



REPUBLIC OF KENYA



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**Tarameera Limited v Kantaria & another (Environment & Land Case
1325 of 2015) [2022] KEELC 15498 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1325 OF 2015
LC KOMINGOI, J
NOVEMBER 24, 2022**

BETWEEN

TARAMEERA LIMITED PLAINTIFF

AND

MRADULA SURESH KANTARIA 1ST DEFENDANT

MEERA KANTARIA 2ND DEFENDANT

JUDGMENT

1. By the plaint dated December 23, 2015, the Plaintiff prays for judgement against the Defendants for:-
 - a. A declaration that the 1st Defendant has committed trespass on LR No 9104/133 as from July 15, 1997.
 - b. An order that the 1st Defendant pays to the Plaintiff mesne profits at Kshs 32,422,500/= from July 15, 1997 to November 30, 2015, and thereafter until the judgement at Kshs 210,000/= each month.
 - c. An order that the Defendants give to the Plaintiff vacant possession of the house on LR No 9104/133, forthwith.
 - d. Interest on (b).
 - e. The costs pf this suit.
2. It is the Plaintiff's case that in 1989, it purchased LR No 9104/133 Whispers Estate Gigiri and leased it to Kenwood Trading Company Limited for use by the chairman of its Board of Directors Mr Suresh Kantaria and his family. It is also the Plaintiff's case that the said Suresh Kantaria was also one of its shareholders and a member of its Board of Directors and is the 1st Defendant's former husband and the 2nd Defendant's father. It added that Mr Suresh and his family occupied the suit property until 1994



when the marriage between him and the 1st Defendant broke down, prompting him to move out and the said marriage was dissolved in 2000.

3. It is also the Plaintiff's case that on June 2, 1997, the 1st Defendant filed Nairobi High Court Misc Civil Suit No 1606 of 1997(OS) Mradula Suresh Kantaria v Suresh Nanalal Kantaria under Section 17 of the Married Women's Property Act, 1982 claiming an interest in movable and immovable properties registered in the name of Mr Suresh Kantaria and properties registered in companies owned by Mr Suresh including the suit property. It was the Plaintiff's contention that upon the filing of that case, it terminated the license which had enabled the Defendants to live in the suit property without paying rent.
4. The Plaintiff averred that in the same year, the 1st Defendant also filed High Court Divorce Cause No 6 of 1997:MSK V SNK of 1997(OS) which were subsequently consolidated with Nairobi High Court Misc Civil Suit No1606 of 1997(OS) Mradula Suresh Kantaria v Suresh Nanalal Kantaria and judgment was entered in favour of the 1st Defendant herein on May 10, 2005. It further averred that the Court ordered that the suit property herein be transferred to the 1st Defendant to be held in trust by the 1st Defendant for herself and Suresh Nanalal but Mr Suresh filed an appeal against the decision being Nairobi Civil Appeal No 139 of 2010. It contended that by the Court of Appeal's judgement delivered on April 24, 2015, Justice Anga'wa's orders that the suit property be transferred to the 1st Defendant herein were set aside.
5. It is the Plaintiff's case that the effect of the orders of the Court of Appeal were that occupation of the suit land by the Defendants was declared null and void thus the 1st Defendant became a trespasser and is obliged to pay the Plaintiff mesne profits for the period after 1997. It claims mesne profits of Kshs 32,442,500/= being rent for the period between July 15, 1997 and November 30, 2015.

The Defendants' case

6. The Defendants filed a joint statement of defence and counterclaim dated February 5, 2016 in which they denied the averments in the plaint. The 1st Defendant contended that the Plaintiff was incorporated on December 18, 1989 by herself and her former husband, Suresh Nanalal Kantaria as the promoters and first directors. She added that at incorporation, the Plaintiff's share capital was Kshs 10,000/= divided into 5000 shares of Kshs 20/= each and that the said Suresh Kantaria and herself subscribed to one (1) share each with the intention that they would always hold equal shares as husband and wife thus she is a bonafide 50% shareholder and director of the Plaintiff. She added that the objective of the Plaintiff's incorporation was merely to be a holding vehicle for the 1st Defendant and Suresh Kantaria and their children's matrimonial home.
7. The 1st Defendant contended that on January 16, 1996, after her cohabitation with Suresh Kantaria had ceased, the said Suresh Kantaria unilaterally without a resolution of the Plaintiff purported to allot the remaining 4,998 shares of the Plaintiff to his late brother Anil Kantaria without allowing her to exercise her right of pre-emption as required under the Plaintiff's Articles of Association and in contravention of the Companies Act. She added that the said Anil Kantaria (deceased) later transferred his 4,998 shares to Keval Kantaria who is the 1st Defendant's and Suresh Kantaria's son. She averred that she filed High Court Miscellaneous Application No 638 of 1997 seeking declarations nullifying the unlawful changes in the directorship of Plaintiff but the case was never heard and determined on its merits.
8. The 1st Defendant further contended that on January 16, 1996, Suresh Kantaria in cohorts with his late brother Anil Kantaria purported to remove her as a director of the Plaintiff irregularly as she was never served with the requisite notices and intended resolution to remove her as a director of the Plaintiff company as required by the law.



