IN THE COURT OF APPEAL

AT NYERI

CIVIL APPEAL NO. 6 OF 2017

(CORAM: MURGOR, SICHALE & KANTAI, JJ.A.)

BETWEEN

HON. MWAI KIBAKI.....1ST APPELLANT

KIMWATU KANYUNGU.....2ND APPELLANT

AND

MATHINGIRA WHOLESALERS COMPANY LIMITED.....1ST RESPONDENT

KIIRU GACHUIGA.....2ND RESPONDENT

NDIRITU MUNUHE.....3RD RESPONDENT

JAMES KANYI WAIGANJO.....4TH RESPONDENT

SAMMY MAINA KIIRU.....5TH RESPONDENT

JOSEPH NGANGA MURIITHI.....6TH RESPONDENT

SAMUEL GITHINJI KIBAKI.....7TH RESPONDENT

(An Appeal from the Judgment and Decree of the Environment and Land Court

at Nyeri (Waithaka, J.) dated 12th July, 2016

in

ELC Civil Suit No. 601 of 2014)

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JUDGMENT OF THE COURT

In or about 1976, some enterprising Kenyans – ***Kimwatu Kanyungu, Francis Gathungwa, Gadson Gitonga Mbuthia, Mwai Kibaki, Kiiru Gachuiga***, ***Kibera Gatu, Philip Gichuhi*** and ***Muriithi Nganga***, came together and decided to engage in investment. They identified a parcel of land ***Title No. Nyeri Municipality/Block 1/94****(hereinafter "the suit land")*which was available for purchase and purchased the same as is evidenced by a Certificate of Lease issued under the ***Registered Land Act Chapter 300 Laws of Kenya,*** issued at Nyeri District Registry on the 5th day of May, 1976. They could not raise the full purchase price for purchase of the suit land as is evidenced by a charge registered under the said ***Act*** and to enable them acquire the land, they obtained a loan of Kshs. 225,000/= from Industrial and Commercial Development Corporation (ICDC) and a charge was registered against that title on 5th May,1976. It is safe to assume that the loan was fully repaid because the property remained in their name.

The said individuals later decided to incorporate a company to manage their business affairs. In that regard they incorporated ***Mathingira Wholesalers Company Limited*** as is evidenced by Certificate of Registration No. C25849 incorporated on 17th day of June 1983. In the

Memorandum and Articles of Association the said individuals and one Samuel Githinji Kibaki are shown as original subscribers and each one of them took 1 share in the company whose share capital was stated to be Kenya Shillings 200,000/- divided into 10,000 shares of Shillings 20/- each.

Various factors came to play thereafter leading to the litigation that was filed at the High Court of Kenya at Nyeri in ***H.C.C.C. No. 17 of 2008*** where the company, Mathingira Wholesalers Company Limited was plaintiff against Kamwatu Kanyungu, the 2nd appellant in this appeal and was sued as defendant. That plaint was amended several times and we shall only go to the plaint as last amended. As stated, the company was the plaintiff while the 2nd appellant was the 1st defendant. Kiiru Gachuiga, the 2nd respondent was in later amendments to the pleadings named as the 2nd defendant while Gadson Gitonga was the 3rd defendant, Kibera Gatu was the 4th defendant and Samuel Githinji Kibaki (the 7th respondent) was the 5th defendant. Hon. Mwai Kibaki came into the scene in the course of the proceedings and he is the 1st appellant in this appeal.

It was alleged in the said plaint that the 9 individuals we have already named were the original subscribers of Mathingira Wholesalers Company Limited (hereafter "the company" or "the 1st respondent"). It was further alleged in the plaint that the shareholders of the company were authorized to sell their shares and that through that authorization, Gadson Gitonga had sold his shares to James Kanyi Waiganjo (the 4th respondent here); Samuel Githinji Kibaki had sold his shares to Peter Ndiritu Munuhe (the 3rd respondent here); that Kibera Gatu had sold his shares to Paul Wamahiu; and that Paul Wamahiu had transferred his shares to his wife Beatrice Wamahiu who subsequently sold the shares to Sammy Maina Kiiru (the 5th respondent here). It was further alleged in the plaint that upon incorporation of the company it was the intention of the shareholders to transfer the assets belonging to shareholders to the company in order to ease the management of the said assets. Those assets were identified as ***Title No. Nyeri Municipality Block 1/94*** (the suit property) and a parcel of land called ***Nyaribo Plot***.

It was further stated in the plaint that the suit property was transferred to the company as per records maintained by The Commissioner of Lands and the then Municipal Council of Nyeri and that records at the Lands Office, Nyeri, showed that the suit land was registered in the name of the proprietors trading as Mathingira Wholesalers. The company therefore claimed to own the suit property and that it had been managing what it stated to be its property for the benefit of shareholders but not as a managing agent. Further that the company had at the end of each financial year shared out dividends and directors' fees among the shareholders and directors after paying out necessary expenses in running the business owned by the company and that no issues had arisen until some matters arose leading to the litigation.

It was further alleged that the 2nd appellant was until 13th October, 2007 the Chairman of the Board of Directors of the company which board was said to consist of the 2nd appellant, one Francis Gathungwa Kingori, Peter Ndiritu Munuhe (3rd respondent), Sammy N. Kiiru (5th respondent), J. K. Waiganjo (4th respondent), one P.W. Gichuhi, Joseph Nganga Muriithi (6th respondent), Kiiru Gachuiga (2nd respondent) and H. E. Hon. Mwai Kibaki (1st appellant).

