its assets would be illegal. Reference was made to the case of [Pacific Frontier Seas Ltd v Kyengo & Another](#) [2022] KECA 396 KLR and [George W M Omondi & Another v National Bank of Kenya Ltd & 2 others](#) [2001] eKLR.
79. On the issue of shareholding of the 7th Defendant, counsel submitted that the company only had two shareholders – Kanyotu and Muriithi – who also made contributions towards the purchase of the suit property and the late Mutahi was only an employee.
80. Whether the Plaintiffs had proved the allegation of fraud, counsel submitted that fraud ought to be proved which the Plaintiffs had failed to show how the Estate of the late Kanyotu had fraudulently



interfered with the 7th Defendant's shareholding or any other alleged fraud as set out in *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 others* [1996] eKLR, *Kinyanjui Kamau v George Kamau* (2015) eKLR and *Vijay Morjaria v Nansingh Madhusinh Darbar & Another* (2000) eKLR.

81. Counsel also cited the case of *Kagina v Kagina & 2 others* KECA 242 (KLR) which held that there was no proof that the said witness was indeed a forensic expert since he had not produced his credentials in court.
82. Counsel finally submitted that the Plaintiffs had no proprietary interest on the suit property and should be evicted and the suit dismissed with costs.

The 4th & 5th Defendants' Submissions.

83. Counsel for the 4th and 5th Defendants in their submissions stated that the Plaintiffs, 1st, 2nd and 3rd Defendants had adduced inconsistent evidence regarding the 7th Defendant and it is unfortunate that the 6th Defendant did not attend court to aid in ascertaining the correct position regarding the 7th Defendant. Adding that even the testimonies and opinions of the forensic experts who testified for the Plaintiffs and the 2nd Defendants was contradictory on the authenticity of the documents produced. As such counsel urged court to arrive at a decision based on the consistency of testimonies made by the witnesses as was held in *Ernest Kithi Mbula v Esther Nzeli Mutua* [2019] eKLR.
84. Counsel submitted that the Plaintiffs had not discharged the burden of proof as per Section 107, 108 and 109 of the *Evidence Act* in showing how the late Mutahi was a shareholder of the 7th Defendant citing *Mbuthia Macharia v Annah Mutua Ndwiga & Another* [2017] eKLR. Counsel added that whereas they differed with the 1st and 2nd Defendants on the shareholding capacities of Kanyotu and Muriithi, they were in agreement that Mutahi was only an employee at the company's farm who had abused the trust bestowed upon him by converting it to his property and should be evicted.
85. On the evidence of the forensic examiner, counsel submitted that it was clear that each party had their own contradictory documents and it was not possible for the examiner to give an accurate opinion based on falsified documents and the court should not place reliance on his testimony citing *Stephen Kinini Wang'onde v The Ark Ltd* [2016] eKLR.
86. Counsel went on to state that after Muriithi's detention he lost interest in the company and never bothered with its running adding that the 1st Defendant had categorically stated in his testimony that he had never stepped foot on the said farm since the 1980's. It was thus evident that Kanyotu was the sole person who ensured that the farm remained profitable and did not waste away and that is how Kanyotu ended up with 98 shares, Muriithi with 1 share and Mutahi with 1 share as their nominee and court should order rectification of the register to reflect this position.

Analysis and determination

87. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
 - i. Whether this court has jurisdiction to determine the issues relating to the shareholding of the 7th Defendant.
 - ii. If so, are the plaintiffs entitled to the orders sought in the plaint?
 - iii. Is the 7th Defendant entitled to the orders sought in the counter claim?
 - iv. Who should bear costs of this suit?



88. A look at the plaint, shows that the plaintiff's case revolves around the shareholding of a limited liability company, the 7th Defendant herein. The prayers in the plaint are in relation to the shareholding of the company. It is also noted that prayer (f) in the plaint seeks to amalgamate and divide the suit property which the plaintiff's admit does not belong to them but to the 7th defendant, a limited liability Company.
89. This court does not have jurisdiction to liquidate a company and/or distribute/divide the properties registered in the names of a limited liability company.
90. The issue of jurisdiction has severally been raised by the Defendants and comprehensively submitted on. Section 13 of the Environment and Land Act provides:
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
91. Article 162(2) of the Constitution stipulates:
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
 - (b) the environment and the use and occupation of, and title to, land.
92. The Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR stated: "...A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."
93. From the foregoing it is not in contention that this court is clothed with jurisdiction to deal with issues on land and environment. It is however evident from the pleadings and evidence adduced and summarised in the preceding paragraphs that this case relates to contention on who are the legitimate shareholders of the 7th Defendant between the late Francis Iganjo Mutahi, the late James Kanyotu and the late Mwangi Stephen Muriithi and as such ownership/proprietorship of LR No. 398/7 and 398/8 Naivasha.