9. It was also the 1st Defendant's contention that while she was still happily married to Suresh Kantaria in 1991, she had donated her power of Attorney to him but he unlawfully used it 1996 while they were estranged to transfer her Share to his close friend Mansoor Ali Kassam who purportedly transferred back the said share to Suresh Kantaria thereby ousting her shareholding in the company.
10. She also contended that Suresh Kantaria was ordered to pay her Kshs 350,000/= with effect from May 5, 2015 as maintenance during her lifetime but since he has totally failed to pay, she is no position to secure alternative accommodation apart from the suit property.
11. The 1st and 2nd Defendants claimed that the suit property is now vested in them by the doctrine of adverse possession having been in actual possession of the suit property for an uninterrupted period of more than 12 years since 1989. The counterclaim against the Plaintiff, Suresh Nanalal Kantaria and Keval Suresh Kantaria jointly and severally is for:-
 - a. A declaration that the purported allotment of 4,998 shares in the 1st Defendant Company to Anil Nanalal Kantaria and subsequently transferred to the 3rd Defendant is null and void.
 - b. A declaration that the purported transfer of 1 share originally subscribed to by the 1st Plaintiff in the 1st Defendant Company to Mansoor Ali Kassam and its subsequent transfer to the 2nd Defendant is null and void.
 - c. A declaration that the bonafide and lawful shareholders and directors of the 1st Defendant Company are the 1st Plaintiff and the 2nd Defendant each holding 1 share.
 - d. An order be directed at the Registrar of Companies to expunge from the record of the 1st Defendant Company all resolutions, allotments of shares forms, transfer of shares forms, notification of change of directors forms, annual returns and any other documents filed which contradicts order no. (c) herein above.
 - e. A permanent injunction restraining the 2nd Defendant from holding himself out together with the 3rd Defendant as the lawful shareholders and directors of the 1st Defendant company and from calling and holding any meetings of the shareholders and directors of the 1st Defendant Company and from passing and giving effect to any resolutions therefrom in the absence of the 1st Plaintiff.
 - f. A permanent injunction restraining the Defendants whether by themselves, their agents and/or servants from evicting or interfering with the Plaintiffs' quiet possession of LR No 9104/133, Nairobi.
 - g. In the alternative, a declaration that the suit property, LR No 9104/133, Nairobi is vested in the 1st Plaintiff by operation of the doctrine of adverse possession.
 - h. Costs of this suit.
 - i. Any other relief that this Honourable Court may deem fit to grant.



Evidence of the Plaintiff

12. PW1 Suresh Nanalal Kantaria, a director of the Plaintiff testified on May 16, 2019. His witness statement dated December 21, 2015, as well as his affidavits sworn on April 8, 2016 and April 17, 2016 were adopted as part of his evidence in chief. He produced documents in the Plaintiff's bundle of documents as exhibits. They include the Certificate of incorporation of the Plaintiff, the Plaintiff's CR-12, certificate of title of the suit property, the Plaintiff's Articles of Association as well as judgments in Civil Appeal No 139 of 2010 and Divorce Cause No 6 of 1997 as consolidated with HCCC No 1606 of 1997(OS).
13. He told the court that the 1st Defendant filed High Court Miscellaneous Application No 638 of 1997 claiming to be a shareholder of the Plaintiff but the suit it was dismissed for want of prosecution and there is no appeal from the order dismissing the said suit.
14. In his statement, he stated that the suit property was bought by his brother Anil Nanalal Kantaria from his own personal savings but he chose to have it registered in the name of the Plaintiff which was to let it out to Kenwood Trading Company Limited for use by its directors and since he had contributed a substantial amount of money to pay for the suit property, he was allotted 4,998 shares and due to his physical absence, he allocated one of his shares to the 1st Defendant to hold it upon trust for him. He further stated that his late brother's intention was to let the property to Kenwood Trading Company Limited and use the rent therefrom to service a mortgage he had taken with Kenya Commercial Bank Limited.
15. It was his testimony that the suit property was purchased in 1989 and it was occupied by himself, his ex-wife, their two sons Ketan and Keval and their daughter the 2nd Defendant. He added that they occupied it as tenants as Kenwood Trading Company Limited was the tenant and he was its executive chairman from 1994 to 1997 when the lease expired. He told the court that from 1989, the suit property was occupied through a Licence to him by the Plaintiff and that he currently resides in a rented two bedroomed apartment in Kilimani while the 1st Defendant and his daughter reside on the suit property.
16. He testified that he left the suit property in 1994 and left his ex –wife and children due to mistreatment by 1st Defendant whereby he was not allowed to have food or water and his clothes were left in the garage. He further testified that the judgement in Civil Appeal No 139 of 2010 was an appeal from two consolidated cases filed by his ex-wife being Divorce Cause No 6 of 1997 and HCCC No 1606 of 1997(OS) which are among many cases filed against him by the 1st Defendant such that his life has been hell from 1994 as his companies were wound up, his accounts frozen and he was bombarded with cases from his ex-wife.
17. He urged the court to award him reliefs sought including the computed rent which the Plaintiff would have received from 1997 to 2015 which is Kshs 32,422,500/= based on the valuation report as at 2015. He also stated that the Plaintiff demanded vacant possession of the suit property vide the letter dated September 15, 2015 addressed by Plaintiff's counsel, Kamau Kuria & Company Advocates to the Defendants' Advocates but it was not complied with.
18. When he was cross-examined, he stated that there is a resolution giving him authority to testify on behalf of the Plaintiff. When referred to the Plaintiff's CR12, he stated that he is a shareholder together with his son Keval Suresh. When referred to the Plaintiff's certificate of incorporation dated December 18, 1989, he stated that the original shareholders were himself and his ex-wife with one share each. When referred to the Plaintiff's Memorandum of Association dated November 21, 1989, he stated that they were only two shareholders as 4,998 shares had not been allocated.



