



**Dalco Trading Limited v Imathiu & 3 others (Environment & Land Case 18 of 2019) [2022] KEELC 13461 (KLR) (11 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13461 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT & LAND CASE 18 OF 2019  
CK YANO, J  
OCTOBER 11, 2022**

**BETWEEN**

**DALCO TRADING LIMITED ..... PLAINTIFF**

**AND**

**KAMAITA IMATHIU ..... 1<sup>ST</sup> DEFENDANT**

**LAWRENCE N. MUGAMBI ..... 2<sup>ND</sup> DEFENDANT**

**MOHAMED HASHIN JAMA ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, THARAKA NITHI COUNTY ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. In this case, I am required to write a judgment based on the evidence that was partly taken by hon PM Njoroge J, who was seized of the matter before he was transferred. The learned Judge took the evidence of PW1 to PW7 as well as DW1, DW2 and DW3. Pursuant to the provisions of order 18 rule 8(1) of the Civil Procedure Rules, I proceeded with the matter and took the evidence of DW4, DW5 and DW6 and concluded the matter.
2. The plaintiff moved this court by way of a plaint dated March 2, 2017 and filed in court on March 6, 2017. The plaint was amended on 30<sup>th</sup> July, 2018 and further amended on October 11, 2018. The further amended plaint seeks the following reliefs:
  - a. A permanent injunction against the defendants, their agents and servants restraining them from evicting the plaintiff and its directors from the suit land no (sic) and or in any manner whatsoever interfering with the plaintiff's occupation, use and enjoyment of the suit land.



- b. Cancellation of the 2<sup>nd</sup> defendant's registration as proprietor of the suit land no S Tharaka/Tunyai 'A'/38 and in place an order directing the Land registrar – Chuka the 4<sup>th</sup> defendant herein to revert transfer the suit land to Dalco Trading Limited; the plaintiff herein.
  - c. Special damages in the sum of ksh 2,713,642.30 together with lost profits/income of ksh 2,435,818.75.
  - d. In the alternative the money value of the suit land, the same being ksh 21,6000,000/=(sic).
  - e. Punitive and/or exemplary damages.
  - f. Costs of the suit and interest.
3. The plaintiff's case is that it is a limited liability company incorporated in Kenya under the companies Act Cap 486 of laws of Kenya and that its only directors are Patrick Karani and Mohamed Hashin Jama who hold 50% share each in the company. It further states that in the year 2009, it purchased from the 1<sup>st</sup> defendant the suit land LR No S Tharaka/Tunyai 'A'/38 measuring 12.2 hectares in size at a consideration of ksh 5,600,000 (Five million six hundred thousand) only.
  4. The plaintiff states that the Land Control Board Consent to transfer the suit land was duly obtained by the advocate who was to transact transfer of the same from the 1<sup>st</sup> defendant to the plaintiff who had not executed the said instructions as at the time of filing suit. The plaintiff further states that upon the execution of the said agreement, it was put in exclusive possession of the suit land by the 1<sup>st</sup> defendant sometime on April 23, 2009.
  5. The plaintiff states that it developed the land and connected water from Catholic Diocese of Meru Ng'uuru Gakirwe water project pursuant to a contract executed by mr Patrick Karani one of the plaintiff's directors and that the water bills have over the years been issued in the name of the said director. The plaintiff states that the suit land has over the years been put under agricultural use by the plaintiff through the said director with the blessings of the 3<sup>rd</sup> defendant.
  6. The plaintiff states that having previously undertaken a professional feasibility study, in the year 2016 it tilled and prepared the entire suit land for use by growing capsicum chillies through irrigation in 15 acres and other crops under season rains for the rest of the land. In this regard, the plaintiff states that it spent a total of ksh 5,190,192.30 as per the inventory shown in the further amended plaintiff. The plaintiff avers that at the end of December, 2016 the suit land had been put into use and it was projected that the drip irrigation would generate a net income of ksh 2,435,818.75 in 2018 in terms of a feasibility study undertaken in the years 2015/2016.
  7. The plaintiff avers in the plaint that on February 22, 2017, its director, mr Patrick Karani, received a letter dated February 6, 2017 from the 2<sup>nd</sup> defendant's Advocates M/s Njeru Ithiga & Co Advocates demanding that the plaintiff's said director vacates from the suit land within 14 days failing which eviction proceedings before a court of law would be filed against him. That the 2<sup>nd</sup> defendant was described in the said letter as the "registered owner" of the suit land, a fact the plaintiff established to be true upon a search.
  8. The plaintiff states on February 10, 2017, some people who were instructed by the 2<sup>nd</sup> defendant descended on the suit land and caused a damage totaling ksh 2,713,642.29, but were repulsed by the plaintiff's workers and a report was made to Tunyai police post *vide* OB No December 11, 2002/2017 which matter is stated to be pending under investigation.
  9. The plaintiff avers that its director, mr Patrick Karani, and the 2<sup>nd</sup> defendant know each other and come from the same place known as Nkubu within Meru but the suit land is about 30 kilometers away.



It is the plaintiff's contention that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are aware that the plaintiff is the owner of the suit land and is in occupation, that Mr Patrick Karani is overseeing the affairs undertaken by the plaintiff's workers within the suit land, that the plaintiff is undertaking massive development on the said land, and that Mr Mohamed Hasin Jama was also a director of the plaintiff company with Mr Patrick Karani and nobody else.