94. The Court of Appeal in the landmark case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR also pronounced as follows on the issue of jurisdiction:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence... A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”

95. On the 29th September 2017 when the matter came up for further hearing before Hon Gitumbi J Ms. Judy Thongori for the 3rd Defendant raised the issue of whether this was an ELC matter or a matter falls within the jurisdiction of the High Court (Commercial Division) She felt that the issue was who were the shareholders of Kamuita Limited, the Company that holds the land and the issue of who were the right shareholders.

96. Mr. Kariuki for the plaintiffs’ in response stated that the claim revolves around shareholding as well as a claim to hold the late Iganjo’s share in the two properties. He felt that the issue was whether or not Francis Mutahi Iganyo was a shareholder and whether he was entitled to the land owned by the company.

Mr. Thuita for the 1st, 2nd and 7th defendants stated that they had raised the issue of jurisdiction in their defence and counter claim.

97. On the 13th October 2017, the court gave the following directions,

“I have considered the challenge to the jurisdiction of the court to hear and determine this suit on the ground that it is a matter falling within the jurisdiction of the Commercial Division of the High Court because the dispute revolves around the shareholding of a company, which owns the suit properties. To that challenge I respond that while that may as of well be so, as pointed out by the 7th defendant, there is before this court a counter claim seeking orders of eviction and arising issues of trespass which fall squarely within the jurisdiction of this court.

Further also observe that this suit has already been heard by this court substantially and in particular note that the evidence of the 1st defendant a very old, frail and ailing man was taken in priority. Subjecting such a man to a fresh trial would appear to me taxing, arduous and difficult. Accordingly I direct that the hearing of this suit do proceed before this court. A further date to be given”.

98. Upon the court giving these directions Mr. Kariuki for the plaintiffs’ who was present did not challenge them. In my view, counsel ought to have taken the earliest opportunity to have this suit transferred to the right forum. He chose to proceed with this suit in this court.

Following these directions this court had no choice but to proceed with the hearing of this matter to conclusion.

99. This court wishes to depart from the directions of 13th October 2017, and state that it is not clothed with jurisdiction to determine the question of shareholding in a limited liability company. These are issues that fall within the jurisdiction of the High Court (Commercial Division).



In the case of *Monica Wangui Njenga v. Davis Kinyanjui Njenga & Another* (2020)eKLR , the court stated as follows;

“Looking at the reliefs sought in the plaint, it is manifest that they all relate to the manner in which the affairs of the Company were conducted. Even where they appear to refer to matters to do with the use, occupation and title to land, there is possibly no way of resolving the dispute without first determining whether the processes within the 2nd defendant that led to such use or occupation or title to the suit properties were lawful and valid pursuant to Section 3 (1) of the *Companies Act* 2015, the court with the jurisdiction to deal with such matters is the High Court. This court does not have jurisdiction in such matters”.

100. I agree with the 3rd Defendant’s submissions that the suit properties belong to the 7th Defendant which is a Limited liability Company. The plaintiff’s claim on the suit properties, is based on the shareholding of the 7th Defendant. As stated therein above this court has no jurisdiction to determine with the shareholding of the 7th Defendant.

101. I also agree with the 3rd Defendant’s submissions that to allow an “alleged” shareholder to dissolve the company in a dispute that ought to only involve land would be unfair and illegal in the case of *Pacific Frontier Seas Ltd v. Kyengo & Another* (2022)KECA 396 KLR the Court of Appeal stated as follows;

“it is trite law that what the estate of a deceased shareholder is entitled to are only the shares of the deceased in the company, and not to the property of the company. We have already adverted to the decision in *Re Estates of Gitere Kahura and Mary Nyokabi* (supra). In the course of determining an application for confirmation of grant, the High Court realised that the properties that the parties wanted to distribute did not belong to the deceased persons, but to a company in which they held shares. In refusing the application, the court stated that the jurisdiction of the probate court lies with the distribution of the shares, but not the liquidation of the company or distribution of its assets, which belong to the company”.

Similarily in *George W.M.Omondi & Another v. National Bank of Kenya Ltd & 2 others* (2001) eKLR where the court stated;

“it is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even when the directors happen to be the sole shareholders (see *Salmon v. a Salmon & Co. Ltd* (1897)AC 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own. From the basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation”.