19. He stated that allotment of 4,998 shares in favour of Anil Kantara, his brother who is now deceased was done by the Plaintiff in 1996 and by then, he had parted ways with the 1st Defendant. He further stated that his brother gave him a Power of Attorney and that there was a board resolution to allot the 4998 shares to his brother. He added that the one share held by the 1st Defendant was held in trust for his late brother and that there is a trust deed and a power of Attorney but they have not been produced in this case as the issues here are different.
20. He stated that there was no fraud, and that he did not use the Power of Attorney fraudulently. When referred to the Plaintiff's notification of change of directors that gave notice that the 1st Defendant be removed from the office of director of the company with effect from January 16, 1996, he stated that the resolution to remove the 1st Defendant was made by himself and Anil Kantaria and that the 1st Defendant must have been invited but she failed to attend. He however stated that he had no evidence that she was invited.
21. When referred to the Plaintiff's annual returns dated 31st December, he stated that shareholders at the time were himself, Mr Mansoor Ali Kassam, and Mr Anil Nanalal Kantaria. He added that Mansoor Ali Kassam was allocated one share previously held by the 1st Defendant by a company resolution made by himself and Anil Kantaria .
22. When referred to the current CR12, he stated that he holds two shares as Mansoor Ali Kassam transferred one share to him while Keval holds 4,998 shares which were transferred to him by Anil before 2015. He also stated that Mansoor was holding one share in trust for him and that he bought with Anil but he did not have evidence of the purchase. When referred to the prayers in the Defendant's counterclaim, he stated that they are the same with prayers in Misc 638 of 1997 where issues of shares were raised but the suit was dismissed for want of prosecution.
23. He also stated that there have been various cases between him and the 1st Defendant. He pointed out Civil Appeal No 139 of 2010 which arose from the High Court case in respect of matrimonial property. He further stated that the High court's decree of May 10, 2005 and in particular Order No 4 which declared the suit property to be transferred to the 1st Defendant herein was set aside by the Court of Appeal. He added that the order that he pays the 1st Defendant 100 million in maintenance was vacated and instead, he was ordered to pay the 1st Defendant Kshs 350,000/= monthly in maintenance .He added that he has not applied to vary that order and that the 1st Defendant has been paid Kshs 350,000/= through a trust fund but he had no evidence and he is not aware the 1st Defendant's counsel had been writing letters to his counsel about the payment. He stated that the question of possession of the suit property was not addressed by the Court of Appeal.
24. PW1 also stated that he resided in the suit house from 1989 to 1994 and that the 1st Defendant and his daughter still reside there. He also stated that in respect of the properties he holds, the court declared that he holds 25% in trust for the 1st Defendant. He further stated that he is not able to sell those properties since the 1st Defendant has placed caveats on them. He added that he went to the suit property but he was evicted. He added that he intends to sell the suit premises in order to save a property in Dar es salaam that is in at the verge of being auctioned.
25. He also stated that the 1st Defendant is taken care of by his brother from the trust fund left by their father. He further stated that he was unable to pay Kshs 350,000/= per month in maintenance to the 1st Defendant since he had no income and he is financially unable to put up his properties on the market. He stated that as regards to the transfer of shares, he was unable to find the board resolutions remitting the same.