10. The plaintiff avers that early in the year 2016, the 2<sup>nd</sup> defendant approached Mr Patrick Karani and informed him that he had an interest in the suit land and wanted to purchase it and that he had spoken to the 3<sup>rd</sup> defendant, but was informed that the plaintiff had purchased the land and the shareholding with the 3<sup>rd</sup> defendant was 50:50, and that the plaintiff company was not contemplating disposing of the suit land.
11. The plaintiff's claim is that the 1<sup>st</sup> defendant went behind the plaintiff's back and proceeded to irregularly and fraudulently sell and transfer the suit land to the 2<sup>nd</sup> defendant. It is the plaintiff's case that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants acted fraudulently to take away its land, that the 2<sup>nd</sup> defendant cannot claim to be a bonafide purchaser for value without notice of the said land. The plaintiff avers that having sold the land to the plaintiff the land was not available for sale, and the 1<sup>st</sup> defendant had no capacity to sell it to the 2<sup>nd</sup> defendant. The plaintiff has particularized the collusion, irregularity and fraud that it claims was perpetuated by the defendants and claims that it has suffered loss, damage and inconvenience, hence the reliefs sought herein.

#### **Defendants' Case**

12. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a joint statement of defence dated July 11, 2017 and amended on October 15, 2019 in which they denied the plaintiff's claim. They aver that the transfer and registration of the suit land by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was done legally and procedurally and with the consent of the plaintiff's company which they stated received KSh 8,100,000 from the 2<sup>nd</sup> defendant and relinquished its whole interest in the suit land. The 1<sup>st</sup> and 2<sup>nd</sup> defendants state that Patrick Karani who purports to bring these proceedings and who has executed the affidavit verifying the plaint herein is not a director or authorized officer of the plaintiff company and that the proceedings herein are a total nullity. They further state that the said Patrick Karani being a stranger to the plaintiff cannot act and has no authority to prosecute this suit for and on behalf of the company adding that there was no authorization by the directors of the plaintiff to commence these proceedings.
13. The 2<sup>nd</sup> defendant states that he is a bonafide purchaser of the suit land, acquired good title and bought the suit land with all the developments, crops and plants that were on the land at the time of purchase.
14. The 1<sup>st</sup> defendant states that he has no proprietary interest in the suit land having sold it to the plaintiff company who in turn sold the same to the 2<sup>nd</sup> defendant. It is the 1<sup>st</sup> and 2<sup>nd</sup> defendants' contention that the plaintiff's suit is a sham and prayed for the same to be dismissed with costs.
15. The 3<sup>rd</sup> defendant filed his statement of defence dated October 24, 2019 in which he denies the claim and avers that the plaintiff has breached the mandatory provisions of the *Companies Act* as repealed by the *Companies Act* No 17 of 2015 as the plaintiff inter-alia filed the suit without the requisite resolutions and authorities to sign and execute the pleadings. The 3<sup>rd</sup> defendant avers that the suit land belongs to the 2<sup>nd</sup> defendant who is also in occupation of a portion thereof. It is the 3<sup>rd</sup> defendant's case that the plaintiff has no cause of action against him, adding that the plaintiff's claim for special damages does not meet or satisfy the requirements necessary to prove a claim for special damages. He prayed for the plaintiff's suit to be struck out and/or dismissed with costs.



16. The Honourable Attorney General filed a defence dated 10<sup>th</sup> December, 2019 on behalf of the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant contended that he is not privy to the business arrangement between the plaintiff and the 1<sup>st</sup> – 3<sup>rd</sup> defendants and denied that any inquiries were ever made to his office in relation to the suit property, adding that if any inquiries were made, the same were addressed in a procedural manner as statutorily prescribed. The 4<sup>th</sup> defendant denies the particulars of fraud attributed to him in consort with the 1<sup>st</sup> to 3<sup>rd</sup> defendants. The 4<sup>th</sup> defendant further avers that if there are any dealings with the suit property, the same was proper, lawful and in execution of their statutory powers which have been particularized.
17. The 4<sup>th</sup> defendant denies that the plaintiff suffered loss or damage, and that if any were suffered, the same is not attributable to the defendants. The allegations of collusion by the defendants is also denied.
18. The 4<sup>th</sup> defendant further avers that no notice or demand has ever been issued as prescribed by the law adding that the plaintiff's suit is defective and bad in law on the grounds that the plaintiff lacks the requisite authority for the institution of this suit and that the verifying affidavit is incurably defective and consequently the same ought to be struck out. It is prayed that the suit herein be dismissed with costs.