It was further alleged in the plaint that the Chairman of the Board, the 2nd appellant, had been given authority by the company to be a signatory to various bank accounts held by the company at Equity Bank Limited and Kenya Commercial Bank Limited and had the custody and possession of the Company Seal, the Company's Memorandum and Articles of Association, cheque books, audited accounts, Certificate of Incorporation of the company and other property, files and receipts of the company. Further, that by a meeting held on 13th October, 2007 the company's board of directors had removed the 2nd appellant as Chairman of the Board, revoked his authority and mandate as signatory of bank accounts, and the following Board was elected to run the affairs of the company but that the 2nd appellant remained a director of the company: James Kanyi Waiganjo, Joseph Nganga Muriithi, Peter Ndiritu Munuhe and Francis Gathungwa Kingori.

It was alleged that at the time of the institution of the suit and in violation of the said board's resolution, the 2nd appellant had on diverse dates in the years 2007 and 2008 fraudulently and without authority of the company purported to and actually operated the company's bank accounts, obtained services and received or collected payments meant for the company, and that he committed and continued to commit acts of fraud detrimental to the affairs of the company. Particulars of fraud were stated as misrepresenting and withdrawing money in the sum of Ksh.75,824.65 from a company's account held at Equity Bank Limited, Nyeri, without consent or approval; unlawfully collecting Kshs.18,000/= from a company investment known as *Café De Ficus*, a bar and restaurant situated in Nyeri; misleading, confusing and/or misrepresenting to National Bank of Kenya that he was authorized to transact for and on behalf of the company and in that regard opening an account with the said bank; refusing to hand over to the company the company's seal and the company's statutes and other property in his possession and finally misrepresenting to Kenya Commercial Bank that he was authorized to act for the company which action was said to have culminated in the said bank refusing to recognize new and authorized signatories to bank accounts of the company. For all these, it was alleged that the company was said to have lost the said sum of Kshs.75,824.65 money withdrawn from Equity Bank and Kshs.18,000/= collected from the tenant, *Café De Ficus.* That sum was claimed as having been converted by the 2nd appellant.

There was also a prayer in the plaint for injunction to restrain the 2nd appellant from purporting to act as the chairman of the company or acting on behalf of the company contrary to the resolutions reached at the meeting of 13th October, 2007. The prayers in the plaint also included a permanent injunction to restrain the 2nd appellant from acting on behalf of the company or holding out as chairman of the company or interfering with the affairs of the company. There was a prayer against the 2nd appellant for an account to the company for the said sum of Kshs.93.824.65 being the total sum said to have been withdrawn from the Equity Bank account and the sum collected from a tenant; that the 2nd appellant be ordered to pay the said sum to the company and a declaration be issued to the effect that the suit property belonged to the company. Costs and interest thereof to be awarded to the plaintiff.

In so far as pleadings go and because there were very many applications to which we shall not refer as they shall not assist in the discussion we propose to have in this judgment, on amended amended statement of defence and counterclaim which was filed for the defendant. It was admitted that the company had been incorporated and the 9 subscribers we have referred to were admitted as the correct subscribers of the company. It was alleged that the company had under Article (n) of the Memorandum and Articles of Association been incorporated as an agent of the proprietors of the suit property which suit property was said to contain premises to let to tenants and run as a business comprising a bar, restaurant and a butchery. The subscribers were said to be the proprietors of the said business of bar, butchery and

restaurant. It was further alleged that the proprietors of the suit property had bought the same and entrusted its management to the 2nd appellant. It was contended that the proprietors had power in law to appoint by majority decision an agent to manage their property; that they had power to appoint and to terminate the management of their property; that they had power to sell their property; that they had power to purchase their property if offered for sale and that they were entitled to an equal share of the rent yielded by the property they held in common.

At paragraphs 1D, 1E, 1F and 1G of the amended amended defence and counterclaim it was stated that:

> ***"1D. The defendants aver that when they came together and decided to purchase the suit property, they came up with a name which could describe their group which is also the name that they gave the building in dispute herein. The name was Mathingira Wholesalers Company. To enable the defendants raise funds for purchasing the property, they charged it with Industrial and Commercial Development Corporation and secured a loan which they paid using the income they received from their aforesaid business investments. Mr. Samuel Githinji is the one who paid the deposit of the purchase price but inadvertently, his name was omitted from the list of the proprietors and that explain*** *(sic)* ***why although he is one of the people who purchased the building, his name does not appear in the title documents.***
>
> ***1E. The defendants further aver that when they decided to incorporate the plaintiff in 1983, they found it easier to use the name they were accustomed to, Mathingira Wholesalers Company, since it was the same proprietors who were the sole subscribers of the company. The defendants therefore aver that they were using the name Mathingira Wholesalers Company even before the plaintiff was incorporated as evidenced by the Charge Documents of 1976.***
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> ***1F. The defendants aver that in 1983, the 9 co-proprietors appointed the plaintiff an agent to let the premises, collect rent from the tenants and generally manage the said LR No. Nyeri Municipality/Block/1/94, and also the manager of a business offering restaurant, bar and butchery services. Between 1983 and 2007, the plaintiff discharged its duties under an agency agreement made by it and the Defendants and accounted to them both the rent realized and revenue received from the said business.***
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> ***1G. Sometime between 1983 and 2007, the Plaintiff opened the under-mentioned bank accounts with the Nyeri Branches of Kenya Commercial Bank Ltd. and the National Bank of Kenya Ltd. into which rent and revenue from the business pleaded above were banked:***
>
> | ***No.*** | ***Bank*** | ***Account No.*** |
> |---|---|---|
> | 1. | ***Kenya Commercial Bank Ltd.*** | ***044212680407*** |
> | 2. | ***National Bank of Kenya Ltd.*** | ***0102043453900*** |
>
> ***The defendants contend that at all material times, the Plaintiff owed the Defendants fiduciary duties and held upon trust for them all the rent and revenue received from the premises and businesses pleaded above...".***