26. When he was re-examined, he stated that the Plaintiff's directors are Keval Suresh and himself and that the 1st Defendant is not a shareholder of the Plaintiff. He further stated that on the shares issue, Civil Suit No 638 of 1997 was dismissed for want of prosecution by orders of January 14, 2004 and no appeal was filed by the 1st Defendant.
27. PW1 also stated that he occupied the suit house with the 1st Defendant during their marriage but they occupied as tenants through a lease as it was provided by his employer but he left the house in 1994 when the marriage broke down and that from 1994 to 1996, the 1st Defendant and the children occupied it then from 1997 the 1st Defendant and their daughter and granddaughter occupy it. He added the Plaintiff did not permit the 1st and 2nd Defendants to occupy the suit property after 1994 and that he has not let it to them and as such they occupy it illegally.
28. He stated that from the date of delivery of the judgement by the Court of Appeal on April 24, 2015, the 1st Defendant did not vacate the suit property. He added that the certificate of title to the suit property is in the name of the Plaintiff and that the suit property does not touch on maintenance and on the other three properties which were subject in the High court divorce case.
29. He stated that he went back to the suit house when he was a shareholder and director of the Plaintiff and that at the time he went there, the 1st and 2nd Defendants were away in Mombasa and he waited for them and asked them to allow the suit property to be sold to pay for a debt which the Plaintiff had guaranteed the loan but when they came back, the 1st Defendant brought about ten people who threatened to throw him out of the house and one of them who was a police officer threatened to shoot him so he allowed them in. He left and now resides in a rented house in Kilimani and has lived in rented apartments since 1994.
30. He stated that the 1st Defendant applied to have Kenwood Limited placed under receivership and that is where he derived his income from yet it is still in receivership. He added that in 1994, Jaribu Credit Limited was carrying on business but the 1st Defendant was not a shareholder. He also stated that the 1st Defendant has not made an application for him to be committed to civil jail since 2015 for failing to pay her maintenance fees. He stated that he is not insensitive to his ex wife and daughter but the Plaintiff needs to sell the property to pay off debts and legal fees to fidelity bank and other debts and if the house was to be let it would fetch about Kshs 300,000/=.
31. PW2, Ben Mutugi, an Executive Officer of this court attached to the Commercial and Tax Division of the High Court, testified on July 29, 2021. He produced the file; HC Misc No 638 of 1997. He told the court that it had originating summons dated June 25, 1997 filed in Nairobi Central registry on June 20, 1997, and an amended Originating Motion dated June 4, 2001 filed in court on June 4, 2001. He stated that the Applicant is Mradula Kantaria, the 1st Respondent is Suresh Naralal Kantaria, the 2nd Respondent is Anil Nanalal Kantaria and the 3rd Respondent is Mansoor Ali Kassim. He stated that the last order was a ruling dated November 4, 2004 by HA Omondi (Mrs)CM . He further stated that there is an order by Justice Mutungi on the Notice of motion dated October 21, 2003 dismissing the suit for want prosecution with costs.
32. When cross-examined, he stated that there is no judgment in the suit except the ruling.
33. PW3, Fredrick J Kinyua was a valuer and real estate agent testified on March 3, 2022. He stated that he is familiar with LR No 9104/133 and has compiled two reports in respect to the property. He further stated that the original report was filed on August 25, 2021 and the second one was filed on March 1, 2022. He testified that there is another report in the Plaintiff's bundle and prayed that it be expunged from the court record and it was expunged by the court.



34. When referred to the first report filed on August 25, 2021, he stated that the suit property would be sold at Kshs 85 million in the open market as at August 17, 2021 and that it would have fetched annual rent of Kshs 41,800,000/= computed from 1997 to 2001. He further stated that the comparable rent in that neighborhood is now between Kshs 250,000 and Kshs 350,000/= per month .He added that he compared the prevailing rents during the years 1997-2021 and gave Kshs 250,000/= per month to be the current rent. He produced photographs of the residence built on the property.
35. When he was cross-examined and referred to the instruction letter dated August 29, 2021 addressed by Plaintiff's counsel, he stated that he did not find out whether there was a tenant before 1997. He further stated that he personally went to the residence and was welcomed by the occupants but he did not ask any questions. He stated that his valuation was in 2021 and he used comparables of what used to be in 1997. He added that he used five comparable of houses he was managing at the time to file the expert report but he did not attach those leases as he not required to do so.
36. He also stated that by 1997,the suit property must have been in good condition as repair and maintenance can affect rent that is to be paid. He added that the pandemic situation prevailing at the time of valuation would also affect the rent chargeable.