### **The plaintiff's Evidence**

19. Oganga Dennis (PW1) informed the court that he was the Assistant County Commissioner, Mlolongo Division. That he was the author of the letter dated July 12, 2018 which he wrote when he was Assistant County Commissioner (ACC), Tharaka South Sub-County (Chiakariga), Tharaka Nithi County. The letter made reference to parcel No Tharaka South/Tunyai 'A'/38 which was within his area of jurisdiction.
20. PW1 testified that during his stay he was the Chairman of the Land Control Board. That from their records, no Land Control Board transaction had been approved and no application for consent had been filed with respect to Lawrence N Mugambi (2<sup>nd</sup> defendant) and the plaintiff. He further testified that there was no application between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. He produced the said letter dated July 12, 2018 as P Exhibit 1.
21. PW1 was cross-examined by mr Murango Mwenda advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, mr Kiogora Arithi advocate for the 3<sup>rd</sup> defendant and mr Kiongo state counsel for the Attorney General for the 4<sup>th</sup> defendant. PW1 was also re-examined by mr Siagi advocate for the plaintiff.
22. PW1 stated that he wrote the letter (P Exhibit 1) at the request of the plaintiff's counsel, and the request was delivered by the Deputy County Commissioner's Office (DCC) for the witness to shed light on the issue. He stated that a copy of a letter dated July 10, 2018 had got to the Deputy County Commissioner (DCC) who forwarded to PW1 who replied to the same on July 12, 2018. He agreed that the letter was written when the matter was still in court, but denied that he was assisting the plaintiff, but rather explain the true position.
23. PW1 stated that he reported as assistant county commissioner (ACC) Chiakariga in January, 2016. He also admitted that there is a Division known as Tunyai, but he could not tell when it was established. PW1 testified that the suit land falls within Tunyai Division, whose offices are in Tunyai, but stated that the area was under one Assistant County Commissioner (ACC) which was PW1. He stated that Tunyai Division did not have a Land Control Board (LCB), adding that the LCB sits at Chiakariga (Tharaka South Division). He stated that Land Control Board (LCB) keeps registers and minutes though he did not have it in court. He stated that Deputy County Commissioner (DCC) sits as Chairman of Land Control Board (LCB) but could delegate through writing. That Tharaka Land



- Control Board (LCB) was delegated to him. He stated that he referred to a consent granted on May 11, 2009 which he got from the office records since he was not serving as an Assistant County Commissioner (ACC) at the time. PW1 stated that a consent is issued in triplicate with a copy left in the office.
24. PW1 stated that he did not have the Land Control Board (LCB) register in court, but added that the office of the Assistant County Commissioner (ACC) can produce it. He admitted that he was not the DO in 2009. PW1 stated that he did not record any witness statement nor did he receive court summons, but came to testify following an invitation by the plaintiff's advocate.
  25. PW1 stated that they have a Land Control Board (LCB) register and minutes which shows all approved and unapproved Land Control Board (LCB) consents. He stated that the Land Control Board (LCB) consists of Deputy County Commissioner (DCC) who can delegate to Assistant County Commissioner (ACC) and other seven members. He stated that the Land Control Board (LCB) receives application for dealings with land especially transfer of ownership. PW1 stated that the only consent he found in the register was for the plaintiff and the 1<sup>st</sup> defendant. He agreed that family members accompany applicants and especially the wife if the applicant is married. He added that one must bring identification documents, Pin, Search among others. He stated that the proprietor of the suit land at the time Land Control Board (LCB) consent was given was Kimaita Imathiu, the 1<sup>st</sup> defendant.
  26. PW2 is James Kithinji Mutwiri who relied on his witness statement dated December 13, 2019 as his evidence-in-chief. He was also cross-examined and re-examined.
  27. In his statement, PW2, stated inter alia, that he runs a capsicum company which operates mainly in Mt. Kenya region. That he had known Patrick Karani for a very long time (since the time he was a student). He stated that sometime in 2007/2008, mr Patrick Karani approached him and made enquiries about his farming activities which was explained to in detail. That Patrick Karani expressed some interest and hired a piece of land and that under instructions of PW2, he got very good returns. That Patrick Karani informed him that he had gotten another person whom he had convinced to carry out the farming business on bigger sale, and requested PW2 to search for an ideal land which they could purchase. PW2 stated that he later met mr Kimaita (the 1<sup>st</sup> defendant) through a friend by the name mr Murugu and they discussed details of sale of land measuring about 30 acres in Materi area, Tunyai. PW2 stated that he then informed mr Patrick Karani who later came with his partner by the name mr Mohamed and the purchase of the land was discussed and agreed. That the partners stated in the presence of all those present that they would proceed under a limited liability company, and the transaction to be undertaken by a lawyer. PW2 stated that a few days later, mr Patrick Karani and the 1<sup>st</sup> defendant separately informed him that an agreement had been drawn and signed and the next process would be the Land Control Board. PW2 stated that all the parties informed him of the date of Land Control Board (LCB) and he attended together with Patrick Karani, the 1<sup>st</sup> defendant and his wife who he said he did not know before, and that the application was allowed. He stated that the Land Control Board (LCB) sat at Ciakariga. According to PW2, he knew the deal was complete and that the respective parties sorted him out. That he later held a series of meetings with mr Patrick Karani and mr Mohamed in Nairobi over capsicum farm and that the same began on the parcel of land in question. He stated that this went on for a period of 1½ years when it was discontinued for lack of water. PW2 stated that the partners paid him for the in-put in the venture.
  28. PW2 testified that he did not know the plaintiff's directors, but stated that two of them told him that they were directors. He stated that he did not see any documents of the company. PW2 further stated that Karani and Mohamed paid some money for seeds.



