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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURT

HCCOMM CIVIL APPEAL NO. E173 OF 2024

TAMARIND PROPERTIES LIMITED.....

..... APPELLANT

VERSUS

ANNE WAIRIMU KURIA..... 1ST

RESPONDENT

HOUSING FINANCE COMPANY LTD..... 2ND

RESPONDENT

TAMARIND VALLEY EMBAKASI LIMITED..... 3RD

RESPONDENT

[Being an Appeal from the Judgment and Decree of the Milimani Chief Magistrate’s Court at Nairobi Honourable B.M. Cheloti - PM made on 28th May, 2024, in Milimani CMCOMMSU E608 of 2021]

BETWEEN

ANNE WAIRIMU KURIA.....

PLAINTIFF

VERSUS

TAMARIND PROPERTIES LIMITED..... 1ST

DEFENDANT

HOUSING FINANCE COMPANY LTD..... 2ND

DEFENDANT

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TMARIND VALLEY EMBAKASI LIMITED..... 3RD
DEFENDANT

JUDGEMENT

1. This is a Judgement in respect to the Appeal against the judgment and decree of **Honourable B.M. Cheloti - PM**. It arose from Milimani Chief Magistrate's Court in **Milimani CMCOMMSU E608 of 2021**. It was delivered on 28.5.2024.

Background Facts

2. The facts in this Appeal are fairly straight forward. They are also very similar to the facts in **Milimani HCCOMMA NO. E046 of 2025 ANNE WAIRIMU KURIA VS TAMARIND PROPERTIES LIMITED & 2 OTHERS**. The Appellant is the unsuccessful 1st Defendant before the Trial Court. The 1st Respondent was the successful Plaintiff. The suit against the 2nd Respondent was withdrawn long before the trial. Therefore, they were not the subject of the judgement and or Decree of the Lower Court. They are also not parties to the Appeal.

3. The Plaintiff sued the Defendants jointly and or severally seeking the following reliefs as per the Further Amended Plaint amended on 03.9.2021.

a) An order of permanent injunction restraining the Defendants and/or their agents, servants,

employees and anyone acting on its behalf from selling and/or in any other way, interfering with the Plaintiff's quiet possession and/or ownership of the suit property being House No. CD2 erected on L.R. No. 7340/1077 and/or dealing with the same in a manner inconsistent with the interests of the Plaintiff thereon.

- b) An order of mandatory injunction compelling the defendants to cause the partial Discharge of Charge on the suit property namely: House No. CD2 erected on L.R. No. 7340/1077 and to register the lease thereof in favour of the Plaintiff.***
- c) In the alternative and/or addition to prayer No. (b) above the Honourable Court be pleased to issue an order for specific performance of the Agreement for sale dated the 18th March, 2011 between the Plaintiff and the 1st 3rd Defendant.***
- d) General damages for breach of contract, mental torture and anguish against the Defendants.***
- e) Special damages for the loss of rental income at the rate of Kshs. 21,000.00 from 30th March, 2020 until the date of registration of the Lease in favour of the Plaintiff or the date of determination of the suit herein.***

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- f) Further in the alternative to prayers (a), (b) and (c), this Honourable Court be pleased to issue an order of against the 1st and 3rd Defendants jointly and or severally for the refund to the Plaintiff and of the full purchase price in the sum of Kshs. 3,400,000/= paid by the Plaintiff to the 1st 3rd Defendant together with accrued interest at commercial rates or court rates, whichever is higher.**
- g) The costs of this suit and interest at Court rates.**
- h) Any other remedy that this Court may deem fit and just to grant.**
4. The 1st Respondent sought the reliefs above as arising out of a breach of contract for sale of a property. This being a House No. CD2 erected on L.R. No. 7340/1077 in Embakasi. She sought for a refund of the purchase price of Kshs. 3,400,000/=.
5. The 1st Respondent sued the Defendants jointly and/or severally for the reliefs sought.
6. The Appellant opposed the suit and filed a defence. In respect of the 3rd Respondent, they did not enter and appearance or file a defence. This being a liquidated claim, a judgment was entered against the 3rd Respondent.

