



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYERI**

**ELC NO.601 OF 2014**

**MATHINGIRA WHOLESALERS COMPANY LTD.....PLAINTIFF**

**-VERSUS-**

**KIMWATU KANYUNGU ..... 1ST DEFENDANT**

**KIIRU GACHUIGA ..... 2ND DEFENDANT**

**GADSON GITONGA ..... 3RD DEFENDANT**

**KIBERA GATU ..... 4TH DEFENDANT**

**SAMUEL GITHINGI KIBAKI ..... 5TH DEFENDANT**

**HON. MWAI KIBAKI ..... 6TH DEFENDANT**

**JUDGMENT**

**Introduction**

1. The subject matter of this suit is ownership and management of the the parcel of land known as **Nyeri Municipality Block 1/94** (hereinafter referred to as **“the suit property”**).
2. The property was acquired by Kimwatu Kanyungu, Francis Gathungwa, Gadson Gitonga Mbuthia, Mwai Kibaki, Kiiru Gachiga, Kibira Gatu, Phillip Gichuhi and Muruthi Nganga (hereinafter called **“the registered proprietors of the suit property”**).
3. On 5th May,1976 the registered proprietors of the suit property, trading as Mathingira Wholesalers Company, charged the suit property to Industrial and Commercial Development Corporation (ICDC) to secure a loan of Kshs. 225,000/= which the company had advanced to them.
4. On 17th June, 1983 the registered proprietors of the suit property incorporated Mazingira Wholesalers Company (hereinafter referred to as **“the company”**) and got registered as the first shareholders/directors of the company.
5. At the time of incorporation of the company, each of the registered proprietors of the suit property (plus Samuel Githinji Kibaki-the 5th defendant herein) subscribed to one share each out of the declared share capital of the company.
6. In due course, the original shareholders subscribed to more shares of the company, but this time not in equal proportions. In this regard see the returns for the period 1986 to 1992.

7. The shareholding of the company also changed in the due course of time. The change in shareholding of the company was caused by transfer of shares by some of the initial proprietors of the company and/or inheritance of shares of shareholders who had passed on by their family members.
8. Owing to the change in shareholding of the company referred to above, some of the initial shareholders of the company ceased being shareholders of the company and were replaced by the persons to whom they had transferred their shares to or who succeeded them.
9. Some of the initial shareholders of the plaintiff company who transferred their shares or whose shares were transferred to members of their family include Samuel Githinji Kibaki and Gadson Gatu. The two sold their shares to Peter Ndiritu Munihe and Paul Wamahiu respectively.
10. The evidence adduced in this case shows that other changes in shareholding of the company occurred after the original shareholders passed on and their names were substituted with the names of some members of their family. For instance the shares of Paul Wamahiu were transferred to Beatrice Mumbi Wamahiu, who later sold and transferred them to James Kanyi. Similarly, the shares of Nganga Muruthi, were transferred to Joseph Nganga Muruthi.
11. There is evidence that upon joining the company, the new shareholders of the company began participating in the affairs of the company and enjoying the rights and privileges of a shareholder (participating in the company's meetings, partaking in sharing of dividends and receiving directors' fees, where applicable).
12. Unfortunately, it appears that in transferring the shares from the initial shareholders, some aspects of the company's Articles of Association were not complied with. It also appears that transfer of shares of deceased shareholders of the company was effected in disregard of the law governing succession of estates of deceased persons. Be that as it may, the new shareholders were accepted as shareholders of the plaintiff company.
13. It is noteworthy that all the shareholders/directors of the company with an exception of Hon. Mwai Kibaki, who was not actively involved in the management of the company, knew about the sale and transfer of the company's shares to the new shareholders. They in fact participated in the transfer by executing the transfer documents in favour of the incoming shareholders.
14. It is also noteworthy that no shareholder of the company or any of its directors complained about the transfer of the shares of the company to the new shareholders. The evidence adduced shows that there were no disputes concerning the management of the company until sometime in 2007 when elections were conducted and some shareholders/directors who served in the board of management of the company were removed from its management.
15. Concerning the ownership of the property, while it is not in dispute that the persons mentioned in paragraph (2) above are its registered proprietors, the evidence on record shows that the company and its shareholders have been the beneficiaries of the rent collected therefrom and the income of the businesses operated on the property.
16. There is evidence that the registered proprietors of the suit property had intimated their intention to transfer the suit property to the company but owing to undisclosed reasons, that intention never materialised. Consequently, when the term of the lease granted to the registered proprietors of the suit property expired, the lease was renewed in the name of the initial proprietors of the suit property.
17. After disputes arose concerning the management of the company, through its board of management appointed on 13th October, 2007, the plaintiff brought this suit seeking judgment against the 1st defendant for:-

**a). permanent injunction to restrain the 1st defendant, his agents, servants, employees and or any person whomsoever acting under his instructions, from misleading, confusing, receiving,**

collecting, transacting for and on behalf of the plaintiff company, from interfering with the management of the company's affairs without the authority of the board.

b). permanent injunction to restrain the 1st defendant, his agents, servants, employees and or any person whomsoever acting under his instructions, from holding out as chairman of the plaintiff company and further interfering with the management, business operation and affairs of the plaintiff company without authority of the board.

c). A declaration that the 1st defendant is liable to account to the plaintiff company for the sum of Kshs.93,824.65 or such other sum as the court thinks fit.

d). An order directing the 1st defendant to pay to the plaintiff company Kshs.93, 824.65 or such other sum as the court thinks fit.

e).Spent.

f). A declaration that the suit property belongs to it.

g). Costs and interest.

g) any other order or relief this honourable court may deem fit to grant.