29. According to PW2, the 1<sup>st</sup> defendant was selling the suit land to the two partners, Patrick Karani and Mohamed whose other name he stated he did not know. He also stated that he did not know the lawyer they were referring to but that they mentioned the name Hassan. He further stated that Karani, Mohammed and 1<sup>st</sup> defendant invited him verbally and went to the Land Control Board (LCB) as the link man and that the application was allowed, though he did not see any documents given.
30. Julia Makena Mbui (PW3) adopted her witness statement dated January 31, 2020 as her evidence – in-chief. She was also cross-examined and re-examined. She stated that she accompanied her husband, the 1<sup>st</sup> defendant, to 3 Steers Hotel where they met mr Patrick Karani. She stated that she did not know about what her husband and mr Karani were discussing in those private meetings since they sat separately, but stated that later it was disclosed to her that mr Patrick Karani was buying their land at Tunyai when he came to where they used to stay. That she was informed that there would be a Land Control Board (LCB) meeting the following day in which she was required to attend and give approval as a spouse of mr Kimaita. That she attended the Land Control Board (LCB) meeting, gave approval and consent was given. PW3 stated that before the Land Control Board (LCB) meeting, it was stated that mr Patrick Karani was buying the land with his partner, one mr Mohamed.
31. During cross-examination PW3 disclosed that she had separated with her husband, the 1<sup>st</sup> defendant in 2017. She stated that though she stated in her statement that she attended several meetings, she informed the court that she only attended one meeting. PW3 stated that there could be a mistake in her statement and added that there was also one mr Kithinji in attendance. According to her, the land was transferred to Karani, Mohammed and others, adding that women are not always told everything, but are just called and told to sign and they signed. She stated that though they had issues with her husband with whom they have children together, but separated, she was not hitting back at him. She stated that she was not told how much money Karani paid for the land.
32. PW4 is Nicholas Nganga Mbugua, a valuer who made a report on September 29, 2018 in respect of the suit land which report he produced as an exhibit. He stated that page 4 of the report indicated that the registered owner is Kimaita Imathiu while the title issued on January 24, 2017 shows that it is registered in the name of Lawrence N Mugambi. Asked about the discrepancies, the witness stated that he relied on details from his client, mr Karani. He stated that the certificate of valuers registration boards says that his company is in the name of Stephen Kyalo Makau whom he stated that both signed the report. He also confirmed that in the Kenya Gazette dated March 23, 2018, there is the name of Stephen Kyalo Makau, and when asked why his name was not there, PW4 stated that he has a practicing certificate though he did not carry it to court. He stated that In Light Consultants was his company where he is a director, and that he filed the report as a valuer in that company.
33. PW5 is Felix Naftali Mutethia, a clerk at the Business Registration service, formerly the registrar of companies' office. He produced the documents marked PW Exhibit No 2. He was also cross-examined and re-examined.
34. PW5 stated that the letter addressed to the registrar of companies was asking for the status and shareholding for Dalco, and testified that he was before court with the authority and knowledge of the registrar of companies. He stated that they prepared the report using the hard file and soft copy details from the system, adding that the physical file was available but was not requested for.
35. PW5 stated he was not aware that the file was under lock and key as it is for companies with disputes and those that the Government has a lot of interest in. He stated that the report said that there are two directors; Mohamed Jamah and Patrick Karani. He confirmed that the back page had inconsistencies. He stated that the directors are mentioned as Farah Dala (950 shares) and Salieman Yusuf (60 shares) to make a total of 1000 shares as at March 22, 2017.



36. PW5 agreed that paragraph 8 states that there is a fraudulent alteration of the companies' records filed at incorporation. He also agreed that it says that the returns for 2011, 2012, 2013, 2014, 2015 and 2016 were manipulated by Patrick Karani. He stated that he saw that Karani and Mohamed were directors, and agreed that there were disputes. He denied that the letter originated from their office. He stated that there was a transfer deed to Patrick Karani by Suleiman Yusuf and further that Dala transferred 450 shares to Patrick Karani, though he had not brought a copy of the transfer deed. That upon transfer, dates should be indicated. He stated that both Farah Dala and Solieman Yusuf signed as directors and that there was Form 203 A for change of directors signed, and which must be accompanied by a resolution for change of directors and ought to have been signed by the outgoing directors.
37. PW5 stated that according to the report, Farah Dala and Salieman Yusuf had resigned according to form 203 but he did not know if they signed it. He stated that he did not know if Farah Dala and Suleiman Yusuf were out of the country when the report submitted was prepared. He also did not know if there was an investigation by the Directorate of Criminal Investigations. When shown the certificate of incorporation for Dalco Tyres Limited and another copy of certificate which he stated the emblem did not resemble the original filed in court by the 3<sup>rd</sup> defendant. Also, that there is no sign by the registrar of companies.
- PW5 stated that the registrar allows people with authority to sign letters, but he was not one of them. He referred to several documents such as deeds, resolutions but did not bring them to court because he was not asked to. He stated that the company was registered on August 20, 2008.
38. PW6 is Patrick Karani who said he was an MCA of Utawala Ward, Embakasi, Nairobi. He testified that he was one of the directors of the plaintiff company and caused the filing of this suit. He adopted his witness statements dated March 2, 2017 and September 4, 2019 as his evidence-in-chief and produced the plaintiff's bundle of documents as exhibit No 3 save for annual returns and was cross-examined and re-examined.
39. PW6 stated that one of his co-directors is one Mohammed Hashin Jana and they held 50% shares each in the plaintiff company. It was his evidence that the plaintiff purchased the suit land at a price of ksh 5,600,000 in the year 2009 and that payment was made on diverse dates from 2009 to 2010. That thereafter, the plaintiff obtained Land Control Board Consent (LCB) consent to transfer the land to its name in 2009. PW6 stated that the transfer documents were deposited with the firm of Hassan N Lakicha & Co Advocates, Nairobi to process the transfer but never did so.
40. PW6 stated that since the plaintiff took exclusive possession of the suit land in the year 2009, it has through him heavily invested on it. That he was the one paying all the plaintiff's overheads as well as filing annual returns. PW6 further stated that on February 22, 2017 he received a demand letter from the 2<sup>nd</sup> defendant's advocate demanding that he vacates from the suit land, claiming that the 2<sup>nd</sup> defendant was the lawful owner of the land. That a search conducted at the Chuka Lands Office confirmed that the 1<sup>st</sup> defendant resold and proceeded to transfer the land to the 2<sup>nd</sup> defendant. It is the evidence of PW6 that that action was done without the plaintiff's knowledge and was illegal and fraudulent, hence the filing of this suit.
41. In his statement dated September 4, 2019, PW6 stated that he teamed up with the 3<sup>rd</sup> defendant and started a joint business venture and that the 3<sup>rd</sup> defendant mandated him to find land which they could purchase jointly. That he was then introduced to the 1<sup>st</sup> defendant who sold them the suit land. PW6 stated that they agreed with the 3<sup>rd</sup> defendant that instead of forming a new company which may take long, they use Dalco Tyres company which he said was shell company and which the shareholders were willing to sell. That the 3<sup>rd</sup> defendant dealt with those shareholders in January, 2009 and Dalco Tyres