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7. The matter thereafter went on for a full trial in respect of the 1st Respondent's claim as a Plaintiff against the Appellant as a 1st Defendant.
8. The Court delivered a judgment on 29th May 2024 and held as follows:
 - a) *That the 1st and 3rd Defendants to jointly and severally refund to the Plaintiff the full purchase price in the sum of Kshs.3,400,000/= paid by the Plaintiff to the 3rd Defendant.*
 - b) *The costs of this suit be borne by the 1st and 3rd Defendants*
 - c) *Interest on (a) and (b) above at court's rates from the date of delivery of this judgment until payment in full.*
9. The 3rd Defendant/Appellant being dissatisfied with the decision of the Trial Court, has preferred this appeal. It seeks the following reliefs in the Memorandum of Appeal dated 27.6.2024.
 - a) *THAT this appeal be allowed.*
 - b) *THAT the judgment of the Milimani Chief Magistrate Court delivered on 28th May, 2024 be set aside and be substituted with a judgment dismissing with costs, the suit against the 1st Defendant/Appellant.*

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- c) *THAT this court be pleased to make any other or further orders as it shall deem fit to make within its powers.*

Issues for Determination

10. The Court has considered the Record of Appeal and the respective submission filed by the parties, as well as the oral highlights. It frames three (3) issues for determination as follows:
- a) *Whether the Trial Court abused procedure in entering default judgment against the 3rd Defendant and thereafter allowing proceedings to continue against the 1st Defendant.*
 - b) *Whether the claim by the Plaintiff as against the 1st Defendant was properly pleaded.*
 - c) *Whether the Plaintiff was entitled to the reliefs sought against the 1st Defendant and specifically a refund of Kshs. 3,400,000/=.*

Analysis

11. This is a first appeal. The Appellant invites this Court to undertake the role of the 1st Appellate Court. It is therefore invited to re-evaluate the evidence of the Trial Court both on facts and on points of law and arrive at its own independent decision. The Court refers to **Edith Gicuku Mungai -vs- John Njiru Njeru & another [2018] eKLR** and **Selle and**

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another -vs- Associated Motor Boat Company Ltd & others [1968] E.A 123.

a) Whether the Trial Court abused procedure in entering default judgment against the 3rd Defendant and thereafter allowing proceedings to continue against the 1st Defendant.

12. The Court understands the Appellant to complain that there was already a default judgment against the 3rd Defendant. This was for a liquidated claim. That once the Court entered an interlocutory judgment on 8.11.2021, it was for a sum of Kshs.3,400,000/=. Hence this was a final judgment for a sum equivalent to what was sought against the 1st Defendant. That there was no need to proceed for a formal proof. The 1st Defendant sees itself as pursued twice over. This is because the Plaintiff could extract a Decree and follow up recovery against the 3rd Defendant. Hence there was no need to proceed for a formal proof.

13. The 1st Defendant has drawn the Court's attention to the provisions of **Order 10 Rule 5, of the Civil Procedure Rules**, which states as follows (*underlined emphasis ours*):

5. Liquidated demand against several defendants [Order 10, rule 5.]

Where the plaint makes a liquidated demand with or without some other claim, and there are

several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff's right to proceed with the action against such as have appeared.

14. The Court is persuaded that the above rule leaves no doubt that despite entry of interlocutory judgement for a liquidated amount against one party, the Plaintiff can still pursue the other Defendant(s) for the same amount or the balance. Therefore, entry of interlocutory judgement against the 3rd Defendant should not therefore prejudice or be seen as raising a bar against the 1st Defendant.

b) Whether the claim by the Plaintiff as against the 1st Defendant was properly pleaded

15. The Plaintiff pleaded particulars of fraud and misrepresentation by the 1st and 3rd Defendants. This can be summarized that the two companies were so interconnected that the lines of their separation were blurred to the Plaintiff. That the 1st Defendant represented itself as an alter ego of the 3rd Defendant. That there was no clear separation between the two companies. They either entered into an

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agreement with the Plaintiff or received her money interchangeably. They were mere facades of each other.