18. Upon being served with the plaintiff's claim, the 1st defendant denied all the allegations levelled against him and instead contended that the suit property does not belong to the company but the persons registered in paragraph (2) above. The 1st defendant further contended that the plaintiff was merely an agent of the registered proprietors of the suit property for purposes of collecting rent from the tenants in the suit property and managing the businesses thereon.

19. Terming the meeting held on 13th October, 2007 invalid, the defendants contend that the meeting was called by persons who were not genuine shareholders/directors of the company (strangers). For the foregoing reasons, the defendants urge the court to dismiss the plaintiff's case and enter judgment in their favour for:-

a). A declaration that between 1983 and 28th February, 2009, the plaintiff served as their agent for purposes of collecting rent from the tenants on the suit property and running the bar-cum-butchery business thereon.

b). A declaration that the plaintiff is obliged to account to them their shares of respective rent and revenue yielded by the suit property and the business of bar-cum-restaurant-cum-butchery thereon.

c). An order directing the plaintiff to account to them their respective shares of the rent and revenue yielded by the suit property and the business of the bar-cum-restaurant-cum-butchery thereon.

d). A permanent injunction to restrain the plaintiff by itself, its agents or servants from collecting rent, managing or dealing in any manner with the suit property.

d) the costs of the counter-claim.

#### **Application for amendment of the defendants' pleadings**

20. Through their submissions, filed after close of the cases for the respective parties, the defendants seek leave of this court to further amend their counter-claim to include the following prayers:-

1. A declaration that the owners of the suit property are Kimwatu Kanyungu, Francis

**Gathungwa, Gadson Gitonga Mbuthia, Mwai Kibaki, Kiiru Gachuiga, Kibira Gatu, Philip Gichuhi and Muruthi Nganga.**

**2. An order that all the money deposited in Kenya Commercial Bank Ltd, Nyeri Branch account No.1140771892 in the names of Kamau Kuria & Kiraitu Advocates & L. Mwai & Company Advocates pursuant to the order made in this matter on 18th February, 2013 be released to the defendants' advocates.**

21. Concerning the application, it is acknowledged that the amendments sought to be effected are not pleaded but submitted that they are implicit in the defendant's prayer No.1 of the amended defence and counter-claim.

22. Based on the decision of the Court of Appeal in the case of **J.C. Patel v. B.D Joshi (1952)19 EACA 42** to the effect that a court has power to permit an amendment of pleadings no matter how late, if the other side shall not be prejudiced by the amendment and the decision of the same court in the case of **Odd Jobs v. Mubea (1970)E.A 476** to the effect that a court may base its decision on an unpleaded issue if it appears from the course followed at trial that the issue has been left to the court for decision; the defendants seek leave of this court to introduce the above cited amendments to their pleadings on the grounds that the issue of ownership of the suit property; the rent which the owners are entitled to and the money deposited in the bank account cited in the intended amendments are the real questions for determination in this suit.

23. Having read and considered the cases of the respective parties to this case, I find that the issues raised in the amendments sought to be introduced have been canvassed in the pleadings, evidence and submissions of the respective parties to the suit hence no prejudice will be occasioned to the plaintiff if the amendment is allowed. Consequently, in exercise of the power donated to this court under **Section 100** of the Civil Procedure Act as read with **Order 8** of the Civil Procedure Rules, I allow the amendment of the defendants' pleading as proposed in their submissions.

### **Summary of the plaintiff's case**

24. The plaintiff's case, as can be discerned from its pleadings, the evidence adduced by its witnesses (Peter Nderitu Munuhe, PW-1; James Kanyi Waiganjo, PW-2; Sammy Maina Kiiru, PW-3) and Joseph Ng'ang'a Muriithi, PW-4) and the submissions filed in support of its case is to the effect that:-

#### **(a). There was change in membership of the plaintiff company;**

25. PW-1, 2 and 3 led evidence which shows that they purchased shares of the plaintiff company from the initial subscribers of the plaintiff company or persons who had acquired shares of the plaintiff company. For instance;

26. PW-1 adduced evidence which shows that he bought his shares from Samuel Githinji Kibaki (the 5th defendant herein). To attest to that fact, he produced the agreement executed between himself and the 5th Defendant on 9th September, 1991 before Samuel G. Mwangi, advocate; the deed of transfer executed in his favour by the 5th defendant; a receipt for payment of stamp duty for transfer of shares; share certificate issued to him by the plaintiff company signed by among other persons the chairman of the plaintiff company (the 1st defendant herein) as **Pexbt-1 to 4** respectively.

27. P.W.1 further informed the court that he bought additional shares from Kiiru Gachuiga (the 2nd Defendant herein), Peter Weru Gichuhi S/O Philip Gichuhi and Peter Kimondo Gichuhi. In total he has 7501 shares.

28. PW-2 became a shareholder of the plaintiff company by purchase of shares from Gadson Gitonga (3rd defendant herein). He informed the court that he bought everything that Gadson Gitonga owned in the company. He signed an agreement with the 3rd defendant before Gathiga Mwangi, Advocate, on 10th March, 1994. Thereafter they signed a transfer of stock/shares which was witnessed by the secretary of the

plaintiff company at the material time, Joseph Kiiru Gachuiga, and the 2nd defendant herein. He produced the agreement and the transfer of stock/shares as **Pexbt 19** and **Pexbt 20** respectively.