was then changed into Dalco Trading company, the plaintiff herein and the suit land was bought in April, 2009. His evidence is that the 3<sup>rd</sup> defendant has never visited the land except once in 2009/2010. PW6 stated the plaintiff through him solely developed the land over the years until he received the demand notice to vacate.

42. PW6 further stated inter-alia, that at the beginning of 2016, the 2<sup>nd</sup> defendant approached him and expressed his interest in purchasing the land having spoken to the 3<sup>rd</sup> defendant, but was informed that the land had been successfully purchased by the plaintiff whose shareholding was on a basis of 50:50 between PW6 and the 3<sup>rd</sup> defendant and that the company had no intention of selling it. PW6 further reiterated the contents in the further amended plaint.
43. During cross-examination, PW6 stated that they paid ksh 100,000 to acquire the company from its previous directors, though no formal agreement for sale was made. He stated that there was a resolution of the directors resolving to sell the company, but PW6 said that he did not have it in court. PW6 was also questioned extensively about his meeting with the shareholders of the company as well as authority to institute these proceedings, among others. The court noted that there was no resolution, and that the witness refused to answer some questions and was serially being evasive.
44. PW7 is Nicholas Oduor Aduor from the registrar of societies office of the Attorney General. He said in February, 2017 he was a senior clerical officer at registrar of Companies and confirmed that he signed the letter dated February 21<sup>st</sup>, 2017 which states among other things, that Patrick Karani manipulated the annual returns of Dalco Trading Limited for the years 2010, 2011, 2012, 2013, 2014 and 2016. He stated that he knew that Farah Dalla and Suleiman Yusuf were the sole directors of the company at incorporation, while in another letter, the directors are shown as Mohammed Jama and Patrick Karani.

### **The Defendants Evidence**

45. DW1 is Seargent Fred Wamalwa attached to DCI Naivasha and Previously at Marimanti. He produced a letter dated 28<sup>th</sup> March, 2017 saying the police was investigating complaints of forgeries. He stated that they received a letter from the registrar of companies showing the names of the directors, and the case is pending investigation. DW1 was cross-examined and re-examined.
46. DW2 is Kimaita Imathiu, the 1<sup>st</sup> defendant herein. He adopted his witness statement dated December 3, 2018 as his evidence-in-chief and was cross-examined and re-examined. He testified that the suit land measuring 30 acres was originally his before he sold it to Dalco Trading Limited, the plaintiff herein vide a sale agreement dated April 25, 2009 at a consideration of ksh 5,600,000/= which was paid in full. He stated that he executed the necessary transfer documents after obtaining consent of the Land Control Board (LCB), and gave vacant possession to the purchaser. He further stated that during the sale transaction, the company was represented by Patrick Karani who was sent by Mohamed Hashi Jama. He further stated that before he sold the land, he was introduced to Patrick Karani by Muragu Mukindia and that when he met Patrick Karani, he told him that Mohamed Hashi Jama wanted to buy the land that Karani negotiated for a commission and was paid ksh 400,000 upon discussing.
47. DW2 stated that Karani introduced to him Mohamed Hashi in Nairobi, and that after discussing the price and agreed at ksh 5,600,000 Mohamed Hashi said he would buy the land in the name of Dalco Trading Ltd, and he authorized Karani to sign the agreement on behalf of the company which he did. He stated that the sale agreement was drawn by Ms Hasssan Lakicha & Co Advocates and that most of the payments were made through that firm. DW2 stated that he deposited all the instruments of transfer with the said firm and he assumed that the company registered the transfer.
48. DW2 stated that in 2016, Karani approached him and told him that Githongo Tea Factory wanted to buy the land, but DW2 informed him that he no longer had interest in it having sold it to Dalco



Trading Ltd. That later Mohamed Hashi called him and informed him that the company wanted to sell the land to Lawrence Ngetu, the 2<sup>nd</sup> defendant herein and that the transfer had not been done in the name of the plaintiff, hence was still in the name of the 1<sup>st</sup> defendant. That he went to Nairobi and met the 2<sup>nd</sup> defendant and Mohamed Hashi who discussed the price and agreed at ksh 8,100,000. That the sale agreement was made by the same firm of advocates, and it was agreed that since the land was still in the name of the 1<sup>st</sup> defendant, he would appear as a seller, but clearly indicate that he had sold it earlier to Dalco Trading Ltd. DW2 stated that he only executed the transfer documents in favour of the 1<sup>st</sup> defendant and did not benefit in any way since he no longer had any proprietary interest in the land. He stated that he was not privy to the composition of the directorship or ownership of the company, except what he was told by Mohamed Hashi that the directors of the company are Farah Dala and Suleiman Yusuf. He denied being involved in any fraud or collusion. DW2 stated that he attended the Land Control Board (LCB) meeting around 2017, but denied being accompanied by his wife with whom they had disagreed by then. He stated that the purchaser's representative took the consent from the Land Control Board (LCB). He maintained that he sold the land to 3<sup>rd</sup> defendant who in turn sold it to the 2<sup>nd</sup> defendant.

