



REPUBLIC OF KENYA



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**Ngai & 6 others v Sparkle Properties Limited & 2 others (Civil Appeal
42 of 2020) [2022] KECA 1118 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1118 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 42 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 21, 2022**

BETWEEN

**JOHANA NGAI 1ST APPELLANT
FATUMA MWAMBURI 2ND APPELLANT
SULEIMAN KIBOI MWANYAMBU 3RD APPELLANT
HAMISI KALELA 4TH APPELLANT
ALOIS MWAMBI 5TH APPELLANT
ASHA MWAKE 6TH APPELLANT
FATUMA KODI 7TH APPELLANT**

AND

**SPARKLE PROPERTIES LIMITED 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
BATA SHOE COMPANY LIMITED 3RD RESPONDENT**

*(An appeal against the judgment and decree of the Environment and Land
Court at Mombasa (Omollo, J.) dated 27th January 2020 and delivered
by Munyao Sila, J. on 24th February 2020 in ELC Case No. 265 of 2013)*

JUDGMENT

1. The appellants in this appeal have challenged the judgement and decree of the Environment and Land Court (ELC) at Mombasa (A Omollo, J) in ELC No 265 of 2013 dated January 27, 2020 and delivered by Munyao Sila, J on the February 24, 2020 in which the court: upheld the 1st respondent's title to the property known as LR No 1956/506 (the property); restrained the appellants by permanent



injunction from interfering with the property; ordered the appellants to demolish and pull down structures erected on the property; and ordered the appellants to pay general damages of Kshs 150,000 each for trespass. In the same judgment, the ELC dismissed the appellants counterclaim seeking, among other reliefs, cancellation of the 1st respondent's title to the said property.

2. By a letter of allotment under reference number 37173/Viii/190, the Government of Kenya through the Commissioner of Lands offered Bata Shoe Company (Kenya) Limited, the 2nd respondent, (Bata) a grant of un-surveyed plot shown on a plan attached thereto, measuring approximately 50 hectares for a term of 99 years from the January 1, 1979 on the terms and conditions therein set out. Two special conditions in the letter of allotment are pertinent for purposes of this appeal, namely, that:

“The grantee shall within 6 calendar months of the actual registration of the grant submit... to the local authority and the commissioner of lands plans...of the buildings the grantee proposes to erect on the land and shall within 24 months of the said actual registration of the grant complete the erection of such building” and that,

“if default shall be made in the performance or observance of any of the requirements of this condition it shall be lawful for the commissioner of lands or any person authorized by him on behalf of the president to re-enter into and upon the land or any part thereof in the name of the whole and thereupon the term hereby created shall cease but without any right of action or remedy of the president or the commissioner of lands in respect of any antecedent breach of any condition herein contained.”

3. The other pertinent special condition was that the “land and the buildings shall only be used for a Bata shoe factory and accommodation for a caretaker or a night watchman may be provided.”
4. Subsequently, by grant number CR 23979 registered on April 30, 1993, the President of the Republic of Kenya granted to Bata “all that piece of land situate in Voi Township in Taita Taveta District containing by measurement 54.26 hectares or thereabouts that is to say LR No 1956/506” to hold for a term of 99 years from January 1, 1979 subject to the conditions therein set out. The special conditions in the allotment letter to which we have referred requiring Bata to submit building plans within 6 months of the grant and to erect the buildings within 24 months of the registration of the grant and reserving the right of re-entry in the event of default were incorporated as special condition in the grant.
5. Bata did not within the period of 24 months, or at all, erect or build a factory on the property. Approximately 17 years after the grant was issued to it, Bata agreed to sell the property to Sparkle Properties Limited, the 1st respondent, (sparkle) by an agreement for sale dated November 2, 2010 for the price of Kshs 12,000,000/= by a transfer dated March 8, 2011, Bata transferred its interest in the property to Sparkle, which transfer was registered on March 9, 2011 and thereon Sparkle became the registered owner of the property.
6. Efforts by Sparkle to take possession and develop the property were thwarted by the appellants whereupon, on November 21, 2013, Sparkle filed suit against the appellants before the Environment and Land Division of the High Court at Mombasa, being civil case number 265 of 2013 seeking the reliefs that were eventually granted by the trial court as indicated above.
7. In its plaint Sparkle averred that it is the registered proprietor of the property having purchased it from Bata; that after obtaining title, it took charge of the property; that the appellants had without any right or justification moved into the property and erected structures thereon; that on 14th November 2013 it had visited the property with the intention of taking possession but was prevented by the appellants



from accessing it whereupon it reported the matter at Voi Police Station where it lodged a complaint against the appellants for trespass.