29. P.W.3, Sammy Maina Kiiru, informed the court that he became a shareholder of the plaintiff company in 2002 through purchase of shares from Mumbi Wamahiu.

30. It is the testimony of PW-3 that he was introduced to the plaintiff company by his father Kiiru Gachuiga (2nd defendant herein) and his uncle, James Kanyi Waiganjo (the 2nd defendant herein). The two told him that there were shares for sale in the company. Consequently, he attended a meeting and was issued with a share certificate for 2432 shares, a transfer of shares and a share certificate which documents he produced as **Pexbt 26, 27** and **28** respectively.

31. P.W.4, Joseph Ng'ang'a Muriithi, informed the court that his father Muriithi Ng'ang'a (deceased) was a shareholder of the plaintiff company (he died in 1987). After his father passed on, his family appointed him to represent them in the company. Consequently, he was accepted as a shareholder of the plaintiff company.

**b). outgoing shareholders were replaced with incoming shareholders;**

32. The plaintiff's witnesses adduced evidence which shows that the company's returns filed with the registrar of companies reflected them as shareholders of the plaintiff company and/or directors of the company. The returns also indicate that those who sold their shares ceased to be shareholders and/or directors of the company.

**c). Incoming shareholders were accepted as shareholders of the plaintiff company;**

33. To prove this fact, the plaintiff's witnesses led evidence which shows that after they joined the company, they freely participated in the activities of the plaintiff company like attending meetings; partaking in sharing of dividends and receipt of directors' fees.

**d). Plaintiff company represented itself as the owner of the suit property;**

34. The plaintiff's witnesses adduced evidence which shows that the plaintiff company represented itself and acted as the owner of the suit property. For instance, land rent and rates in respect of the suit property were being paid in the name of the plaintiff company as opposed to the name of the registered proprietors. In this regard see **Pexbt 6** and **7** respectively. Other documents which the plaintiff's witnesses relied on to show that the company represented itself as the owner of the suit property are: demand notice to tenants for none payment of rent and court documents.

**e). There was intention to transfer the suit property to the plaintiff company;**

35. The plaintiff's witnesses produced several correspondences exchanged between the plaintiff and its advocates which shows that the registered proprietors of the suit property had the intention of transferring the suit property to the company.

**f). Plaintiff company and its shareholders are the beneficiaries of the proceeds from the suit property;**

36. The plaintiff's witnesses led evidence which shows that the dividends paid by the plaintiff company to its shareholders were raised from rent received from the suit property.

**g). No agency fee was being paid to the company**

37. The plaintiff's witnesses contended that the registered owners of the suit property were not paying the agency fees to the plaintiff company.

**h) Accounts were being filed.**

38. The plaintiff's witnesses also led evidence which shows that they were filing accounts (see Pexbt-18), that is to say, they accounted to all the people concerned.

**i). No disputes/differences between the shareholders/directors of the plaintiff company.**

39. It is the plaintiff's case that there were no disputes/differences between its shareholders/directors. Disputes/differences only arose on or about 13th October, 2007 when the plaintiff carried out elections which resulted in change of its board of management.

**j). Who are the genuine owners of the suit property**

40. According to the plaintiff's witnesses, despite the fact that the company is not the registered proprietor of the suit property, it's shareholders are the genuine owners of the suit property.

**k) None compliance with the Company's Articles of Association**

41. The plaintiff's witnesses conceded that the procedure for transfer of shares contemplated in the Company's Articles of Association was not complied with but blamed the company's directors for the none compliance with the said procedures.

**l). No fraud in transfer of shares**

42. The plaintiff's witnesses pointed out that sell of shares was done on willing buyer willing seller basis.

**The Defendants' case**

43. The defendants' case as contained in their pleadings and the testimony of Hon. Mwai Kibaki (D.W.1) is to the effect that the persons whose names appear in the certificate of lease issued in respect of the suit property plus Samuel Githinji Kibaki who does not feature in the certificate of lease are the owners of the suit property, including the building thereon.

44. D.W.1 informed the court that neither he nor his co-owners of the suit property transferred their interest in the suit property to anyone.

45. Concerning the allegation that his fellow co-owners of the plaintiff company sold their shares; in addition to denying that contention, D.W.1 contended that applicable procedures were not followed in transferring the shares. In this regard, he contended that he never received any notice of transfer of shares by his co-shareholders as required in the company's Articles of Association.

46. Upon being cross-examined by counsel for the plaintiff, Ms. Mwai, D.W.1 admitted that the name of Samuel Githinji Kibaki does not appear in the certificate of lease but maintained that he is a co-owner of the suit property.

47. Concerning the contention that Samuel Githinji Kibaki and some other co-owners of the suit property had sold and transferred their interests therein, he stated that he was not aware of that.

48. With regard to company meetings, he explained that although on some occasions he was aware of them, he never attended any.

49. While admitting that he did not have to authorize the company's meetings, D.W.1 stated that he trusted other members.

50. Concerning payment of dividends, he stated that he is not aware that money inform of dividends was being sent to him.