49. DW3 is Lawrence Mugambi, the 2<sup>nd</sup> defendant herein. He adopted his witness statement dated 11<sup>th</sup> December, 2018 as his evidence-in-chief. He also produced the documents in the 1<sup>st</sup> and 2<sup>nd</sup> defendants list of documents as defence Exhibits 1 – 8, and was cross-examined and re-examined. DW3 stated that one Mutua told him about the 3<sup>rd</sup> defendant's intention to sell land, and after a discussion, they agreed at a price of ksh 8,100,000. He stated that Mohamed informed him that he had bought the land from the 1<sup>st</sup> defendant but the transfer had not been done. That he later met the 1<sup>st</sup> defendant who confirmed that he had sold the land to the 3<sup>rd</sup> defendant. That upon request, the 1<sup>st</sup> defendant took him to the land for inspection and survey and later carried out a search which confirmed the ownership to be in name of 1<sup>st</sup> defendant, and had no encumbrances. That they later went to the offices of Hassan Lakicha & Co Advocates who had the documents including sale agreement in the name of the plaintiff. DW3 stated that when he asked the 3<sup>rd</sup> defendant about the plaintiff, he was informed that the company was owned by the 3<sup>rd</sup> defendant's relative, but the 3<sup>rd</sup> defendant had a power of attorney to transact on behalf of the company. He stated that the same assurance was given by the advocate and they therefore entered into a sale agreement dated 20<sup>th</sup> April, 2016. DW3 stated that he paid Patrick Karani a commission since he was as broker, and a caretaker of the 3<sup>rd</sup> defendant, and had assured the 2<sup>nd</sup> defendant that he had no interest in the land. His evidence is that he is a bona fide purchaser for value.
50. DW4 is Benson Maina Waithaka, the land registrar in Marimanti Land Registry. He was cross-examined and re-examined. He testified that the suit land was first registered on January 5, 1989 in the name of Leonard M'Imathiu M'Tamawari and title deed issued on 7<sup>th</sup> February, 1989. He stated that on March 12, 2008, the land was transferred to the 1<sup>st</sup> defendant and title issued on March 13, 2008, and the land was again transferred to the 2<sup>nd</sup> defendant on January 27, 2017 and title deed issued on the same date. That on March 9, 2017, an order of inhibition was registered pending hearing and determination of Chuka ELC Case 191 of 2017 and the order is dated March 8, 2017. That an order of temporary injunction was registered in Marimanti SPMC ELC Case No 480 of 2017. DW4 testified that their office was not initially in possession of any documents transferring the suit land from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant but they were able to trace the same. He produced copies of the Green Card and other documents as 4<sup>th</sup> D. Exhibits 1 and 2. He stated that as at now, the registered proprietor of the land is the 2<sup>nd</sup> defendant, adding that the plaintiff's name has not been registered in the Green Card. DW4 explained that documents sometimes get misplaced due to misfiling but can be recovered. He stated that Chuka land registry used to cover the whole of Tharaka Nithi County, but Marimanti land registry was opened in July, 2020 and therefore while transferring documents, some could be misplaced. DW4



confirmed that the documents produced as D Exhibit 2 do warrant registration and transfer of a title deed. The documents include original transfer form, identity card, PIN certificate, application and letter of consent of Land Control Board (LCB) and certificate of official search. However, he stated that there was no receipt and the transfer document has no embossing and franking. He further confirmed that the letter of consent reads N Tharaka/Tunyai 'A'/38 while the title deed that was cancelled is S Tharaka/Tunyai 'A'/38, and that while the consideration in the letter of consent is given as ksh 100,000, the consideration in the transfer is ksh 2,100,000/=.

51. DW5 is Hassan Lakicha an advocate of the High Court of Kenya practicing as Hassasn N Lakicha & Co Advocates. He was cross-examined and re-examined. His evidence was that sometime in 2008/2009, the 3<sup>rd</sup> defendant and the 1<sup>st</sup> defendant went to their firm for purposes of executing an agreement for sale over the suit land. He stated that the 3<sup>rd</sup> defendant was representing the plaintiff's company and was buying the land from the 1<sup>st</sup> defendant at a consideration of ksh 5,500,000. He confirmed that sale transaction was not concluded because there was delay in payment of the balance of the purchase price and later in 2016, with the consent of the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant sold the land to the 2<sup>nd</sup> defendant for ksh 8,100,000 which was paid and the land transferred to the 2<sup>nd</sup> defendant. He denied that Patrick Karani was a partner with the 3<sup>rd</sup> defendant, stating that he was just a witness. He stated that he prepared the agreements for sale dated April 23, 2009 and April 20, 2016. He stated that the transfer of the land was effected pursuant to the second agreement. He disowned the agreement in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' list of documents bearing the same date. He stated that the 1<sup>st</sup> defendant was referred to as the vendor in the second agreement because the land was still in his name as it had not been registered in the plaintiff's name.
52. Mohammed Hashin Jamah, the 3<sup>rd</sup> defendant testified as DW6 and was cross-examined and re-examined. He testified that he bought the land in April, 2009 from the 1<sup>st</sup> defendant, but the same had not been transferred into his name. He stated that though he paid the consideration, the land was being purchased by the plaintiff company in which he said he has never been a director. DW6 stated that the plaintiff company belonged to his friends, Farah Dala and Suleiman and he used it because his own company, Sool Logistics had problems of theft. He further stated that before completing payment of the purchase price, he found a buyer, the 2<sup>nd</sup> defendant whom he sold the land for ksh 8,100,000. That the transfer was then effected directly from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. DW6 stated that one of the directors of the plaintiff's company by the name Farah Dala was in London in the United Kingdom while the other by the name Suleiman Yusuf was in Australia.