Further and as further defence, it was stated that on 13th October, 2007 one Francis K. Gathungwa, a shareholder of the company, Peter N. Munuhe (3rd respondent) said to be a stranger to the company, Sammy M. Kiiru (5th respondent) stated to be a stranger to the company, Peter W. Gichuhi, a son of a shareholder Joseph N. Muriithi (6th respondent) illegally convened and held a meeting of the company at the company's office and purported to pass resolutions to remove the control and management of the company from the majority of the shareholders and vest the same in one shareholder Francis Gathungwa, two sons of shareholders and to a stranger. It was stated that the said resolution made at that meeting was null and void. It was further stated in the defence that the company had since 13th October, 2007 collected rent from the tenants of the suit property but had not accounted for the same to the named defendants. It was alleged that the 2nd appellant was still the legally elected Chairman of the Board of Directors of the company at the time of the suit and that he was the duly mandated signatory of the company's accounts. Further, that the 2nd appellant had on 2nd March, 2009 handed over to the company's lawyers relevant documents relating to the company upon being ordered to do so by the High Court.

Fraud alleged in the plaint was denied and it was denied that the 2nd appellant had converted any money belonging to the company. By way of counterclaim judgment was prayed for against the company for a declaration that between 1983 and 28th February, 2009 the company served as an agent of the defendants to the suit in collecting rent from the tenants on the suit property and running the bar, restaurant and butchery business erected in the premises. Also, that it be declared that the company was obliged to account to the defendants in the suit their respective shares of rent and revenue yielded by the suit property and the business run thereon. It was also prayed that a permanent injunction be issued restraining the company by itself, its servants or agents from collecting rent, from managing or dealing in any manner with the suit property and costs of the counterclaim be awarded to the defendants.

A hearing took place where evidence of witnesses was taken. In a judgment delivered on 12th July, 2016, L. N. Waithaka, J. held that money held in bank accounts belonged to the company. It was ordered that such money be released to *bona fide* board of management of the company. It was further held that the meeting held on 13th October, 2007 was valid, but in order to promote reconciliation between the members of the company the learned Judge directed that the company hold a fresh meeting for purposes of electing a new board to manage its affairs. Such meeting was to be held within 3 months from the date of delivery of judgment (*"judgment" is mistakenly referred to as "meeting").*

It was further ordered that the board so elected access the funds in the company's accounts but *status quo* to be maintained in the meantime. As against the 2nd appellant it was ordered that he accounts to the company for money he withdrew from the company's account without sanction of the board. To further promote and facilitate reconciliation between the warring factions in the company, the learned Judge

ordered each party to bear its costs.

Those orders provoked this appeal premised on a Memorandum of Appeal drawn on behalf of the appellants by their advocate M/s Kamau Kuria and Company Advocates where 27 grounds of appeal are set out. In the 1st ground:

> ***"The learned Judge misunderstood the nature of the case before her Ladyship".***

The next few grounds fault the learned Judge for ignoring the legal separate personality of a company from that of its shareholders and in holding that upon acquiring shares in a company a shareholder acquires proprietory interest in its property. The learned Judge is further faulted for holding that the company is the owner of the property in the name of its shareholders and directors. The learned Judge is also faulted for not holding that shareholding or membership in a company can only be acquired or lost in accordance with its Memorandum and Articles of Association. The learned Judge is also faulted for not holding that the meeting held on 13th October, 2007 was illegal, and that the resolutions passed by the participants in that meeting were null and void. Also, that the learned Judge erred in holding that the 2nd – 6threspondents had been vested with powers of lawful shareholders and directors of the company since 13th October, 2007. It is said that the 2nd – 6th respondents committed acts of trespass on the suit property from 13th October, 2007 and that the learned Judge was wrong not to so to hold.

In grounds 13, 14 and 15 of the Memorandum of Appeal:

> ***"13. That the Learned Judged (sic) erred in granting to the 1st Respondent, a prayer which it had not sought in the Plaint, namely, that the proprietors of Nyeri Municipality/Block 1/94 hold the said property upon trust for the plaintiff.***
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> ***14. That the Learned Judge erred in making in favour of the 1st Respondent orders against the proprietors of Nyeri Municipality/Block 1/94 against whom no case had been pleaded.***
>
> ***15. That the Learned Judge erred in making orders against proprietors of Nyeri Municipality/Block 1/94 who were not parties to the suit…".***

In the next set of grounds the learned Judge is faulted for ignoring the principle that equity follows the law; in recognizing a method of transferring registered property in a manner other than that which is prescribed by ***Section 37*** of the ***Land Registration Act*** and its predecessor in ***Sections 28*** and ***85*** of the ***Registered Land Act*** *(repealed).* The learned Judge is further faulted for what the appellants say is ignoring the unchallenged evidence on record that the nine proprietors of the suit land had never transferred their respective interests in the suit land to either the 1st respondent or anyone else and that the proprietors registered in 1976 had not changed. The learned Judge is further faulted for interpreting ***Article 159 (2) (d)*** of the ***Constitution*** to create property rights not recognized by Land Registration Act or its predecessor or in the manner envisaged by the Memorandum and Articles of Association of the company.

The learned Judge is also faulted for not holding that the circumstances of the case before the court did not warrant the recognizing and declaring of either a resulting trust or a constructive trust in respect of the suit land in favour of the company.