51. D.W.1 explained that the company has been with them (read the defendants) since the beginning. According to him from 1989, the shareholders have been the owners of the suit property.

52. D.W.1 further informed the court that he does not know what happened in the meeting of 13th October, 2007. However, he was aware of the complaints concerning the meeting but could not remember what the complaints were about.

52. He was also not aware whether a resolution was passed authorising the filing of the current suit.

53. In re-examination, he maintained that they have not changed the ownership of the company and that he is not aware of any changes to the composition of the plaintiff company. He also restated that he was not involved in management of the company.

54. D.W.2, Waiteri Ramigious Nganyi, who is the Land Registrar, Nyeri, gave a history of the suit property. In this regard, he informed the court that before the parcel of land was registered under the Registered Land Act, Cap 300, it was registered under the Crown Land Ordinance, as LR No.1108/14 measuring 0.973 hectares.

55. He pointed out that the 1st lease was for 99 years w.e.f from 1st April,1913. That lease expired in 2012. Another lease was granted for 50 years in favour of the original tenants in common (the registered proprietors of the suit property).

56. According to D.W.2, apart from the charge registered in 1976 in favour of ICDC no other change has been registered against the title issued in respect of the suit property. He produced an extract of the green card in respect of the suit property as **Dexbt (a) to (c)**.

57. In cross examination, he stated that he is not aware that the tenants in common incorporated a company.

58. Upon being shown demand notices for rent and rates in respect of the suit property,he stated that the owner of the suit property appears to be Mathingira Wholesalers. He was however, not aware about the dispute between the tenants in common and Mathingira Wholesalers.

59. In re-examination, he explained that when processing documents they only rely on the documents held in their offices.

60. D.W.3, Peterson Wachira, a records officer from the Registrar of the Companies, gave a history of the plaintiff's company. According to him there were various changes in the shareholding of the plaintiff company. For instance, at the inception of the company, each shareholder had subscribed to one share of the plaintiff company. That position changed in due course of time. There was also a change in the composition of the shareholding in the company. He produced copies of returns attesting to that fact.

61. He however took issue with some of the returns arguing that they appeared irregular.

62. At the close of hearing, advocates for the respective parties filed submissions which I have read and considered.

### **Analysis and determination**

63. Having read and considered the cases of the respect parties, the evidence adduced in respect thereof and the submissions in respect thereof, I find the following facts to be either common ground or uncontroverted:-

- a) The property was acquired by Kimwatu Kanyungu, Francis Gathungwa, Gadson Gitonga Mbuthia, Mwai Kibaki, Kiiru Gachiga, Kibira Gatu, Phillip Gichuhi and Muruthi Nganga. On 5th May, 1976 the registered proprietors of the suit property, trading as Mathingira Wholesalers

Company, charged the suit property to Industrial and Commercial Development Corporation (ICDC) to secure a loan of **Kshs. 225,000/=** which ICDC had advanced to them.

b) On 17th June, 1983 the registered proprietors of the suit property incorporated Mazingira Wholesalers Company (hereinafter referred to as “**the company**”) and got registered as the first shareholders/directors of the company.

c) At the time of incorporation of the company, each of the registered proprietors of the suit property, **plus Samuel Githinji Kibaki**, the 5th defendant herein subscribed to one share each out of the declared share capital of the company.

d) In due course of time, the registered proprietors of the suit property and Samuel Githinji Kibaki subscribed to more shares in the company, but this time not in equal proportions. See the returns for the period 1986 to 1992.

e) The shareholding of the company also changed in due course of time. The change in shareholding of the company was caused by transfer of shares by some of the initial proprietors of the company and/or inheritance of shares of shareholders who had passed on by their family members.

f) Owing to the change in shareholding in the company referred to in (h) above, some of the initial shareholders of the company ceased being shareholders of the company and got replaced by the persons to whom they had transferred their shares to or who had succeeded them.

g) Some of the initial shareholders of the plaintiff company who transferred their shares or whose shares were transferred to members of their family include **Samuel Githinji Kibaki** and **Gadson Gitonga** (the third defendant herein). These two sold their shares to Peter Ndiritu Munuhe and Paul Wamahu respectively.

h) Other changes in shareholding of the company occurred after the original shareholders passed on and their names got substituted with the names of other members of their family. For instance the shares of Paul Wamahu were transferred to Beatrice Mumbi Wamahu, who later sold and transferred them to James Kanyi. Similarly, the shares of Nganga Muruthi, were transferred to Joseph Nganga Muruthi, his son.

i) Upon joining the company, the new shareholders of the company began participating in the affairs of the company and enjoying the rights and privileges of a shareholder (participating in the company’s meetings, partaking in sharing of dividends and receiving directors’ fees, where applicable).

j) That in transferring the shares from the initial shareholders, some aspects of the company’s Articles of Association were not complied with. For instance, some shareholders of the plaintiff who ought to have been given an opportunity to buy the shares before they could be sold to persons who were not shareholders of the company were not given opportunity to exercise their right to buy the shares of outgoing shareholders).

k) That transfer of shares of deceased members of the company was effected in disregard of the law governing succession of estates of deceased persons.

l) That notwithstanding, the flaws mentioned in paragraph (k) and (j) above, the new members of the plaintiff company were accepted as shareholders of the plaintiff company.

m) That all the shareholders/directors of the company with the exception of Hon. Mwai Kibaki, who was not actively involved in the management of the company, knew about the sale and transfer of the company’s shares to the new shareholders. They, in fact, participated in the transfer by executing the transfer documents in favour of the incoming shareholders.