16. The Appellant maintains that it is a separate and distinct legal entity from the 3rd Respondent. Notwithstanding that they shared a common director, the principles laid out in **Salomon vs Salomon & Co. Ltd {1897} AC 22 H.L** still held true. That a Company has a distinct legal personality from its directors. For that reason, the Appellant could not answer for the liabilities of the 3rd Respondent.
17. The Trial Court in its wisdom as a Court of first instance, was not persuaded that there was no privity of contract between the Plaintiff and the 1st and 3rd Defendants. In its findings it held as follows,

“It is not disputed that the 1st Defendant is an agent of the 3rd Defendant. This in essence creates a principal-agency relationship between the parties with the 3rd Defendant being the principal and the 1st Defendant the agent as stated under paragraph 12 of the 1st Defendant’s witness statement by Joe Mungai dated 16th March, 2022. Despite the fact that the 1st Defendant was not privy to the deed of variation between the 3rd Defendant and the Plaintiff, the law of agency ties the 1st Defendant owing to the fact that the 1st Defendant’s director executed the agreement with the Plaintiff on behalf of the 3rd Defendant.”

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18. The Court is persuaded by the reasoning of the Trial Court. That the 1st and 3rd Defendants were so entwined leaving no other explanation than that they were alter egos of each other. It is also very unjust for the two companies to play along the Plaintiff. They traded in the same premises and in such close-knit proximity. The 3rd Defendant received the money but the 1st Defendant cannot be allowed to escape, jump aside and plead it is a separate and distinct corporate entity. The Court is persuaded that the arrangement was a scheme to obtain money from the Plaintiff and using the corporate shield, to avoid liability. This is a proper case for the application of the alter ego principle.

19. The Court refers to **Mugenyi & Company Advocates -v- The Attorney General (1999)2 EA 199** where the Court adopted the **Principles in Palmers Company Law** and expressed itself as follows on the ten instances the veil of corporate personality may be lifted. Thus

(i) Where companies are in the relationship of holding and subsidiary companies'

(ii) Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;

(iii) In certain matters relating to taxation;

(iv) In the law relating to exchange control;

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- (v) *In the law relating to trading with the enemy;*
- (vi) *In the law of merger control in the United Kingdom;*
- (vii) *In competition of the European Economic Community;*
- (viii) *In abuse of law in certain circumstances;*
- (ix) *Where the device of incorporation is used for some illegal or improper purpose; and*
- (x) *Where the private company is founded on personal relationship between the members.*

c) Whether the Plaintiff was entitled to the reliefs sought against the Defendant and specifically a refund of Kshs. 3,400,000/=.

20. The Court is convinced that the Plaintiff did prove her case to the required standard. It is not in doubt that a sum of Kshs. 3,400,000/= was paid for a house that could not legally be sold to her. It was still charged to the 2nd Defendant. This encumbrance meant that the property was not available for sale. The 3rd Defendant had no right to convey the property. The decision of the Trial Court is sound. A refund lay as the consideration for which the amount was paid had wholly failed *ab initio*.

21. As to costs, the same ordinary follow the event. The 1st Respondent is entitled to the costs of the Appeal, as a successful party. The same are awarded to her.

Determination

22. The Appeal is dismissed in its entirety for lack of merits.

23. The costs of the Appeal are awarded to the 1st Respondent.

24. It is so ordered.

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**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 12TH
DAY OF MARCH, 2026.**

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of:

N/A for Miss Gacheru for the Appellant.

Mr. Ochieng for the 1st Respondent

N/A for the 3rd Respondent

Peter Wabwire - Court Assistant.