### **Submissions**

53. The parties in this matter through their respective advocates, filed written submissions which I have considered and I do not wish to repeat.

### **Analysis and Determination**

54. The court has carefully considered the filed pleadings, the evidence on record and the submissions. The issues that arise for determination as I can see them are as follows:
- i. Who are the directors/shareholders of Dalco Trading Limited?
  - ii. Whether the suit as instituted is competent.
  - iii. Whether the plaintiff has made out a case against the defendants.
  - iv. Whether the 2<sup>nd</sup> defendant is a bona fide purchaser of the suit land.



- v. Whether the plaintiff is entitled to the reliefs sought in the further amended plaint.
- vi. Who should bear the costs of the suit?

**i. Who are the directors / shareholders of Dalco Trading Ltd?**

- 55. The plaintiff is a limited liability company incorporated under the *Companies Act* Cap 486 Laws of Kenya (now repealed). From the documents produced, it is not contested that the plaintiff's company was incorporated as Dalco Tyres Limited on 20<sup>th</sup> August, 2008 as per the Certificate of Incorporation No C160170 and changed its name to Dalco Trading Limited on January 22, 2009. According to the memorandum and articles of association of Dalco Tyres Limited that has been produced, the subscribers to the memorandum and articles of association of the company are Fara Dala and Solieman Yusuf who were the founders of the company.
- 56. In this case, Patrick Karani (PW6) testified that he purchased the company jointly with Mohamed Hashin Jamah, the 3<sup>rd</sup> defendant herein and own it on a 50:50 basis. However, the 3<sup>rd</sup> defendant who testified as DW6 denied being a director/shareholder of the plaintiff company. It was the evidence of the 3<sup>rd</sup> defendant that the plaintiff company belongs to his friends Fara Dala and Suleiman Yusuf and that he (the 3<sup>rd</sup> defendant) was only acting as their agent. The 3<sup>rd</sup> defendant vehemently denied that they acquired the company as stated by Patrick Karani.
- 57. Whereas Patrick Karani has stated that he jointly acquired the plaintiff company from the initial subscribers upon payment of ksh 100,000, there was no evidence produced to support the said acquisition. Indeed, Patrick Karani in his evidence confirmed that there was no formal agreement for sale that was made. And whereas PW6 (Patrick Karani) stated that there was a resolution of the directors of the company to sell the company to them, PW6 did not produce such a resolution before court. In the absence of any evidence such as an agreement or transfer deed to support the alleged acquisition by Patrick Karani and the 3<sup>rd</sup> defendant, and considering that the 3<sup>rd</sup> defendant himself denied having acquired the company as alleged by PW6, this court is of the opinion that the directors/shareholders of the plaintiff company remain Farah Dala and Suleiman Yusuf. Furthermore, PW7 (Nicholas Oduor Aduor) who used to work at the registrar of Companies in his evidence confirmed that Patrick Karani had manipulated the records of the plaintiff Company. This, in my view, explains the divergent views between the 3<sup>rd</sup> defendant and Patrick Karani who are the alleged buyers from the initial subscribers/directors/shareholders. As already stated, it is my finding that the directors/shareholders of the plaintiff company are still Farah Dala and Suleiman Yusuf.

**ii) Whether the suit as instituted is competent.**

- 58. As already stated, the plaintiff herein is a limited liability company. Order 4 rule 1(2) of the *Civil Procedure Rules* requires that every plaint be accompanied by a verifying affidavit. In the case of a corporation, rule 1(4) thereof provides:

“where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”
- 59. It is also trite law that where the plaintiff is a limited liability company, the institution of a suit can only be filed pursuant to a resolution. In *East African Portland Cement Ltd v Capital Markets Authority* <sup>68</sup>



4 others [2014] eKLR in which the Ugandan Case of Bugerere Coffee Growers Ltd v Sebaduka & others [1970] EA 147 had been referred to and in which it was held in dismissing the suit:

“when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or board of directors meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. The court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff, the applicant becomes personally liable to the defendants for the costs of the action.”

60. Similarly, in the case of East African Safari Air Limited v Anthony Ambaka Kegode & another [2017] eKLR, it was held that:

“When an Advocate is however instructed to file a suit, particularly against current or sitting directors or immediate former directors of the company, special care is required on the part of the advocate or his firm that necessary authorization by way of clear resolutions of the Board had been taken to institute the suit.”