- n) That no shareholder of the company or any of its directors complained about the transfer of the shares of the company to the new shareholders.
- o) That there were no disputes concerning the management of the company until sometime in 2007 when elections were conducted and some shareholders/directors who served in the board of management of the company were removed from its management.
- p) That the plaintiff company and its shareholders have been the beneficiaries of the rent collected from the suit property and the income from the businesses thereon.
- q) That the registered proprietors of the suit property had intimated their intention to transfer the suit property to the company but owing to undisclosed reasons, that intention never materialised.
- r) That when the term of the lease granted to the registered proprietors of the suit property expired, the lease was renewed in the name of the initial proprietors of the suit property.

### **Issues for the court's determination**

64. From the pleadings, the evidence adduced in support thereof and the submissions by the respective parties, the issues for determination are found to be as follows:-

- i) Whether between 1983 and 28th February, 2009, the plaintiff served as an agent of the defendants for purpose of collecting rent from the tenants on the suit property and running the bar-cum-restaurant-cum-butchery on the same?**
- ii) If the answer to one above is in the negative, what was/is the relationship between the plaintiff and the registered proprietors of the suit property?**
- iii) Whether the plaintiff owes the registered owners of the suit property an account?**
- iv) Whether the changes effected to the membership of the plaintiff company are valid?**
- v) Whether the elections held on 13/10/2007 were lawful/valid?**
- vi) Who is entitled to the money held in the account?**
- vii) What orders should the court make?**

65. With regard to the 1st issue, on behalf of the applicant, reference is made to the testimonies of the plaintiffs' witnesses concerning their acquisition of shares of the plaintiff company and submitted that they understood that by purchasing shares of the plaintiff company they became owners of the suit property; that the building on the suit property is popularly known as Mathingira Wholesalers and that the proprietors of the suit property were trading as Mathingira Wholesalers Company.

66. It is pointed out that all activities in respect of the suit property were carried out in the name of the plaintiff company. For instance payment of land rates and rent was done in the name of the plaintiff company; So were suits instituted in respect of the suit property.

67. The conduct of the shareholders and directors of the plaintiff company prior to filing of this suit is said to be another indicator that the plaintiff was the owner of the suit property. In this regard, it is pointed out that there were no disputes concerning the status of the shareholders who had bought shares from the plaintiff company. Such shareholders continued receiving dividends generated from proceeds of rent from the building erected on the suit property as well as the other business activities conducted by the plaintiff company in the suit property. The registered proprietors of the suit property ceased attending the meetings of the plaintiff company and receiving dividends upon transferring their shares.

68. It is further pointed out that there were no disputes concerning the pertaking of the new shareholders in the affairs of the plaintiff like the sharing of proceeds of rent, attending the company's meetings and earning director's fees where applicable. Besides, the plaintiff company was not receiving any agency fee from the registered proprietors of the suit property (the defendants). The registered proprietors of the suit property had also intimated their intention to transfer the suit property to the plaintiff company.

69. Terming the contention that changes to shareholding of plaintiff company were not effected in accordance with the Company's Memorandum and Articles of Association a scheme calculated at defrauding some of the shareholders of the plaintiff, counsel for the plaintiff argues that it is the defendants (read the company's directors) who were supposed to ensure that all conditions of the plaintiff company were complied with when admitting new shareholders.

70. From the conduct of the shareholders and directors of the plaintiff company, it is submitted that the new shareholders were justified in presuming that the rules and regulations of the plaintiff company were complied with in admitting new shareholders to the plaintiff company.

71. Wondering why the defendants waited for so long (from 1991 to 2007) to raise issues concerning admission of new shareholders to the plaintiff company, counsel for the plaintiff maintains that the defendants had no grievance against admission of new shareholders.

72. The plaintiff took issue with failure by the 1st and 2nd defendants to attend court to testify and rebut the evidence of its witnesses yet they were actively involved in admission of its new shareholders.

73. Arguing that the defendants acquiesced to the alleged unauthorised change in the shareholding of the plaintiff company, the plaintiff's counsel submitted that the defendants should not be allowed to deny those shareholders their rightful share in the suit property and the plaintiff company.

74. Maintaining that the plaintiff's witnesses demonstrated that the parcel of land herein is synonymous with the plaintiff company, counsel for the plaintiff urges the court to declare that the plaintiff company owns the suit property and it is not merely an agent of the defendant for purpose of collecting rent from the suit property and running the businesses therein.

75. On behalf of the defendants, reference is made to the evidence of D.W.1, Hon. Mwai Kibaki, and that of the Land Registrar, Nyeri County (D.W.2) and submitted that the evidence adduced by those witness shows that the suit property belongs to the registered proprietors thereof as per leases dated 5th May, 1976 and 20th November, 2012 respectively.

76. With regard to the contention of P.W.1, 2 and 3 that they were meant to believe that by buying shares in the plaintiff company they were acquiring interest in the suit property, reference is made to **Section 103** of the **Registered Land Act (RLA)**, Cap 300 Laws of Kenya (repealed) and **Section 91** of the **Land Registration Act (LRA), 2012** and submitted that such purported sale of the defendants' interest in the suit property would be void.