For all that, we are asked to allow the appeal, to set aside the judgment of the High Court and order a dismissal of the 1 st respondent's suit and allow the appellants' counterclaim as prayed in the counterclaim filed at the High Court.

This is a first appeal from a decision of the High Court in its original jurisdiction and it is our duty to re-evaluate the evidence as required by Rule 29 of the rules of this Court. The substance of that rule and the said duty was well enunciated in the oft - cited case of ***Selle v Associated Motor Boat Company Ltd. [1968] EA 123*** where at page 126 the following passage appears:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must re-consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is consistent with the evidence in the case generally (Hameed Saif v Abdul Mohamed Sholan (1955), 22 E.AC.A.. 270)".***

We shall revisit the record and retrace the evidence to enable us carry out the said duty we have set out of this Court acting as a first appellate court to reconsider the evidence and evaluate it ourselves mindful that we have not heard the witnesses or observed their demeanour, an advantage only the trial Judge enjoys. We are entitled to depart from findings of the trial Judge if they are based on no evidence or findings are made on account of failure to take into account particular circumstances, but because we have not seen or heard the witnesses, we must give allowance for that.

It is important to point out again for purposes of this analysis that, from the record, in the original plaint and amendments that followed the plaintiff was Mathingira Wholesalers Company Limited (herein the 1st respondent) and the defendant was Kimwatu Kanyungu (herein the 2nd appellant). As we have already stated the plaint was amended various times and in the final version the parties were the following: Mathingira Wholesalers Company Limited as plaintiff, Kimwatu Kanyungu as 1st defendant, Kiiru Gachuiga as 2nd defendant, Gadson Gitonga as 3rd defendant, Kibera Gatu as 4th defendant and Samuel Githinji Kibaki as 5th defendant. Upon establishment of the Environment and Land Court as a division of the High Court, the original suit was transferred to the new Environment and Land Court at Nyeri and acquired a new case number – Nyeri ELC Civil Suit No. 601 of 2014. The judgment appealed here is from the findings of that Court.

In evidence before the trial court, the 1st respondent Mathingira Wholesalers Company Limited called four witnesses. Peter Ndiritu Munuhe (the 3rd respondent) herein was called as the 1st witness and his testimony was to the effect that he bought shares from Samuel Githinji Kibaki (the 7th respondent) on unstated dates. He said that he did not know the procedure of admission to be a member or a shareholder of the 1st respondent. According to him, he visited the offices of M/s Muthoga, Gaturu & Company Advocates where an agreement was drawn which agreement was produced in the record as part of the evidence. He paid for the shares which were transferred to him and he signed a Transfer Deed. He was issued with a Share Certificate which according to him showed that he was a registered proprietor of Plot No. 1/94 Nyeri (the suit land). According to him he bought more shares from Kiiru Gachuiga (the 2nd respondent) and held the share certificate for the same at the time of the hearing. He also bought more shares from Peter Weru Gichuhi a son of shareholder Philip Gichuhi. According to him all the transactions were recorded and registered by the Registrar of Companies and he testified that ownership of shares in the 1st respondent to him amounted to ownership of the suit land. He confirmed that he knew that the 1st respondent was an agent of the owners of the building that stood on the suit land, and in his own words as appears at page 1261 of the record:

> ***"I bought shares from Samuel Githinji Kibaki and therefore I became a shareholder. I did not know whether Githinji Kibaki was a registered owner of the property. Githinji Kibaki was not in the title of the property but I bought shares from him".***

According to the witness upon acquiring the said shares he attended meetings of the 1st respondent and received dividends when they were declared. He produced many documents into the record to show the various activities he had engaged in upon joining the 1st respondent. In further testimony this witness testified that he was the Secretary of the Board of the 1st respondent and in that capacity he handled board meetings and executed decisions of the board including signing of share certificates. According to him shareholders who had sold their shares did not thereafter receive dividends. According to the witness, on 13th October, 2007 the 1st respondent held a meeting where officials of the company were elected. James Kanyi Waiganjo (the 4th respondent) was elected chairman, one Joseph Nganga Mumbi was elected as vice chairman, one Francis Gathungwa Kinyoni was elected as treasurer while he, Peter Ndiritu Munuhe, was elected secretary. According to him problems for the 1st respondent arose because of those elections where the 2ndappellant had been removed as chairman of the board. That is what led this witness and his colleagues to instruct lawyers to file a suit in court.

On ownership of the suit land, it was the evidence of this witness that the new board of the 1st respondent had instructed advocates to transfer the suit land to the 1st respondent but this process had not been completed by the time the suit was instituted. For all that, he asked the court to order that ownership of the suit land be changed from those in whose favour it was registered to be registered in the name of the 1st respondent. He also prayed for award of money which is set out in the plaint.

In cross examination the witness stated:

> ***"We did not know that there was a Memorandum of Association; we did not know that shares could only be transferred as per the memorandum. I do not know whether a sale notice was assured (sic) as per paragraph 14 of the Memorandum of Association. I do not know whether a valuation was undertaken. We were not told that there was need for valuation. I do not know whether notice was circulated to all members.***
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> ***The procedure in Article 16 was not followed by Mr. Kanji. The shares were sold on the basis of willing buyer willing seller. I did not obtain my shares secretly. We had many meetings with Kimwatu. I can see page 34 of the Memorandum of Association (MA). There are nine people. (reads the names) My name is not in the Memorandum of Association. The same is also not in page 34".***

Later:

> ***"The company was formed to carry out agency business. Page 1 is a Certificate of lease. The title No. 1/94 is in Nyeri Municipality. The lease is dated 5th May, 1976. The lease was issued 7 years before the company was formed. The property was changed (sic) to Industrial and Commercial Development Corporation to secure a loan of Kshs. 225,000/- the people who sold their shares left and new ones took over. When the property was purchased the company was not born but the name was in existence. The company was incorporated in 1983".***

The witness admitted in further cross-examination that the agreement he had made with the 7th respondent did not refer to land but was about buying shares. Also that the meeting called for 13th October, 2007 when the composition of the board was changed was not preceded by notices to shareholders as required; that there was no special resolution passed and there was no resolution produced before the trial court authorizing the filing of the suit. He further testified on rents collected from the suit property and monies held at the bank.