Evidence of the Defendants

37. DW,1 Mradula Suresh Kantaria the 1st Defendant testified on March 3, 2022. Her witness statement dated February 5, 2016 was adopted as part of her evidence in chief testified. She stated that the Plaintiff Company was incorporated on December 18, 1989 with herself and her former husband, Suresh Nanalal Kantaria as the promoters and first Directors holding a share each of the Plaintiff's 5000 shares thus she is a bonafide 50% shareholder and director of the Plaintiff. She further stated that it was to be used as a holding vehicle for their matrimonial home together with their children erected on LR No 9104/133. He added that Suresh Kantaria left the said residence owing to matrimonial differences but she continued residing there with the 2nd Defendant.
38. She stated that she was not notified of any board meeting of the Plaintiff to authorize the institution of this suit nor appointing Suresh Kantaria to swear affidavits/witness statement on behalf of the Plaintiff company or appoint Kamau Kuria & Company Advocates to represent the Plaintiff in this suit.
39. She stated that in 1996 after cohabitation with Suresh Kantaria had ceased, he purported to unilaterally all of the remaining 4,998 shares in the Plaintiff company to his late brother, Anil Kantaria (deceased) without calling her to a meeting to pass the said resolution and without offering her the shares to exercise of her right of pre-emption as required under the Company's Articles of Association. He added that Anil Kantaria (deceased) subsequently transferred those unlawfully acquired shares to Keval Kantaria and that Anil and Suresh Knataria purported to remove her as a director of the Plaintiff which was a calculated move by Suresh Kantaria to divest her of her 50% shares in the Plaintiff Company and ultimately the matrimonial home where she resides. She added that the same year, Suresh Kantaria unlawfully purported to utilize a Power of Attorney she had donated to him in 1991 to transfer her share in the Plaintiff Company to one Mansoor Ali Kassam who seems to have further transferred that share to Suresh Kantaria.
40. DW1 also stated that she had she filed High Court Miscellaneous Application No 638 of 1997 seeking declarations nullifying the unlawful changes in the Plaintiff company but it was never heard and determined on merits. She also stated that Suresh Kantaria was ordered to pay her Kshs 350,000/= with effect from May 5, 2015 as maintenance during her lifetime but since he has totally failed to pay, she is no position to secure alternative accommodation apart from the suit property.



41. When she was cross-examined and referred to her witness statement in which she stated that she is the bonafide 50% shareholder of the Plaintiff, she stated that the CR12 dated April 27, 2015 shows that she has no shares. When referred to the Notice of Motion dated April 11, 2016 and the affidavit in support by Suresh Nanalal Kantara, and the annexed CR12, she stated that her name is not there.
42. She also stated that in Misc Application No 638 of 1997, she is the Applicant while her former husband is the 1st Respondent, Anil N Kantara the 2nd Respondent and Mansour Ali Kassim the 3rd Respondent and that prayers in her Notice of Motion filed therein sought orders reinstating the name of the Applicant as a director and shareholder but the court did not grant her those reliefs as the application was not heard. The suit was dismissed for want of prosecution. She added that she applied to reinstate the suit but at the same time, divorce proceedings were ongoing and she did not appeal against the dismissal.
43. She stated that when her son passed on, her former husband threw her out of the suit house. She further stated that in suit 1606 of 1997(OS), she is the Applicant and her ex-husband is the Respondent and that she sought to be declared to hold 75% of properties held by her husband while her ex husband held 25% of but the court awarded her the entire suit property. She added that between 1994 to 2005, she occupied the suit property as co-owner as of right. She stated that her ex-husband appealed against the said judgement and the court of Appeal found that the suit property is the property of the Plaintiff.
44. She stated that Kenwood Trading Company was owned by herself and her ex-husband and that as per the lease dated July 16, 1994, Kenwood Trading Company was the tenant and that the lease was a three years lease. When referred to receipts for payment of rent towards the suit property, she stated that they were forged since she was the one running Kenwood Trading Company from 1984 to 1994 and she did not issue cheques towards paying rent over the suit property. She reiterated that the suit property was matrimonial property and that there was no landlord and tenant relationship. She added that she has not entered into any tenancy relationship with the Plaintiff as the suit property was a matrimonial home.
45. When she was re-examined, on her statement that she is a 50% shareholder and director of the Plaintiff, she stated that at the inception of the Plaintiff, she and her former husband were the shareholders holding one share each as shown in the Plaintiff's memorandum of association dated December 18, 1989 but her name does not appear on the CR12 dated April 27, 2005. She also stated that the Plaintiff was a holding vehicle for a matrimonial home.
46. She further stated that in 1991, she gave a Power of Attorney to Suresh Kantaria, her former husband and in 1996, he unlawfully transferred her share in the Plaintiff company to Mansour Ali Kasim using the said Power of Attorney. She added that Mr Mansour transferred his share to Mr Suresh Kantaria and that Keval Kantaria came to own 4,998 shares. She stated that she was not offered those shares as required by the Plaintiff's Articles of association and she was not called to meetings and did not participate in any resolutions.
47. She also stated that on January 16, 1996, Suresh Kantaria conspired with his late brother Anil Kantaria to remove her from the company as director and filed a Notification of change of directors. When referred to Misc Application 638 of 1997, she stated that it did not go to full hearing thus no judgment was given and the issue of shareholders in the Plaintiff's company has not been determined.
48. She stated that the decree of the Court of Appeal did not state that she vacates the suit property nor does not state who the shareholders of the Plaintiff are. She further stated that she has not been paid any monthly maintenance since 2015 by her ex-husband and that her Advocates have written to his Advocates to comply.



49. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's Submissions

50. They are dated April 19, 2022. They raise the following issues;

- a. Who is the rightful owner of LR No 9109/133?
- b. Whether a shareholder or director has a right to occupy his company's property by virtue of being a shareholder/director?
- c. Whether the Defendant has acquired a right to occupy the premises through adverse possession?
- d. Whether the Defendant is entitled to the reliefs she has prayed in the counterclaim?
- e. Who should bear the costs of this suit?