77. The assertion of the plaintiff's witness that by virtue of being shareholders of the plaintiff company they own the suit property is said to be based on the wrong assumption that the property of a company belongs to the individual shareholders. Based on the case of **Salomon vs. Salomon (1897) AC 1** it is submitted that a company is a separate person from its shareholders. Further reference is made to the case of **Omondi v. National Bank of Kenya (2001)1 EACA 177** where **Ringera J.**, (as he then was) observed:-

**“The property of a company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own.”**

78. It is admitted that there was intention to transfer the suit property to the plaintiff company but based on the provisions of **Sections 38 and 85** of the **Registered Land Act** (now repealed) submitted that the said intention was incapable of extinguishing, transferring, varying or effecting any estate right or interest

in favour of the plaintiff or its shareholders because the intended transfer was not completed as anticipated by **Section 85(2)** of the Act.

79. Because the current lease over the suit property has a clause to the effect that transfer cannot be effected without the consent of the lessor and there being no such consent, it is submitted that the plaintiff's plea for transfer of the suit property is unmaintainable.

80. Based on the provisions of **Section 27** of the **RLA** (repealed), it is submitted that it is only the registered proprietors of the suit property who have rights to the suit property. Since PW1 to PW-4 are not proprietors of the suit property, it is submitted that they were not entitled to receive proceeds therefrom. As there is evidence to the effect that they pertook in proceeds of rent from the suit property, it is submitted that receipt of rent by them was wrongful and should, therefore, account for it to the defendants.

81. In view of the above factual situation and the legal position, it is reiterated that the persons named in the certificate of lease referred to and produced by DW1 are the sole owners of the suit property.

**Whether the plaintiff was an agent of the registered proprietors of the suit property?**

82. Concerning this issue, it is the defendants' case that the plaintiff company was merely their agent for purposes of collecting rent from the suit property and running the businesses thereon. The agency relationship between the plaintiff company and the registered proprietors of the suit property is said to be pegged on one of the objects of the plaintiff's company which provides as follows:-

**“(n) To carry on all kinds of agency business and to take part in management, supervision or control of the business or operation of any other company, association, firm or person and in connection therewith appoint and remunerate any directors, accounts and other experts or agents.”**

83. It is however, noteworthy that the defendants' did not adduce any evidence capable of showing that the plaintiff company was an agent of the registered proprietors of the suit property and for the said purpose.

83. The Memorandum and Articles of Association of the plaintiff company shows that the company was incorporated to do many other things, for instance the company can, *inter alia*:-

**“(I) establish and carry on and permit the establishment and carrying on upon any property in which the company is interested any business which may be conveniently carried on upon or in connection with such property and establishment of which may seem calculated to enhance the value of the company's interest in such property or to facilitate the disposal thereof.**

**(q) Acquire on any terms, carry on and develop the whole or any part of the business, undertaking or assets of any corporation, company or person carrying on any business or undertaking of a kind which the company is authorized to carry on or possessed of property suitable for the purpose of the company”**

84. The evidence adduced in this case shows that, in exercise of its objects cited above, the company acquired among other properties, the business which was being run by Beatrice Wamahiu on the suit property.

85. Under **Section 107** of the Evidence Act, Cap 80 of the Laws of Kenya, the defendants had a duty to prove that the plaintiff company was merely its agent for the said purposes.

86. There being no express agency relationship between the plaintiff and the defendants, it is my considered view that, the only other way the defendants could have proved the alleged agency is by

leading evidence capable of showing that from the relationship between them and the plaintiff, the only reasonable inference that can be made is that there exists an agency relationship between them and the plaintiff company for the said purposes.

87. On whether the relationship between the plaintiff and the defendants points to existence of the alleged agency relationship, having considered the conduct of the parties in this suit, I find nothing that can warrant a determination that the the plaintiff was an agent of the defendants' for the said purposes. I say this because the evidence on record shows that the plaintiff conducted itself as if it was the owner of the suit property and the businesses therein. For instance, it conducted its affairs without reference to the defendants; it did not at any instance, conduct itself as if it was an agent of the defendants.

88. In view of the foregoing, I find and hold that the plaintiff was not an agent of the defendants either for the purpose of collecting rent from the tenants in the suit property and/or for the purpose of running the business thereon.

**What is the relationship between the plaintiff and the defendants, as far as the suit property is concerned?**

89. As pointed above, it is not indispute that the persons indicated in the certificate of lease produced by D.W.1 and referred to by D.W.2 are the registered proprietors of the suit property. That being the case, by dint of the provisions of **Section 27** of the **RLA**, the said persons are entitled to the rights and privileges indicated in that portion of the law.

90. It is however, noteworthy that the rights created under that subsection are subject to the interests contemplated under **Section 28** thereof, if proved to exist. These include overriding interests under **Section 30** thereof and the duties imposed on the registered proprietor as a trustee. In that regard see the said provisions of the law which provide as follows:-

**28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

**Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”**

**“30). Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -**

**(a) ...**

**(b) ...**

**(c) ...**

**(d) ...**

**(e) ...**

(f) ....