In re-examination it was the witness's testimony that proper notice had been issued for the meeting of 13th October, 2007 and that an agenda was part of the notice. Further, that when he bought shares in the 1st respondent, it was his understanding that he was buying the property owned by the 1st respondent.

The 1st appellant, Hon. Mwai Kibaki was then called as the next witness but it is convenient for good order in this judgment that we defer this testimony so that we go to the evidence of the other witnesses called in support of the 1st respondent's case before we come to the evidence of Hon. Mwai Kibaki.

James Kanyi Waiganjo, 4th respondent herein, was called and testified that he had been invited by one of the original proprietors of the suit land who wanted to sell shares to him. He was shown a building erected on the suit land and according to him he was buying the suit premises. He visited a lawyer and signed an agreement for transfer of stock which was witnessed by the 1st respondent's secretary.

Thereafter he attended directors' meetings of the 1st respondent and started receiving dividends and directors' fees from the 1st respondent. He confirmed that although they had as a board resolved that ownership of the suit premises be transferred from the original owners to the 1st respondent, the process of transfer though commenced was not completed. He asked the court to order the suit premises to be registered in favour of the 1st respondent. He confirmed in cross-examination that his name was not in the Certificate of Lease and that there was no lease in favour of the 1st respondent. According to him he did not know that companies are governed by Articles of Association and he did not even know that such articles existed. This witness was elected chairman of the Board of Directors in the meeting held on 13th October, 2007 but according to him:

> ***"The Memorandum of Association and Articles of Association was not complied with by the directors. They are the ones who knew, sold and therefore I cannot be blamed…".***

The third witness was Sammy Maina Kiiru, the 5th respondent herein. According to him he became a shareholder of the 1st respondent on 14th June, 2002 when he purchased shares from one Beatrice Mumbi Wamahiu. An agreement was drawn by a lawyer for purchase of shares. He was issued with a Share Certificate. He had received dividends since becoming a shareholder which income was generated from the operations of the business. According to him the company i.e. the 1st respondent was synonymous with a building erected on the suit land and, as shareholder, he was co-owner of the building together with other shareholders.

The last witness called for the 1st respondent was Joseph Nganga Muriithi, the 6th respondent herein. His father Muriithi Nganga was a shareholder of the 1st respondent but he had died in the course of time The witness was appointed by his family to represent his father's estate for purposes of the 1st respondent. According to him the affairs of the 1st respondent were properly conducted and problems only began when the elections were held in October 2007 when the 2nd appellant was removed as Chairman of Board of Directors of the 1st respondent. According to this witness he had since joining the 1st respondent received dividends on behalf of his family which was shared out accordingly.

That was the evidence that was tendered on behalf of the 1st respondent before the trial court.

Then we come to the evidence given for the adverse side, part of which we had deferred for good order in this judgment.

Hon. Mwai Kibaki was called as a witness. He identified various documents which he produced in court as part of the evidence. This witness identified the original proprietors of the suit land which names he gave to the trial Judge. According to him he had never transferred his interest in the property to any third party and neither had his co-owners transferred their interest to any person at all. The witness further testified that he and his other colleagues incorporated the 1st respondent and that the 3rd respondent, Ndiritu Munuhe and other people in the suit were not known to him as shareholders of the 1st respondent. The witness further testified that he had never received any notice of sale of the suit land and further that the processes set out in the Memorandum and Articles of Association of the 1st respondent on transfer or sale of shares had not been followed. The witness concluded his testimony by stating that on expiry of the original lease, the same had been renewed for 50 years in the name of and in favour of the original proprietors of the suit land.

In cross-examination Hon. Kibaki confirmed that he had never attended any meeting of the 1st respondent and he did not have to authorize holding of such meetings as he trusted that the other members would conduct the affairs of the 1st respondent as required. He confirmed that he was not invited to the meeting of 13th October, 2007 where there was change of office bearers. He did not know of any authority given by the company to institute the suit before the High Court.

Next to be called was Waheri Remigious Nganyi, the Land Registrar Nyeri. She gave a history relating to the suit land and gave the names of the original proprietors of the suit premises who owned the same as tenants in common in equal shares. These are the names we have already set out in the judgment. The witness testified that property had been charged to Industrial and Commercial Development Corporation to secure a loan which charge was registered under the retired ***Registered Land Act Cap 300 Laws of Kenya***. The suit property was issued with a Certificate of Lease on 5th May, 1976 after a register had been opened on 31st July, 1973 as per Green Card produced. The lease of 99 years commenced on 1st April, 1913 and expired in 2012 and another lease was granted for 50 years from 19th November, 2012. The new lease was prepared in favor of the then tenants in common already identified.

The last witness was Peterson Wachira from the office of Registrar of Companies. According to his records, the shareholders of the 1st respondent were as already stated. Various returns had been filed over the years showing some changes in shareholders of the 1st respondent. It is not necessary for purposes of this judgment to go into every detail of the testimony of this witness as relates to returns made over the years because it does not have an impact on the position we have taken in this judgment.