8. Sparkle asserted that the appellants illegally and maliciously claimed to be entitled to the property and put-up houses and structures thereon without its consent and mobilized local residents against it as owner of the property. It asserted further that as a result of the appellants' actions and unwarranted trespass, it had suffered loss and damage as it could not develop the property on account of having been denied access.
9. In their defence, the appellants denied that Sparkle is the registered proprietor of the property. They asserted that the property belongs to the residents of Msambweni Village having been registered for them by the colonial government as Native Reserve for Sagala Peoples and subsequently registered as Ndara Group Ranch "B"/1 measuring approximately 2215 hectares and a title issued on March 31, 1982. The appellants pleaded further that Bata was given a restrictive grant to construct "the biggest shoe factory in Africa" on part of the land; that the grant had conditions including the conditions to which we have already referred as well as the condition that Bata "shall not sell, transfer...part with possession" without the prior written consent of the Commissioner of Lands; that Bata did not therefore have the right to sell and part with possession of the property; and that Bata lost its right to the lease on October 3, 1994 being 24 months from the date of registration of the lease and did not have anything to sell to Sparkle in 2011.
10. It was pleaded that the sale of the property by Bata to Sparkle was fraudulent on account of: failure to comply with terms of the grant; absence of valid sale agreement; failure to show company resolutions authorizing the sale and purchase of the property; and purchasing the property with the knowledge that it was inhabited by the appellants and others.
11. In their counterclaim against Sparkle, Bata and the Attorney General on behalf of the Commissioner of Lands, Registrar of Lands Mombasa and the National Land Commission, the appellants reiterated that the property was part of the larger native land reserve later registered as Ndara Group Ranch "B"/1 measuring approximately 2215 hectares; that in 1978 the government and the community agreed to cede un-surveyed part of that land to Bata to construct a factory for the benefit of the community; that Bata failed to honour the terms contained in the grant and the lease in its favour registered in 1993 became invalid 24 months thereafter being the period within which it should have constructed the factory; that Bata had therefore no right to transfer the property and the transaction between it and Sparkle is null and void.
12. The appellants averred further that there is no sale agreement authorized by the companies' resolutions and by dint of the *Law of Contract Act*, the transaction is null and void. In their counterclaim, the appellants prayed for cancellation of the lease in favour of Bata as well as for cancellation of the transfer of the property of March 9, 2011 in favour of Sparkle; general and special damages against Bata and Sparkle for trespass and loss of jobs and development; and a permanent injunction to restrain them from dealing with the property.
13. At the trial, Mashru Jitendra Popatlal (PW3) a director of Sparkle stated that they purchased the property from Bata to build a mall and in that regard applied for and obtained all necessary approvals. That after obtaining the approvals, they took contractors to the site but hostile squatters on the property chased them away; and that he called the squatters and offered to give them title to part of the property. He stated that there are very many structures on the property as the initial squatters were selling to other people. He produced as exhibits: the certificate of incorporation showing that Sparkle was incorporated in April 2009; official search in respect of the property; the transfer in favour