51. On the issue of ownership of the suit property, Counsel for the Plaintiff submitted that the Court of Appeal determined that question as it ordered: 'Gigiri property LR Nairobi /9104/33 is the registered property of Tameera Limited.' He added that the Plaintiff is also owner by virtue of its certificate of title issued under Section 23(1) of the repealed Registration of Titles Act which has now been replaced by Section 26 of the *Land Registration Act*. He added that ownership is a bundle of rights which can be enjoyed by the owner by such actions as possession, letting or licensing and in the absence of permission by the Plaintiff or letting of the same to the Defendants, they have no right to be in possession of the suit property as a company is a different person from its directors and shareholders.

52. It was also counsel's submission that the Plaintiff is entitled to mesne profits of Kshs 42,360,000/= calculated from July 1997-April 30, 2022. He relied on the decision of the Court of Appeal in Kenya Hotel Properties Ltd v Willesden Nairobi Civil Appeal No 149 of 2007.

53. Counsel also relied on the case of Moses Mbatia & Another v Joseph Wamburu Murang'a ELC No 37 of 2020 to submit that the issue of whether the 1st Defendant is a shareholder in the Plaintiff was not determined in High Court Miscellaneous Application No 638 of 1997 Mradula Kantaria v Suresh Kantaria & others. Further, relying on the decision in Borland's Trustee v Steel (1901) 1 CH 279, counsel submitted that the 1st Defendants' cause of action in her counterclaim is based on breach of contract therefore it ought to have been filed within 6 years of the breach in accordance with Section 4 of the *Limitation of Actions Act*. He pointed out that since Miscellaneous Application No 638 of 1997 was terminated in 2004, the 1st Defendant ought to have filed another suit within 6 years and since she failed, she lost her right to enforce that right.

54. It was also submitted that the 1st Defendant is a trespasser in terms of Section 3(1) of the *Trespass Act* and she cannot rely on the order made on January 15, 1997 in High Court Divorce Cause No 6 of 1997 between her and Mr Suresh to argue that it converted that trespass into lawful occupation since orders made in the course of hearing a matter are not final. He relied on the case of *Stanley Munga Githunguri v Jimba Credit; Civil Appeal No 144 of 1988, M'Kiriara M'mukanya & Another v Gilbert Kabeere M'mbijiwe [1984] e KLR* as well as *Civil Appeal No 146 of 2007 Kenya Hotel Properties Ltd b Willesden Investment Limited*.

55. On the issue whether the 1st Defendant has acquired a right over the suit property by way of adverse possession, he relied on the case of *Mbugua Njuguna v Elijah Mburu Wanyoike & others, Civil Appeal No 27 of 2002* to submit that as of January 1997 until April 24, 2015 when the court of Appeal ruled



that the Plaintiff was the owner of the property, there were proceedings touching on the suit property therefore the Defendants could not acquire any title by adverse possession.

The 1st and 2nd Defendants' Submissions

56. They are dated May 18, 2022. Counsel for the 1st and 2nd Defendants submitted that the 1st Defendant's purported ouster from the Plaintiff was illegal and she remains to be a bonafide 50% shareholder. He pointed out that Suresh Kantaria purported to unilaterally allot 4,998 shares in the Plaintiff company to his late brother, Anil Kantaria without offering them to the 1st Defendant as a 50% shareholder of the company to exercise her pre-emption rights as required under Section 74 of the repealed Companies Act, Cap 486 which was then applicable and which required consent of existing shareholders before any variation to shares of a company is affected.
57. He further submitted that for such an allotment to be valid, it required the consent by way of a resolution of both the 1st Defendant and Suresh Kantaria as the directors and only shareholders of the company which was not done and that action is therefore contrary Section 133 and 134(a) of the Companies Act, cap 486 (repealed).
58. It was also counsel's submission that Suresh Kantaria did not adduce any evidence of alleged meetings held to allot and change the directorship of the Plaintiff Company as well as transfer of the 1st Defendant's share as required under Section 154(1) of the Companies Act, Cap 486 (repealed).
59. Counsel further submitted that the fact that the share purportedly allotted to Said Mansoor Ali Kassim was later purportedly transferred to Suresh Kantaria gives credence to the 1st Defendant's testimony that the whole point of these illegal machinations by Suresh Kantaria was to alienate the suit property from the reach of the 1st Defendant by removing her from the Plaintiff company.
60. It was counsel's submission that issues of unlawful changes in the Plaintiff company are not res judicata since even though the 1st Defendant filed High Court Miscellaneous Application No 638 of 1997 seeking declarations nullifying the sad unlawful changes, it was not heard and determined on its merits as it was dismissed for want of prosecution thus it does not offend Section 7 of the *Civil Procedure Act*. He relied on the case of *Kennedy Mooka Ongiri v John Nyasende Moisoma and another [2022]eKLR*. He added that without prejudice, the 1st Defendant's occupation of the suit property was at least until April 24, 2015 by a valid decree of the High Court which was varied on April 24, 2015 by the Court of Appeal in Civil Appeal 139 of 2010.
61. On the issue of mesne profits, Counsel submitted that the Defendants have never been tenants and there have never been a tenancy relationship between the Plaintiff company and themselves and as such the issue of mesne profits does not arise. He added that the purported lease agreement between the Plaintiff and Kenwood Trading Company Limited and receipts thereof were not genuine and there is no evidence that the Plaintiff was paying any taxes on the said rental income as required under Section 42 of the *Value Added Tax Act*, Cap 576.
62. He relied on the case of *PME and another v PNE [2019]eKLR* to submit that The Plaintiff which is owed jointly in equal shares by the 1st Defendant and Suresh Kantaria cannot maintain an action for mesne profits for trespass as Suresh Kantaria is not a superior shareholder to the 1st Defendant who is also a bonafide 50% shareholder. He added that the Plaintiff Company has not passed a resolution in a duly requisitioned meeting of the shareholders or directors which would include the 1st Defendant requiring her to give up possession of the suit property.
63. It was also counsel's submission that equity will not aid a party who comes to it with dirty hands. He pointed out that in Civil Appeal 139 of 2010, Suresh Kantaria who now represents the Plaintiff in this