That was the totality of the evidence tendered by the opposing sides leading to the judgment appealed from.

This appeal came up for hearing before us on 6th February, 2018 when learned Senior Counsel, Gibson Kamau Kuria, appeared for the appellants, Miss Lucy Mwai, learned counsel appeared for 1st, 2nd, 3rd, 4th, 5thand 6th respondents, while learned counsel, Mr. D. Mindo appeared for the following parties who had upon application been admitted to the appeal: Ededious Mwangi Kibera and John Mwangi Kibera as 8th respondents, Peter Weru Gichuhi and Jacinta Mwara Mathenge as 9th respondents; and Daniel Githinji Gitonga as 10th respondent. For completion of the record on appearance for the parties it is safe to assume that Miss Lucy Mwai, learned counsel, appeared for the 7th respondent.

For further completion of the record, there is a Notice of Cross-Appeal filed by M/s Mindo & Company Advocates for the said 8th-10th respondents. It is stated in the Notice of Cross-Appeal that the High Court lacked jurisdiction to make orders against parties not enjoined to

the proceedings including the 8th – 10th respondents. It is also said that there was lack of jurisdiction to make orders against the 8th – 10th respondents against whom the suit had abated; that the High Court lacked jurisdiction to make orders against the estate of the 9th respondent who had died before the suit was filed; that the learned Judge erred in assuming that a property owned by a proprietor becomes the property of the company where the proprietor holds shares; that the learned Judge erred in holding that co-owners of the suit land held the same upon trust for the 1st respondent; that the learned Judge erred in holding that the 3rd - 6th respondents were shareholders in and directors of the 1st respondents; that the learned Judge erred in holding that there existed circumstances under which the proprietors who were not parties to the suit could be held to be trustees of the 1st respondent; that the learned Judge erred in not holding that 3rd – 6th respondents were trespassers in the suit premises; that the learned Judge should not have accepted the evidence of the 3rd – 6th respondents; that the learned Judge erred in not dismissing the 3rd respondent's suit and finally, that the judgment was against the overwhelming evidence on the record and the law applicable.

In oral submissions before us which were a highlight of written submissions filed by respective parties, Dr. Kamau Kuria for the appellants saw two major issues arising in the appeal for our determination. Firstly, the issue as to the ownership of the suit land and secondly, an issue involving control of the 1st respondent. Learned counsel submitted that it was the appellant's position that they and 6 other persons were the registered proprietors of the suit land, and had sought a declaration in the High Court to that effect. On the second issue learned counsel submitted that the two appellants and 6 others contended that they were the only lawful shareholders of the 1st respondent who had never transferred their respective shares to any person in accordance with the Memorandum and Articles of Association of the 1st respondent. According to learned counsel it was the case of the 3rd – 6th respondents at the High Court that they had lawfully purchased their respective shares from lawful owners of the 1st respondent and that they had upon such purchase become owners of the 1st respondent with control over the same. Further that the 3rd and 6th appellants also contended that by virtue of owning shares in 1st respondent they had become owners of the assets of the 1st respondent as borne out by evidence given to the trial court. In that regard it was learned counsel's submission that the principle of company law is that the company and the shareholders are separate legal entities and ownership of shares in a company does not entitle shareholders to ownership of the company. To support these submissions learned counsel cited the old company law case of ***Salomon vs Salomon [1897] AC 1*** where it was held that a company is a separate person from its shareholders. It was learned counsel's further submission that shareholding in a company confers on a shareholder rights and imposes obligations as per the company's Memorandum and Articles of Association and for a shareholder to transfer a share, they must abide with the Memorandum and Articles of Association absent which, a purported purchaser of shares cannot acquire a good title to the shares.

Learned counsel attacked the evidence given by the 3rd – 6th respondents who had admitted before the trial judge that they had acquired shares in the 1strespondent without following the procedures set out in the 1st respondent's Memorandum and Articles of Association. According to learned counsel, the 3rd – 6th respondents convening of a meeting of shareholders of 13th October, 2007 that was invalid because they had no authority to convene such a meeting. Learned counsel further referred to the evidence which showed that the appellants and 7 others acquired the suit land in 1976 while the 1st respondent was incorporated in 1983. According to learned counsel, the 1st respondent could not own an asset like the suit land as it (the 1st respondent) had been incorporated 7 years after the suit land had been acquired by the appellants and 7 others, and there was no evidence that a lawful process of transfer ever took place. According to learned counsel it was wrong for the trial court to hold that the appellants and 7 others held the suit property in trust for others when no evidence of trust had been pleaded or proved. In further submissions it was learned counsel's view that the trial court erred in making orders against parties who had not been heard in the proceedings. Learned counsel ended his submissions by stating that the judgment as written was a travesty of justice as it made orders against parties who had not been joined to the proceedings or heard and orders contrary to the Memorandum and Articles of Association of the 1st respondent.

We allowed Mr. Mindo to come next and urge the cross appeal and in doing so, learned counsel pointed out that orders had been made against a deceased person, Philip Gichuhi, who died in 1995 before the suit was filed. Learned counsel also pointed out that other parties in the suit had all died and he then adopted the submissions made by the learned counsel for the appellants.