- of Sparkle; a certified copy of the title; the sale agreement; land control board consent; rates clearance certificate; company resolution; and approved building plans.
14. Francis Malili (PW1), a manager at Sparkle stated that after the property was transferred to Sparkle, he visited the property on November 14, 2013 with a view to clear the bush with use of tractors but was prevented from doing so by the appellant's agents who came out with crude weapons and threatened to kill him; and that he reported the matter to Voi Police Station on the same day. He referred to the transactional documents between Bata and Sparkle, namely the agreement for sale, application for consent, transfer, certificate of incorporation, certificate of title, official search and stated that when Sparkle decided to buy the property, there were 60 household on it; that the occupiers were informed to vacate the property and some of them did so while others began selling the land; that at the time of his testimony on February 25, 2016, there were almost 300 squatters on the property and that Sparkle is unable to access and develop the property in the presence of those squatters. Under cross examination, Mr Malili stated that there were 66 people living on the property at the time of purchase; that they did not find out the conditions existing on the title; and that the consents required for the transaction were duly obtained.
 15. Sammy Wambua Juma (PW2), a county surveyor, stated in his evidence that the property (LR No 1956/506) and plot No Sagala/Ndara "B"/1 which is claimed by the appellants, are distinct parcels of land situated 5.5 kilometers apart and that there is no overlap or encroachment between them. He maintained that the property is not within plot No Sagala/Ndara "B"/1; that between the two properties there is Sagalla Ndana A Adjudication section; that the property was surveyed in 1979 while No Sagala/Ndara "B"/1 was surveyed in 1981.
 16. Samuel Kariuki Mwangi (DW1), the Land Registrar Mombasa testified for the Attorney General, the third respondent. His testimony, which he based on the records at lands office including the deed file, was that: that there is nothing in the records to show that the property was part of Sagala/Ndara "B"/1; that the property was registered as a new grant; that it was a fresh allocation of government land in 1993 and it was therefore not available for allocation under adjudication or community land as claimed by the appellants; that Bata was the first registered owner of the property but the same was transferred to Sparkle by a transfer dated March 8, 2011; that he had in the deed file, all the documents evidencing the transfer to Sparkle including the transfer instrument, rates clearance certificate and consent of commissioner of lands to transfer dated November 7, 2010. He maintained, under cross examination that the grant was procedural; that the land in question was government land; that consents, including consent to transfer was given.
 17. Prisca Chege (DW3), a legal officer at Bata, stated that based on their records, Bata was issued with a grant by the Government of Kenya and at no time was there an agreement between Bata and the community as claimed by the appellants; that as early as the year 2003, Bata expressed its wish to dispose of the property and advertised it for sale in the local newspapers; that in the year 2010, Sparkle expressed interest to purchase and a sale agreement was executed on November 2, 2010; that through Bata's advocates who were handling the transaction, consent of the commissioner of lands was sought on October 21, 2010 and a reminder sent dated November 5, 2010 and the consent granted by a letter dated November 7, 2010; that a transfer in favour of Sparkle was executed on March 8, 2011; and although the sale was advertised in the newspapers, the appellants did not raise any complaint.
 18. Under cross examination, the witness maintained that the transaction between Bata and Sparkle was valid and not fraudulent as claimed by the appellant; that the full purchase price was paid; that there was no evidence that the community gave the land to Bata to build a factory; that the property sold to Sparkle is distinct from the land claimed by the appellants.



19. Testifying on behalf of the appellants, the 1st appellant Johanna Ngai (DW2) stated that he is an official of Ndana B Group ranch; that the appellants and their fore fathers have always lived on the property; that over 500 families live on the property; that there were talks between the clan elders and Bata to get land to build a shoe factory but after Bata was shown the land, it did not build the factory; that it was a condition of the grant for Bata to build a factory; that as Bata breached the conditions in grant, the property should revert to the community; that the residents living in the property would otherwise be rendered homeless if the claim by Sparkle is allowed.
20. Cross examined, Mr Ngai stated that he did not have the agreement between the clan elders and Bata under which he claimed the clan gave the land to Bata; that he was not present during the talks between the elders and Bata; that Sagala/Ndara “B”/1 is grazing land and is different from the property where they reside, Msabweni village, which is known to belong to Bata; that when Sparkle went to the property with bulldozers wanting to start building, the villagers refused; that the property was sold “kimakosa” (erroneously) and if not cancelled the residents will suffer; and that the sale should be revoked and the government should then give the land back to the community.
21. The learned trial judge framed five questions for determination, namely, whether Bata lacked capacity to sell and transfer the property to Sparkle on account of violation of the conditions of the grant; whether consent to transfer the property was obtained; whether the property comprised part of Sagala/Ndara “B”/1; who, as between Sparkle and the appellants who should obtain positive judgment; and who should bear the costs of the suit.
22. In resolving those issues, the learned judge concluded, that as the right of entry for breach of conditions in the grant had not be exercised, Bata had the capacity to sell and transfer the property to Sparkle; that the requisite consent was obtained; that the property was an allocation from the government and there was no evidence that it was community land prior to allocation; that no evidence was presented to show that the property was part of Sagala/Ndara “B”/1(the bigger Msambweni village); and that Sparkle had established its case while the appellants had failed to prove their case. Consequently, the judge granted judgment as prayed by Sparkle and dismissed the appellants’ counterclaim.
23. The appellants have challenged the judgment on seven grounds, namely that the judge: failed to consider the non-compliance with the special conditions of the grant at the time of transfer of the property; erred in finding that consent to transfer was validly obtained; erred in finding that failure of the commissioner of lands or National Lands commission to re-enter the property did not bar the sale; erred in concluding that lack of company resolutions did not affect the sale and transfer of the property; failed to consider that the appellants were in occupation of the property prior to the purchase and transfer of the same; erred in failing to conclude that the suit was time barred.
24. During the virtual hearing of the appeal before us on July 4, 2022, the parties were represented by learned counsel. Mr Nyange appeared for the appellants. Mr James Ajigo appeared for Sparkle. Mr Daniel Gachau appeared for Bata, while Miss Waswa appeared for the Attorney General. Counsel relied on their written submissions which they orally highlighted.
25. For the appellants, Mr Nyange submitted that having breached the mandatory special conditions in the grant, namely: condition 2 requiring Bata to develop the property with 24 months of registration; and condition 5 prescribing the use of the property for a shoe factory, Bata had no right to transfer the property to Sparkle as its interest in the property had ceased because condition 2 of the grant provided that Bata’s interest would cease if it defaulted on the terms of the grant. Counsel referred to the decision in *Njilux Motors Limited v Kenya Power & Lighting Co Ltd & another* [2000] eKLR for the argument that the terms of the grant could not be waived and Bata could not therefore transfer the property.