102. I also agree with the 1st, 2nd and 7th Defendants’ submissions that the predominant issue in this matter is on the shares of the company rather than the land. As stated earlier the plaintiffs are contesting the shareholding of the 7th Defendant and seek that the register be rectified. This power to rectify a register is available to the High Court under Section 103 of the *Companies Act* 2015.



In the case of Prudenziio Nicholas Gaitara v. Patrick Kariuki Muiruri & 2 Others (2019) eKLR Okongo J stated as follows;

“I am in agreement with the defendants that the only claim which is pending and which can be pursued by the plaintiff is that relating to the alleged illegal and fraudulent alteration of the shareholding in the 2nd defendant. I am of the view that this is a claim which the plaintiff can pursue as of right at it relates to the infringement of his personal rights as a shareholder. The plaintiff does not require leave of this court to pursue such claim. Even if leave was required, as rightly appointed out by the defendants, this court has no jurisdiction to determine disputes over the internal management of companies. The plaintiff’s claim will have to be instituted in the High Court”.

103. I agree with counsel for the 1st, 2nd & 7th Defendants’ submissions that a court cannot lose sight of the issue of jurisdiction because a trial has been done. I find that this court has no jurisdiction just to determine the plaintiff’s claims. The plaintiffs’ suit is hereby struck out with costs to the defendants.
104. As regards the 7th Defendant’s counter claim, it is not in dispute that the plaintiff’s family are in occupation of the suit properties. As stated earlier the plaintiffs have no claim of right on the 7th Defendant’s properties. The 7th Defendant is the exclusive owner of the two suit properties. It has the right to utilize. It derives no income from the suit properties. I find that the plaintiff’s are in illegal occupation of the 7th defendant’s property.
105. There is evidence that the land is used for large scale farming of horticultural crops. It hosts hotels being run by plaintiffs on the main house and cottages built. There is also a catering establishment known as Sakata from which the plaintiffs’ collect rent. The property is also used as a landing bay for boats used in fishing and tourists visiting lake Naivasha.

It is in evidence that the plaintiffs have leased out portions of the properties to third parties and they collect rent. The occupation is without the consent of the 7th defendant. The plaintiffs are liable to pay mesne profits.

In the case of Rajan Shah T/A Rajan S. Shah & Parners v. Bipin P. Shah (2016)eKLR the court stated as follows;

“The mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim of mesne profits and the very foundation of unlawful possessor’s liability thereof.....the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits”.

106. However I note that the 7th Defendant also seeks General damages for trespass in the case of Christine Nyanchama Oanda v. Catholic Diocese of Homa Bay Registered Trustees (2020) eKLR the Court of Appeal held that;

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both”



Going by the above decision I award Kshs. 1,000,000/= being general damages for trespass. I rely on the case of Park Towers Limited v. John Mithamo Njika and 7 Others (2014) eKLR where the court stated that;

“where a trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case”.

107. I find that the 7th Defendant has proved its counter claim as against the plaintiffs on a balance of probabilities.

108. Accordingly Judgements is entered for the 7th Defendant in its counter claim as follows:

- a. That an order of permanent injunction is hereby issued restraining the plaintiffs, their agents or employees from trespass, interfering, claiming or dealing in any way with the 7th Defendants properties namely LR. NO.398/7 and LR. NO.398/8 Naivasha.
- b. That the Plaintiffs their servants and or agents are hereby directed to vacate the suit properties namely LR. NO.398/7 and LR NO.398/8 within One Hundred and Twenty (120) days from the date of this judgment. In default the 7th Defendant be at liberty to use lawful means to evict them.
- c. That the OCS Naivasha Police Station is hereby directed to ensure compliance of the court orders.
- d. That an order is hereby issued compelling the plaintiffs to furnish a comprehensive account of the income derived from LR. NO.398/7 and LR NO.398/8 Naivasha during their occupation and handing over the said income to the 7th Defendant.
- e. General damages for trespass Kshs1,000,000/=.
- f. Costs of the suit and interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21ST DAY OF SEPTEMBER 2023.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Kariuki for the Plaintiff's

Mr. Thuita for the 1st, 2nd and 7th Defendants.

Ms. I. Kiarie for the 3rd Defendant.

Mrs. Akedi for the 4th Defendant.

N/A for the 5th & 6th Defendants.

Court Assistant – Mutisya.