(g) **the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;**

(h)...:

**Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.”**

91. Since in this case the plaintiff contends that there exists a constructive trust over the property created by the defendants in its favour, and in view of the provisions of **Section 28** of the *RLA supra*, it is important to review the evidence produced in this case with a view of ascertaining whether the alleged trust exists. This is so because if the alleged trust relationship is established, the defendants’ contention that the registered proprietors of the suit property are the only persons entitled to the suit property will be unsustainable. In this regard see the case of **Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri (2014) eKLR** where the Court of Appeal observed:-

**“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice. We are reminded and guided by the dicta of Madan, JA (as he then was) in Chase International Investment Corporation and Another vs. Laxman Keshra and Others, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:**

***“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”***

92. Although the facts of the case of **Macharia Mwangi** (*supra*) are not in all fours with those of the current case, I find it applicable to the circumstances of this case in that it addresses equitable rights of a person in possession of land and in whose favour a constructive trust is established.

93. The evidence adduced in this case shows that at all times material to the suit herein, it is the plaintiff company which was in use and control of the suit property (conduct equivalent to possession). The evidence also shows that after the plaintiff company was incorporated, the rights and interests of the defendants to the suit property corresponded with the shares of the company each of them subscribed to. Besides, the testimony of D.W.1 to the effect that Samuel Githinji Kibaki (not one of the registered proprietors) is one of the owners of the suit property, which testimony I have no reason to disbelieve, can only be given effect, if and only if, the registered proprietors of the suit property are declared to be holding the suit property as trustees of the plaintiff company. This is so because the only connection between the said Samuel Githinji Kibaki and the suit property is the fact that he subscribed to the shares of the plaintiff company at its inception.

94. In view of the foregoing and given the conduct of the defendants’ to the effect that those who sold their shares ceased being beneficiaries of the proceeds of rent generated from the suit property and the declared intention of the registered proprietors of the suit property to transfer it to the plaintiff company; the only reasonable inference that can be drawn from the conduct of the parties herein is that the defendants hold the suit property in trust for the plaintiff company. Consequently, I find and hold that the registered proprietors of the suit property hold it in trust for the plaintiff company.

**Whether the plaintiff owes the registered owners of the suit property an account?**

95. Having determined that the plaintiff is not an agent of the defendants' and cognisance of the facts that the plaintiff company has been meeting its statutory obligations under the Companies Act, I return a negative verdict to this question.

**Whether the changes effected to the membership of the plaintiff company are valid?**

96. Reference is made to Articles 12 to 22 of the plaintiff's Articles of Association and submitted that since the provisions of those Articles were not complied with when transferring the shares of the plaintiff company, the transferees of those shares did not become legitimate shareholders of the plaintiff company.

97. Based on the decision of the **Court of Appeal in Arthi Highway Developers Limited v. West End Butchery Ltd and 6 others (2015) e KLR** and **Section 75 of the Companies Act**, the defendants urge the court to hold that the purported transfer of shares to PW-1, PW-2 and PW-3 was unlawful owing to none compliance with the law and the Company's Articles of Association.

98. In **Arthi Highway Developers Limited v. West End Butchery Ltd and 6 others** (*supra*), the Court of upheld the High Court's decision to the effect that:-

**“...the general effect of not following these legal requirements is to invalidate the said transfer of shares as it was not done lawfully and in accordance with Section 77 of the Companies Act. In addition, there is a penalty of imprisonment that is provided for in section 86 of the Act for any person who falsely personates the owners of shares of a company.”**

99. On the other hand, PW-4 is said to have not procedurally succeeded his late father. In that regard, it is pointed out that the shares he administers were not included in the confirmed grant issued in respect of his deceased father's estate.

100. Based on Article 13 of the company's Articles of Association, it is contended that transfer of shares could only be made to relatives of the original shareholders. Although PW.3 and 4 could acquire shares through that clause, it is submitted that they could only do so through their parents.

101. It is further submitted that PW4 could not be registered as owner of his deceased father's shares without having been appointed an administrator of his deceased father's estate. For that reason, registration of PW-4 as a shareholder of the plaintiff company is said to have been illegal.

102. Article 14 which requires a shareholder wishing to sell his shares to give a written notice to the company and Article 15 which required the company's auditor to value shares and find a buyer from among the existing shareholders is said to have not been complied with.

103. Article 16 which required the existing shareholders to be given priority in transfer of shares is, similarly, said to have not been complied with. In this regard, it is pointed out that D.W.1 was not given an opportunity to buy the shares of the retiring shareholders.

104. Maintaining that transfer of shares to the plaintiff's witnesses was not done in accordance with the company's Articles of Association, it is pointed out that the plaintiff's witnesses conceded that transfer of shares was not done in accordance with the dictates of the company's Articles of Association.

105. The defendants also wonder how the shares of the plaintiff's witnesses ended up being more than those sold to them.

106. With regard to the testimony of PW2 concerning the circumstances leading to his acquisition of shares, it is submitted that he ought to have called the persons who introduced him to the company to vouch for his testimony. It is also contended that he should have ensured that D.W.1 was given an opportunity to buy the shares on offer before he was allowed on board.

107. Arguing that the testimony of PW2 does not reflect a true account of the circumstances leading to

how he became a shareholder of the plaintiff company, the defendants' urge the court to prefer the testimony of D.W.1 to the effect that the company's Articles were not complied with in the transfer of shares to him (read P.W.2).

108. Although the plaintiff produced evidence which is by dint of the provisions of **Section 384(3)** of the Companies Act Cap 486 (repealed) is admissible to prove that PW-1, 2, 3 and 4 are its shareholders, it is submitted that the said evidence can be rebutted if evidence is led to show that the records held by the Registrar of Companies do not show the correct position on the ground. In that regard it is contended that the evidence adduced in this case shows that the plaintiff's witnesses (PW-1 to PW-4) did not become shareholders of the plaintiff company because its Articles of Association were not complied with in admitting them as shareholders of the company.