26. Counsel submitted that in further breach of the special conditions of the grant, Bata entered into the sale agreement with Sparkle on November 2, 2010 prior to obtaining the consent of the commissioner of lands which was a condition precedent; that the consent was obtained on November 7, 2010 after the sale; that in any event, the consent was backdated as the letter applying for the consent dated November 5, 2010 was received by the ministry on November 8, 2010. In the result, counsel argued, the contract of sale was illegal and not enforceable. Reference was made to the decision of this court of *Heptulla v Noor Mohammed* [1984] eKLR for the proposition that no court ought to enforce and illegal contract.
27. It was submitted further that neither Bata nor Sparkle produced board resolutions permitting the transaction and consequently the sale and transfer was barred. The decision of the High Court in a ruling in *Kenya Commercial Bank Limited v Stage Coach Management Limited* [2014] eKLR was cited in support.
28. Counsel submitted further that as the appellants have been in occupation of the property from time immemorial, the suit before the trial court was time barred. Counsel for the appellants concluded by urging that the transfer of the property in favour of Sparkle was unprocedural; that it was established that the appellants are in occupation of the property and have overriding interests under section 30(f) of the repealed *Registered Land Act*.
29. In opposition to the appeal, counsel for Sparkle in brief written submissions urged that the record of appeal is incompetent as the notice of appeal was lodged outside the fourteen days period provided under rule 75 of the *Court of Appeal Rules, 2010*. On the merits of the appeal, it was submitted that the judgment of the trial court is unassailable and is supported by the evidence and there is no basis for interfering with it.
30. On behalf of Bata, counsel submitted that the complaint that the suit before the trial court was time barred is in bad faith as it is a new issue that was never raised before the lower court; that to entertain the issue at this stage would be prejudicial to Bata's rights to fair trial as parties are bound by their pleadings. Reference was made to the High Court case of *Twaber Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, civil appeal No 154 of 2013 and *Wachira v Ndanjeru* [1987] KLR 462.
31. As to whether the failure by the commissioner of lands to re- enter the property barred the sale and transfer of the property, it was submitted that it was up to the commissioner of lands or other authorized person to take action for non-compliance with the special conditions in the grant; that the appellants, as third parties, do not have the standing to do so. Reference was made to the case of *Aineah Likuyani Njirah v Aga Khan Health Services* [2013] eKLR. It was urged that the grant was a contract between the government and Bata and specifically provided that it is only the government that could enforce it.
32. As to whether the property was part of community land and whether it would revert back to the community on account of breach of the special conditions, it was urged that, that is a matter for investigation by the National Land Commission, and the appellants were therefore by-passing the proper forum for such determination in violation of the doctrine of exhaustion of remedies. It was submitted that the failure by the Government to re-enter the property, which was within its rights to do so, gave Bata the right to deal with the property as it did as the property was never forfeited.
33. As regards the consent to transfer, it was submitted that the same was duly applied for and obtained; that under the terms of the sale agreement, consent of the commissioner of lands was one of the completion documents to be made available to the purchaser on completion of the transaction; that had there been any issue with the consent, it was up to the commissioner of lands to raise.