It was the turn of Miss Lucy Mwai, learned counsel for the 1st to 7th respondents to respond. According to learned counsel the shareholders of the 1st respondent had been the owners of the suit land since 1983. They collected rent, they sold shares and they attended board and general meetings. According to learned counsel, Samuel Githinji Kibaki (7th respondent) sold his shares on 15th March,1983 as was evidenced by a Transfer Deed filed with Registrar of Companies. In addition, James Kanyi Waiganjo (4th respondent) bought shares from one Mbuthia and further that some of the respondents were still alive at the institution of the suit. According to learned counsel it was only after the elections that were held on 13th October, 2007 that divisions emerged among the shareholders of the 1st respondent leading to the suit filed at the High Court. Learned counsel submitted that neither law nor equity could allow a party to benefit from his own misrepresentation and since according to counsel the board of the 1st respondent knew of the sale of shares, how could misrepresentation be alleged? Learned counsel defended the findings of the High Court that the original shareholders had sold their shares and the new shareholders by participating in the affairs of the 1st respondent had become owners of the same. Learned counsel cited various instances in the record where new persons were summoned to attend board or general meetings of the 1st respondent and reminded us that Mr. Ndiritu Munuhe the 3rd respondent was even a signatory of the 1st respondent's bank accounts. Miss Mwai concluded her submissions by stating that the respondents who she represented were made to believe that upon buying shares in the 1st respondent they would become owners of the suit land and, according to counsel, that created a constructive trust by conduct of the parties as no wrong should be without a remedy. Learned counsel urged to dismiss the appeal and the cross appeal.

Mr. Kamau Kuria in reply submitted that the Memorandum and Articles of Association of the 1st respondent was a public document available to all and that the 3rd - 6th respondents had constructive notice of the procedure of buying shares in accordance with the said documents. On the submissions by learned counsel Miss Mwai of creation of a constructive trust, it was Mr. Kuria's submission that a trust cannot override the provisions of a statute. According to counsel the 3rd -6th respondents were people who endeavored to become shareholders of the 1st respondent but did not follow the procedure, and even if they had followed the procedure, it was Mr. Kuria's submission that those respondents could not own the suit land which was owned by the named individuals.

At the end of the submissions by learned counsel for the respective parties we considered the whole record, the Memorandum of Appeal, the Cross Appeal, the oral and written submissions, the authorities cited, the relevant law and this is what we think of this appeal.

The learned Judge who heard the suit at the Environment and Land Court drew 7 issues for her determination. These issues range from whether between 1993 and 2009 the 1st respondent served as an agent of the appellants and other respondents for purposes of collecting rent from the suit property and running the bar cum restaurant cum butchery on the same. A second issue, the learned Judge identified this to be the relationship between the 1st respondent and the registered proprietors of the suit land. Further, whether the 1st respondent owed the registered proprietors of the suit property an account. Another issue that the learned Judge identified for her determination was whether the changes effected to the shareholders of the 1st respondent were valid. Further, whether the elections held on 13th October, 2007 were lawful and valid. The penultimate issue identified by the learned Judge for her determination was: who is entitled to the money held in the accounts. Finally, what orders should the court make?

We have already set out in this judgment the various pleadings filed by the various parties to the suit filed at the High Court. In the final version of the amended plaint various reliefs were sought which included prayers for injunction to restrain defendants from holding out or transacting any business on behalf of the 1st respondent, a declaration on liability to money; an order for refund of money and:

> ***" A declaration that L.R. NO. NYERI MUNICIPALITY BLOCK 1/94 belongs to the Plaintiff".***

In the final version of the amended statement of defence and counterclaim, prayers included a declaration that the 1st respondent had between 1983 and 2009 served as an agent of the two appellants and other owners of the suit land, a declaration that James Kanyi Waiganjo, Peter Ndiritu Munuhe, Paul Wamahiu and Sammy Maina were neither shareholders in, nor directors of the 1st respondent; that the that the said persons deliver to the appellants and the other owners of the 1st respondent's Company Seal, Memorandum and Articles of Association, Certificate of Registration, cheques books, bank statements and share certificate book; the 1st respondent to account to those parties their respective shares of the rent and revenue yielded by the business on the suit property, and a permanent injunction to restrain the 1st respondent from collecting rent or managing the suit property.

From the pleadings, the prayers made in the plaint, the defence and counterclaim and from this appeal we are of the considered opinion that only 2 issues avail themselves for our determination, a determination of which will conclude all issues between the parties in this appeal. These issues are whether the suit land ever passed from the original proprietors to the 1st respondent or any other party and secondly, whether changes to the shareholding of the 1st respondent said to have been effected at various stages were lawful. We think that a determination of these two issues will dispose of the appeal.

On the first issue it is common ground that Title No. Nyeri Municipality/ Block 1/94 a leasehold for 99 years from 1st April, 1913 was issued on the 5th May,1976 in favour of the following persons: Kimwatu Kanyungu, Francis Gathungu, Gadson Gitonga Mbuthia, Mwai Kibaki, Kiiru Gachuiga, Kibera Gatu, Philip Gichuhi and Muruthii Nganga all of P.O. Box 796, Nyeri. The said title was issued under the then ***Registered Land Act Cap 300 Laws of Kenya*** which had a process for acquiring and disposal of land. Under ***Section 27*** of that ***Act*** the registration of a person as the proprietor of land vested in that person the absolute ownership of that land together with all rights and privileges belonging thereto. The same right was vested in proprietor of a lease whose leasehold interest vested in that person all rights and privileges belonging thereto subject to all implied and expressed agreements, liabilities and incidents of the lease. Under ***Section 28*** of that ***Act***, the rights of a proprietor whether acquired on first registration or acquired subsequently for valuable consideration or by order of the court would not be liable to be defeated except as provided in that ***Act***. The land was to be held by the proprietors together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever, only subject to leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register. Unless anything else to the contrary was expressed in the register, the land was held subject to such liabilities rights and interests as affected by the same and were declared by ***Section 30*** of the ***Act*** as not required noting on the register. All this was subject to the proprietors' duty or obligation to which he was subject as a trustee.