suit was ordered by the court to pay the 1st Defendant Kshs 350,000/= maintenance every month but he does not pay yet he seeks that the 1st Defendant vacates the suit property.

64. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:-

- i. Who is the rightful owner of LR No 9104/133?
- ii. Whether the Defendants are trespassers on the suit property.
- iii. Whether the Defendants have acquired rights to the suit property through adverse possession.
- iv. Are the Defendants entitled to the reliefs sought in the court claim?
- v. Is the Plaintiff entitled to the reliefs sought?
- vi. Who should bear costs of this suit?

65. It is not in dispute that the suit property is registered in the name of the Plaintiff. The judgment of the Court of Appeal in *Suresh Nanalal Kanturia vs Mradula Suresh Kanturia & 5 others [2015] eKLR* granted orders:-

1. That the order and declaration of Angawa J dated May 10, 2005 that the property LR No 9104/133 be transferred by the 4th Respondent outright to the 1st Respondent be and is hereby set aside.
2. Gigiri property LR NO Nairobi/9104/133 is the property of Taramera Ltd'.

66. Section 26(1) of the [Land Registration Act](#) (2012) provides that:-

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'

I agree with the Plaintiff's submission that in the absence of permission by the Plaintiff or letting of the same to the Defendants, the Defendants have no right to be in possession of the suit property.

67. The tussle over the suit land herein pits family members against each other. While the shareholding and directorship of the Plaintiff is disputed by the Defendants, they do not dispute that Suresh Nanalal Kantaria is one of the directors of the Plaintiff. The said Suresh was married to the 1st Defendant, they had two issues; the 1st Defendant and the 3rd Defendant in the counterclaim are their daughter and son respectively. Their marriage was dissolved by the court in 2000.



68. The parties do not dispute that the 1st Defendant filed Divorce Cause No 6 of 1997 and HCCC No 1606 of 1997(OS) which were consolidated and the court awarded the 1st Defendant the suit property herein. The Plaintiff then filed Civil Appeal No 139 of 2010 and the court of Appeal determined that the suit land belongs to the Plaintiff herein. The issue of ownership of the suit land which was the issue in the main suit was therefore settled by the superior court. The Plaintiff is owner of the suit property.
69. It was the 1st Defendant's case that on January 16, 1996 after cohabitation with Suresh Nanalal Kantaria had ceased, the said Suresh Kantaria purported to unilaterally allot the remaining 4,998 shares in the Plaintiff's company to his late brother Anil Kantaria. That the purported allotted shares were never offered to the 1st Defendant as a 50% shareholder of the company to exercise her preemptive rights as required under section 74 of the Repealed Companies Act (Cap 486 Laws of Kenya) which requires consent of existing share holders before any variations in relation to shares is effected. The 1st Defendant stated that she was never invited to any meeting as a member and director of the Plaintiff's company nor did she participate in passing of any resolution allotting the said shares to Anil Kantaria (deceased).
70. It is against this background that the 1st Defendant instituted High Court Misc Application No 638 of 1997; Mradula Suresh Kantaria vs Anil N Kantaria & Mansoor Ali Kassam. The 1st Defendant however did not prosecute the same. PW2 Ben Mutugi executive officer of the court availed the file which confirms the suit was dismissed for want of prosecution. In her counterclaim herein Anil N Kantaria and Mansoor Ali Kassam are not parties. I agree with the Plaintiff's submissions that this court cannot issue declaratory orders against persons who are not parties to the suit.
71. I am aware that the 1st Defendant cannot be barred from bringing another suit to enforce her shareholding in the Plaintiff since HC Miscellaneous Application No 638 of 1997 was dismissed for want of prosecution. The same was dismissed on January 4, 2004. The 1st Defendant did not apply for reinstatement of the said suit nor did she appeal against the said dismissal. I find that raising the same issues in a counterclaim herein is rather too late in the day. Furthermore, the issue of ownership of the suit property has been dealt with by the Court of Appeal. The findings are binding on this court.
72. I agree with the Plaintiff's submission that the cause of action on which it was founded was the special contract embodied in the Memorandum and Articles of Association. The Plaintiff cited *Borland's Trustee vs Steel [1901] Ch 279* in which that contract was described as follows:-
- ' A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all shareholders inter see. The contract contained in the articles of association in one of the original incidents of the share. A share is not a sum of money but is an interest measured by a sum of money and made up of various rights contained in the contract including the right to a sum of money of a more or less amount'.
- It is clear that an action based on contract must be brought within six (6) years of breach. The 1st Defendant ought to have filed another suit by the year 2010. Her counterclaim is therefore statute barred. As per CR 12 the Plaintiff's shareholding consists of Keval Kantaria 4,998 shares and Suresh Kantaria 2 shares.
73. It is not in dispute that the Defendants are in occupation of the suit property since 1997. They have not leased it from the Plaintiff. The Plaintiff is the registered owner of the suit property. It is entitled to possession of the same. It has never let it to the Defendants nor permitted them to occupy it since 1997.