34. With regard to company resolutions, counsel submitted that this is a matter between the contracting parties to which the appellants are not privy; that based on the principles of privity of contract, the appellants are merely busy bodies questioning the contents of a contract to which they are not privy. The High Court judgment in the case of *Securicor Guards (K) Limited v Mohamed Saleem Malik & another* [2019] eKLR was cited for the proposition that a contract cannot be enforced either by or against a third party.
35. As regards the complaint that the learned Judge failed consider that the appellants were already in occupation of the property prior to the sale by Bata, it was submitted that this issue has also been raised for the first time on appeal; that in their defence and counterclaim, the appellants restricted their claim to attacking the transactions between the government and Bata, and between Bata and Sparkle; that the appellants did not assert a claim for adverse possession as they are belatedly seeking to do at this stage; and that the appellants are bound by their pleadings.
36. For the Attorney General, the court was urged to uphold the judgment of the trial court; that the issues raised by the appellants were conclusively addressed and resolved by the trial court; that based on the testimony of the Land Registrar, all the prerequisites for the transfer of the property in favour Sparkle, including the consent of the Commissioner of Lands, were duly presented and the transfer in favour of Sparkle was properly done.
37. In his brief reply on the competence of the appeal, counsel for the appellants submitted that the court is not presently dealing with an application to strike out the appeal under rule 84 of the *Court of Appeals, 2010*; that the Court ought to have been moved to strike out the notice of appeal or appeal within 30 days of service; that Sparkle cannot do so through its written submissions as it is seeking to do. The case of *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* [2014] eKLR for the argument that an application to strike brought after 30 days have lapsed is incompetent.
38. We have considered the appeal and submissions. In that regard, we have reviewed and reevaluated the evidence with a view to reaching our own independent conclusions in keeping with our duty as expressed in *Selle and another v Associated Motor Boat Company Limited and others* [1968] 1 EA 123. As held in that case, this court is not bound necessarily to accept the findings of fact by the court below. however, we can only interfere with the decision of the trial court if is established that the judge misdirected herself in law; misapprehended the facts; took account of considerations of which she should not have taken account; failed to take account of considerations of which she should have taken account; her decision, is plainly wrong. See *United India Insurance Co Ltd & 2 others v East African Underwriters (Kenya) Ltd* [1985] eKLR.
39. With that in mind, the main issues for determination are whether the non-compliance by Bata with the special conditions in the grant as to development of the property vitiated the sale and transfer to Sparkle; whether the consent of the Commissioner of Lands to the transaction was duly obtained; whether the transaction in favour of Sparkle is vitiated by the alleged absence of company resolutions; and whether the Judge erred in failing to uphold the appellant's claim to the property. Other issues are whether the learned judge erred in failing to hold that the claim by Sparkle was/is time barred and whether the appeal is competent on account of late service of notice of appeal.
40. We begin with the question whether the non-compliance by Bata with the special condition in the grant as to development of the property vitiated the sale and transfer to Sparkle. In that regard, there is no dispute that under the letter of allotment and under the grant Bata was under an obligation:

“...within 6 calendar months of the actual registration of the grant submit...to the Local Authority and the Commissioner of Lands plans...of the buildings the grantee proposes



to erect on the land and shall within 24 months of the said actual registration of the grant complete the erection of such building” and that,

“if default shall be made in the performance or observance of any of the requirements of this condition it shall be lawful for the Commissioner of Lands or any person authorized by him on behalf of the President to re-enter into and upon the land or any part thereof in the name of the whole and thereupon the term hereby created shall cease but without any right of action or remedy of the President or the Commissioner of Lands in respect of any antecedent breach of any condition herein contained.”

41. In addition, there was the special condition that the “land and the buildings shall only be used for a Bata shoe factory and accommodation for a caretaker or a night watchman may be provided.”

42. It is also not in dispute that Bata did not comply with those conditions and over 17 years after it was issued with the grant, it sold and transferred the property to Sparkle. It is the appellants case therefore that Bata had “no right under the lease to transfer any interest to anyone” and the transaction between Bata and Sparkle “is null and void *ab initio*”. In effect, the contention is that there was automatic forfeiture of Bata’s interest in the property consequent upon its default in complying with the special conditions.