109. The returns relied on by the plaintiff are said to be worthless because they are not certified. The returns are also faulted on the ground that the person who filed them was one of the persons who convened the meeting of 13th October, 2007 where the management of the plaintiff company was allegedly unlawfully changed.

110. With regard to the issues raised concerning admissions of new shareholders of the plaintiff company, unlike in the case of **Arthi Highway Developers Limited v. West End Butchery Ltd and 6 others** (*supra*) where fraud was pleaded and proved, in the circumstances of this case I find that fraud was neither pleaded nor proved against the new shareholders of the plaintiff. Although it appears that some internal procedures of the plaintiff company were not complied with, there being no fraud alleged or proved against the prospective shareholders, I agree with the plaintiffs' submissions that the prospective shareholders were entitled to presume that the plaintiff's internal affairs were complied with.

111. The defendants' having caused the situation complained about through their actions and/or inaction cannot be heard to say that the law and/or applicable procedures in transfer of the shares of the plaintiff company was not complied with.

In my view, the circumstances of this case constitute a perfect scenario where the maxim equity considers as done that which ought to have been done should be applied. In this regard see **Wambugu Mirugi (2013)eKLR** where **Wakiaga J.**, observed:-

**“I therefore take the view that equity considers as done that which ought to have been done and there being evidence of the validity of an agreement for sale of the interest of the protesters husband in the said estate I am of the considered view that the protest herein lacks merit.**

**The protester cannot undo what was done by her husband in his life time and there being no evidence of fraud in this transaction herein I am of the considered view that the same is valid and ought to be enforced as proposed in the mode of distribution.”**

Also see the case of **Macharia Mwangi Maina** (*supra*) where the Court of Appeal observed:-

**“Article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”**

112. In the circumstances of this case, if this court were to accede to the defendants' protest concerning the transfer of the shares when they were responsible for the situation complained about, it would in effect allow the defendants' benefit from their actions or inactions in transfer of the shares to prospective shares of the plaintiff company. Moreover, the Articles of the plaintiff company relied on to show that the regulations of the company were not complied with in transferring shares do not impose any obligation on prospective shareholders to ensure compliance with the the said procedures. The burden

appears to be on the directors of the company (the defendant's herein). In this regard see Articles 5 and 12 which provides as follows:-

**“5. The shares shall be under the control of the Directors who may allot and dispose of or grant options over the same to such persons, on such terms, and in such manner as they think fit.**

**12. Subject to Articles 13 to 22, the Directors may in their absolute and uncontrolled discretion decline to register any proposed transfer of shares?”**

113. The evidence adduced in this case shows that none of the Directors of the Company exercised the discretion vested in them to decline to register proposed transfer of shares. The evidence further shows that the Directors sanctioned the impugned transfers and never raised any questions in respect thereof until a dispute arose concerning the management of the plaintiff company.

114. In view of the foregoing, one may be forgiven for concluding that, were it not for the differences that occurred in or about 2007, the issue as to whether or not the incoming shares of the plaintiff are legitimate would not arise. In my view, this is a clear case of use of law to settle scores, which this court being both a court of law and equity should not sanction.

115. The upshot of the foregoing is that the changes effected to the membership of the plaintiff company are valid.

#### **On whether the meeting held on 13th October, 2007 was lawful/valid?**

116. Having determined that the changes effected to the membership of the plaintiff company are valid, I find the contention that the meeting of 13th October, 2007 was attended by strangers to be unmaintainable.

117. On whether all bona fide members of the plaintiff company were served with notice to attend the impugned meeting, I note that no evidence capable of proving service on all bona fide shareholders was served. Be that as it may, Article 26 of company's Articles of Association is categorical on the issue of service of notice. It provides:-

**“...The accidental Omission to give notice of a meeting to or the non-receipt of notice of meeting by any member shall not invalidate the proceedings of any meeting.”**

118. Being of the view that the impugned meeting was lawful or valid I return a positive verdict to this issue.

#### **What orders should the court make?**

119. Having found that the registered proprietors' of the suit property herein hold the same in trust for the plaintiff, I declare that the money held in the account herein belongs to the plaintiff. It should as such be released to the bona fide board of management of the plaintiff company. Despite having found the meeting of 13th October, 2007 to be valid, in order to promote reconciliation between the members of the plaintiff company, I direct that the plaintiff holds a fresh meeting for purpose of electing the board to manage its affairs. The meeting to be held within three months from the date of delivery of this meeting.

120. The board elected pursuant to the order herein shall then be the one to access the funds in the account hereto. In the meantime the status quo concerning those funds be maintained.

121. With regard to the claim against the 1st defendant, I direct that he accounts to the plaintiff for the money he withdrew from the plaintiffs' account without the sanction of the plaintiffs' board.

122. With regard to costs, in order to facilitate reconciliation between the warring factions of the plaintiff

company, I order that each party bears its costs.

Orders accordingly.

**Dated, signed and delivered at Nyeri this 12th day of July, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Ms. Mwai for the Plaintiff

Ms. Muhoro for Mr. Kamau Kuria for the Defendants

Court Assistant - Lydia