74. I find that the defendants are trespassers on the suit property. In *Clerk Lindell on Torts (19th Edition)* trespass is defined as:-

'Any unjustifiable intrusion by one person upon and in the possession of another. The lightest crossing of the boundaries is sufficient. If the Defendant places a part of his foot on the claimant's land unlawfully, it is in law as much as trespass as if he walked half a mile on it.'

I disagree with the Defendants' submission that the trespass was converted to lawful occupation by an order dated January 15, 1997 in High Court Divorce Cause No 6 of 1997. The order did not give the 1st Defendant any rights but was provisional to protect the subject matter. Having stated that the Defendants are trespassers on the suit property, I find that the Plaintiff is entitled to damages.

75. I also find that the Defendants have not acquired rights to the suit property through adverse possession. In the case of *Mbugua Njuguna vs Elija Mburu Wanyoike & Others*, Civil Appeal No 27 of 2002, the court stated as follows:-

' Time ceases to run under the *Limitation of actions Act* wither when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor'.

From January 1997 until April 24, 2015 when the Court of Appeal decided that the Plaintiff was the owner of the suit property there were ongoing proceedings touching on ownership. The 1st Defendant could not have acquired ownership through adverse possession. Her claim is an afterthought.

76. Having found that the 1st Defendant is not a shareholder of the Plaintiff, she is not entitled to any of the reliefs sought in the counterclaim. I find that she has failed to prove any of her claims in the counterclaim on a balance of probabilities and the same is dismissed.

77. On the other hand, I find that the Plaintiff has proved its claim on a balance of probabilities as against the Defendant. PW2 Fredrick Kinyua, a valuer told the court that the market value of the suit property is Kshs 85,000,000/- and the monthly rent is Kshs 250,000/=. He told the court that the rent due for the period the Defendants have been in occupation is Kshs 43,380,000/-. The valuation report was produced as an exhibit in this case. The said valuation report was not challenged as the Defendants did not produce any other valuation.

78. I would take Kshs 250,000/- as the monthly rent. This translates to Kshs 43,380,000/- upto August 2021. There would be an addition of about eleven (11) months to date.

79. It was the 1st Defendants' case that Suresh Kantaria did not pay her Kshs 350,000/- per month being maintenance as ordered by the Court of Appeal. PW1 told the court that the 1st Defendant was paid the Kshs 350,000/- monthly maintenance through a trust fund but he had no evidence. He admitted that he has not been paying the 1st Defendant the monthly maintenance because he had no income.

80. The Court of Appeal ordered PW1 to pay the 1st Defendant Kshs 350,000/- monthly as maintenance from May 5, 2015. There is no evidence that the 1st Defendant has remarried. The amount due from May 5, 2015 to day is Kshs 31,850,000/=. The mense profits owing to the Plaintiff to date is:

'Kshs 43,380,00/- + 2,750,000/- = Kshs 46,130,000/=. This amount has to be offset from what is owned to the 1st Defendant Kshs 46,130,000 less Kshs 31,850,000/- would make Kshs 14,280,000/-.'

81. Accordingly, judgment is entered for the Plaintiff as against the Defendants as follows:-



- a. That a declaration is hereby issued that the 1st Defendant has trespassed on the suit property LR NO 9104/133 as from July 15, 1997.
- b. Mesne profits; Kshs 14,280,000/=.
- c. That the Defendants are hereby directed to give vacant possession of the house on LR No 9104/133 within one hundred and twenty (120) days from the date of this judgment. FAILURE TO WHICH the Plaintiff be at liberty to use lawful means to evict them.
- d. Each part do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Ndung'u for Dr. Kamau Kuria (SC) Advocate for the Plaintiff

No appearance for the Defendants

Court Assistant- Mutisya