43. In *Embakasi Properties Limited & another v Commissioner of Lands & another* [2019] eKLR, a five judge bench of this Court (Ouko, (P), Warsame, Musinga, Kiage & Odek JJ.A) considered the question whether there was automatic forfeiture of interest for noncompliance with similar special condition that required the grantee to submit plans for approval and commence development within 24 months. In rejecting that argument, the court stated:

“Where, like here, the lessee has failed to satisfy any of the condition of the grant, the lessor is, by section 77 of the repealed Government Lands Act required to give the lessee notice before moving the High Court for an order declaring the lease forfeited. It is only upon that declaration that the commissioner may re-enter to recover the property. The section states;

“77. (1) If the rent or royalties or any part thereof reserved in a lease under this Act is at any time unpaid for the space of thirty days after the same has become due, or if there is any breach of the lessee’s covenants, whether express or implied by virtue of this Act, the Commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the High Court for the recovery of the premises, and, on proof of the facts, the High Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the commissioner may re-enter upon the land.

(2) In exercising the power of granting relief against forfeiture under this section, the court shall be guided by the principles of english law and the doctrines of equity”.

44. And later in the same judgment, the court expressed:

“The procedure under section 77 aforesaid is in consonance with section 75 of the former Constitution and article 40 of the present Constitution, both of which stress that no private property can arbitrarily or compulsorily be acquired except in the interest of defence, public safety, public order, public morality and / or public health, and that a person whose title is



so affected is entitled to prompt payment of full compensation and to a right of direct access to the High Court to challenge the acquisition.

From our own assessment of the evidence on record, the irresistible conclusion we come to on this question is that the procedure set out under section 77 aforesaid was not followed. In the first place, Embakasi properties was not given a notice of or reason for the intended forfeiture. The commissioner could only re-enter and recover the property, and Embakasi properties could only forfeit it on proof that it violated a condition of the lease and only after the High Court so declaring.”

45. We respectfully agree and associate ourselves fully with that pronouncement. The learned trial judge therefore correctly rejected the contention that Bata’s interest in the property had ceased on account of non-compliance with the condition in the grant on development. We hold, as the Judge did, that at the time Bata entered into the agreement for sale of the property with Sparkle and by the time it transferred it to Sparkle by a transfer dated March 8, 2011 and registered on March 9, 2011, it had the capacity, as owner, to do so, for reason that no evidence was availed to demonstrate that the commissioner of lands vitiated Bata’s rights by way of re- entry or any other action for the alleged breach of the special conditions of the grant. There is therefore no merit in the appellant’s contention the judge erred in concluding that the sale and transfer were not affected by the failure by the commissioner of lands to re-enter the property, such re-entry being a specific requirement and procedure under the grant for the legal repossession of the said property.
46. Next is the question whether the consent of the commissioner of lands to the transaction was duly obtained. Special condition 9 in the letter of allotment and which was replicated as special condition 10 in the grant in favour of Bata provided that Bata shall not sell or transfer or part with possession of the property without prior consent in writing of the commissioner of lands. In their defence and counterclaim, the appellants pleaded that the special conditions in the grant, including the aforesaid condition, were breached. In answer, the application for consent, as well as the consent of the commissioner of lands were produced. Faced with the same, the appellants do not dispute that consent of the commissioner of lands for the transfer in favour of Sparkle was granted by letter dated November 7, 2010. Their complaint is that the consent is invalid because the sale agreement preceded it and is backdated to November 7, 2010.
47. The record shows that the application for consent to transfer to the commissioner of lands was made through Obura Mbeche & Company Advocates by a letter dated November 5, 2010. The commissioner of lands letter of consent dated November 7, 2010 is as follows:
- “With reference to your letter dated November 5, 2010 I hereby give consent in respect of the above-referenced transactions.”
48. However, Ms Obura Mbeche & Company Advocates letter applying for consent to transfer though dated November 5, 2010, bears a received stamp of the cash & documents records, Department of Lands, of November 8, 2010. The matter of the letter bearing a stamp date of November 8, 2010 was raised for the first time in the course of cross examination of PW1 and also the Land Registrar DW1 who stated that the variance could be explained by the issuing office.
49. The question of validity of the consent was not a matter framed before the trial court. Indeed, in their closing submissions, the appellants’ complaint regarding the commissioner of lands consent was that “the commissioner of lands issued a consent in respect of trust land which was under the county council of Taita Taveta without power and authority to do so and to that extent the consent was obtained fraudulently and without due regard to the relevant law.” It is no wonder that the question framed by