61. Further, in Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd [2000] eKLR, it was held:

“It is settled law that where a suit is to be instituted for and on behalf of a company, there should be a company resolution to that effect ... The Secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

62. In this case, the verifying affidavit has been sworn by Patrick Karani. There was no sufficient evidence adduced to support the allegation by the said Patrick Karani that he was a director or shareholder of the plaintiff company. The evidence by PW6 was denied by the 3<sup>rd</sup> defendant whom he stated was his co-director. There was no evidence to support the allegation that there was a change of directors of the company that was filed at the registrar of companies. I do not accept the evidence of Patrick Karani, considering that the same was denied by the 3<sup>rd</sup> defendant and the witness from the registrar of companies was categorical that there was some manipulation of the company records. The court having found that the directors of the plaintiff company are still Farah Dala and Solieman Yusuf as shown in the memorandum and articles of association of the company, it is clear that Patrick Karani had no capacity to act on behalf of the plaintiff company. Moreover, this court cannot be convinced to rely on the resolution that was produced belatedly in light of the manipulations stated. I therefore find that Patrick Karani has not established that he had the authority under seal of the company to act in the suit on behalf of the plaintiff. Patrick Karani has not attached any authority from the company authorizing him to institute the proceedings herein. In the absence of a resolution by the company to file the proceedings in court, and authorization of Patrick Karani to file the suit on behalf of the company, the suit before court no doubt is bad in law, incompetent and must fail.

### **iii. Whether the 2<sup>nd</sup> defendant is a bona fide purchaser for value**

63. I now turn to the issue whether the 2<sup>nd</sup> defendant is a bona fide purchaser for value of the suit land. It is trite that a bona fide purchaser of a suit property without notice has absolute, unqualified and answerable defence against a claim of any prior equitable owner. In this case, it is not in dispute that the suit land was registered in the name of the 1<sup>st</sup> defendant. The evidence on record indicate that there was an agreement entered into between the 1<sup>st</sup> defendant and the plaintiff's company on 23<sup>rd</sup> April, 2009. The evidence on record further indicates that the plaintiff company was represented by the 3<sup>rd</sup>



defendant. It is also not in dispute that the purchase price was paid. However, according to the evidence of DW5, Hassan Lakicha, the advocate who prepared the agreement, the sale transaction could not be concluded because there was delay in the payment of the purchase price. That, in my view, explains the reason why there was no transfer from the year 2009 to 2016. According to the evidence of DW5, there was an outstanding balance of ksh 100,000. That the 3<sup>rd</sup> defendant who had represented the plaintiff in the sale agreement of April 23, 2009 authorized DW5 to draw a second agreement dated April 20, 2016 in which the land was sold to the 2<sup>nd</sup> defendant. DW5 disowned another agreement in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' list of documents which was marked as exhibit 3. Since the 3<sup>rd</sup> defendant had represented the plaintiff in the agreement of April 23, 2009 (whether rightly or not) and having exercised due diligence besides the assurance from the 3<sup>rd</sup> defendant that the plaintiff was selling the land, the 2<sup>nd</sup> defendant in my view is a bona fide purchaser of the suit land.

64. From the material on record, the 2<sup>nd</sup> defendant conducted a search and confirmed that the title was in the name of the 1<sup>st</sup> defendant and there were no encumbrances. In my view, the 2<sup>nd</sup> defendant had no reason to doubt that the 3<sup>rd</sup> defendant was acting on behalf of the plaintiff company, considering that he represented it in the sale transaction of 23<sup>rd</sup> April, 2009 which was also prepared and witnessed by the same advocate, DW5. I note that in some of the documents such as acknowledgment of receipts of money, Patrick Karani was only signing as a witness. The question then that arises is, if he had an interest in the company, why would he be indicated merely as a witness and not a director? The only plausible explanation to this is that Patrick Karani was only a third party in the transactions and was not acting on behalf of the plaintiff company. Moreover, the court has already discussed the relationship of the plaintiff company vis-a-vis Patrick Karani, and I need not to repeat the same.

#### **Whether the plaintiff has made out a case against the defendants**

65. In this case, the plaintiff's case is based on alleged fraud. Allegations of fraud must be strictly proved. The evidence on record is full of mere innuendos without tangent evidence. Section 107 and 108 of the Evidence Act is clear that the burden of proof lies in the person who alleges. In this case, no sufficient evidence has been tendered and I am not satisfied that the alleged fraudulent dealings have been proved against the defendants. From the material on record, it is my finding that the plaintiff's claim based on fraud is without merit and the same must fail.
66. From the foregoing, on a balance of probabilities, the plaintiff has not proved its case. The upshot is that the plaintiff's suit is dismissed.
67. With regard to payment of the successful defendants' legal costs, I have found that mr Patrick Karani who filed and started these proceedings in the name of the Company, had no authority so to do or act. In so far as I have a discretion over awarding costs, I consider it would be monstrous to order the plaintiff company to pay the successful defendants' costs. In my view, the company ought not to have to foot the bill and pay the legal costs of such litigations, all of which have been incurred because mr Patrick Karani chose to start these proceedings in the name of the company. I therefore order that parties bear their own costs.
68. It is so ordered.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 11<sup>TH</sup> DAY OF OCTOBER, 2022**

**C.K. YANO,**

**JUDGE.**

In the presence of:



CA: Martha

Siagi for plaintiff

Kimathi for 4<sup>th</sup> defendant

Wanyanga for 3<sup>rd</sup> defendant & h/b for Murango Mwenda for 1<sup>st</sup> and 2<sup>nd</sup> defendants