the trial judge regarding the consent was “whether or not consent to transfer was obtained.” Whether the consent was invalid on account of the alleged ‘backdating’ date is a matter that did not arise for determination before the trial court, was not pleaded or canvassed and neither was a determination made by the trial court in that regard. Moreover, we do not think there is merit in the claim that the consent is invalid because the sale agreement preceded it. The consent was one of the documents the vendor was required, under the sale agreement, to procure for purposes of completing the transaction. Evidence was led that it was indeed obtained and was part of the documents submitted for purposes of registration of the transfer as attested by the Land Registrar.

50. Next is the question whether the judge erred in failing to uphold the appellant’s claim to the property. The appellants’ plea in its defence and counterclaim was that the suit property was part of community property known Sagala/Ndara “B”/1(the bigger Msambweni village). In that regard, the evidence of the 1st appellant who testified on behalf of the appellants was to the contrary. His testimony was that “Ndarna B is the place for grazing different from where we reside. Ndarna B does not constitute part of the land where we stay” and went on to say, “where we live is not part of Ndarna B registration.” “The land in dispute is different from land under title Ndarna B.” The evidence of DW1, the Land Registrar was to the same effect. He stated that the suit property was government land which was registered as a new grant from the government subsequent to allotment and could not have been available for allocation under adjudication or community land and nor was the property part of Sagala/Ndara “B”/1.
51. Based on the foregoing, we agree entirely with the learned judge when she stated in the judgment as follows:
- “The third question is whether this land comprised part of the Sagala Group Ranch and or Community land. The evidence adduced and not controverted was that the land was an allocation from the government. As stated in the evidence of the DW1, the allocation remains lawful. There has been no evidence led to show that before the allocation, the suit land was community land. PW2’s testimony clearly stated that the suit land is distinct from Ndar “B”/1 title. That the two plots are approximately 5 km apart. He presented his reports to corroborate his evidence.”
52. We turn to the question whether the transaction in favour of Sparkle is vitiated by the alleged absence of company resolutions. In their defence and counterclaim, the appellants averred that “there was no company resolutions” authorizing the purchase and sale of the property and that by dint of the *Companies Act*, the transaction is null and void. The High Court case of *Kenya Commercial Bank Limited v Stage Coach Management Ltd* [2014] eKLR that was cited by counsel for the appellants in support does not, with respect, support the proposition put forward. The ruling in that case related to a preliminary objection taken that the suit be struck out on grounds that it was filed without authority of the plaintiff company therein and that there was no resolution or valid resolution of the company approving the institution of the suit. The judge (Havelock, J) stated in that ruling that “there is no denying the necessity for a company, which is filing suit, to have an authorizing resolution so to do either from the board of directors of the company or by members of the company in general meeting.” That case has no bearing to the present case.
53. Although, as counsel for the appellants has pointed out, this issue was not addressed by the learned judge in the judgment, we are not satisfied that the appellants demonstrated that it was open to them to challenge the sale transaction to which they were not privy on this basis. Furthermore, the appellants did not discharge the burden, in fact and in law, of establishing that the alleged absence of resolutions vitiated the transaction.



54. As regards the complaint that the judge erred in failing to conclude that the suit was time barred, we are persuaded as urged by the respondents that this was never raised before the lower court and is being raised for the first time in this appeal. It was neither pleaded nor urged. The issue of competence of the notice of appeal is a matter that should have been raised as an interlocutory matter by application.

55. The complaint that the judge failed to consider that the appellants were in occupation of the property is negated by the statement in the judgment by the learned judge that:

“The 1st-7th defendants have also not denied that they are residing on the suit land. Having failed to establish the basis of their occupation of the suit land give credence to the plaintiff’s claim for trespass.”

56. There was no claim before the trial judge, as the appellants now contend, for adverse possession and neither did the appellants assert, a claim in the nature of overriding interests as they now belatedly do in their submissions.

57. All in all, we have no basis for interfering with the judgment of the learned judge. The appeal fails and is hereby dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