Under ***Section 30*** of the said ***Act*** various overriding interests were identified and provided to which land was subject to.

On behalf of the registered proprietors of the suit land we have already set out the evidence of Hon. Mwai Kibaki who testified that since their registration in 1976 as proprietors of the suit land, the original proprietors had never transferred the suit land to any person. It was his further testimony that even upon expiry of the lease, the same was renewed for a period of 50 years from 2012. The evidence of Waheri Remigious Nganyi, the Land Registrar, Nyeri confirmed that there had not been change of ownership of the suit land from the original proprietors.

It was the case of the 1st respondent and some of the other respondents that the ownership of suit land had changed from the original proprietors to the 1st respondent.

The learned trial Judge analyzed the evidence adduced before her by both sides and after considering the provisions of ***Sections 27, 28***, and ***30*** of the repealed ***Registered Land Act,*** came to the conclusion that there was an overriding interest created on the suit land affecting and imposing a duty on the registered proprietors who became trustees. The learned Judge held:

> ***"95. In view of the foregoing and given the conduct of the defendant to the effect that those who sold their shares ceased being beneficiaries of the proceeds of rent generated from the suit property and they declared intention of the registered proprietors of the suit property to transfer it to the plaintiff's company; the only reasonable inference that can be drawn from the conduct of the parties herein is that the defendant hold the suit property in trust for the plaintiffs company. Consequently, I find and hold that the registered proprietors of the suit property hold in trust of the plaintiff company".***

The evidence that had been led to the trial court on behalf of the 1st respondent through the witnesses we have already referred to which

evidence we have set out in this judgment was telling. Those witnesses gave evidence to the effect that they believed that upon purchasing shares in the 1st respondent they automatically became owners of the suit land which was, according to them, was an asset owned by the 1st respondent.

There was a process in the then ***Registered Land Act*** as there is a process today in the ***Land Registration Act No. 3 of 2012*** and the ***Land Act No. 6 of 2012*** on ownership and disposition of land. In law the process of disposition of land like the suit land required a valid sale agreement to be drawn under the ***Law of Contract Act (Cap 23 Laws of Kenya)***; consent to transfer sought and obtained under the ***Land Control Act (Cap 302 Laws of Kenya)*** and a valid transfer drawn and registered for the leasehold interest to be cancelled and a new lease issued to a new proprietor in this case the 1st respondent. No evidence was led at all that those legal processes that were necessary for disposal of land were followed at all. There was no sale agreement to show that the original proprietors had entered into contract to dispose of the land to the 1st respondent or any other person. Necessary consent of the Land Control Board of the relevant area was neither sought nor obtained. There was no transfer of land apart from a letter seen in the record where lawyers had been instructed to commence a process of disposition of the land, and Hon. Mwai Kibaki disputes that position and says that there had never been any intention to dispose of the land. There was no evidence placed before the trial Judge that those steps necessary in law for transfer of land had been followed. Indeed the Certificate of Lease was renewed for a further period of 50 years as recently as 19th November, 2012. This evidence was confirmed by the Land Registrar, Nyeri, that the renewal of the lease for 50 years was in favour of the original proprietors when the suit had been filed in court in the year 2008, that is to say that the lease was renewed when the respondents were contending that they owned the suit land but did not record any interest on the register to show any claim they had on the suit land. The title as seen is issued to the original proprietors and is unencumbered. Without any material placed before the trial Judge to show that interest in the land had passed in any way to any other person and in the face of direct evidence that the original proprietors had never intended to transfer the land to the 1st respondent or to any other person it was wrong for the learned Judge to find that a resulting or any trust had arisen to give any rights to the respondents.

The second issue calling for our determination is related to the first.

It was the case of some of the 1st to 6th respondents that they had at various times acquired shares through purchase from the 1st respondent and had become shareholders of the same. According to Hon. Mwai Kibaki who testified on his own behalf and on behalf of the other shareholders, no notice had ever been given to him on the intention to transfer shares.

The Memorandum and Articles of Association at clause 12 to 22 is on "transfer and transmission of shares". Under clause 13, shares in the 1st respondent could freely be transferred by a member to his wife or her husband, children, son or daughter in law or grandchildren, but no share could be transferred to any person who was not a member of 1st respondent except as was provided so long as any member was willing to purchase the same at its fair value which would be determined. Under clauses 14, 15 and 16:

> ***"14. Any person whether a member of the Company or not who proposes to transfer any shares (hereinafter called "retiring member") shall give notice in writing (hereinafter called a "sale notice") to the Company that he desires to transfer the same. Every sale notice shall specify the denoting number of the shares which the retiring member desires to transfer, and the price at which he is willing to sell the same. A sale notice shall constitute the Directors the agents of the retiring member for the sale of any shares comprised therein at the price specified therein or at the option of the transferee the fair price as certified by the Company's auditors for the time being to any holder of shares of the Company. No sale notice shall be withdrawn except with sanction of the Directors.***
>
> ***15. If the Directors shall, within the space of twenty – eight days after services of a sale notice (or if any prospective transfree*** *(sic)* ***shall require the auditor's valuation of such shares then within twenty – eight days of receipt by the Directors of a copy of such valuation) find a holder of shares willing to purchase any share comprised therein at the price so fixed (hereinafter called a "purchasing member") and shall give notice of transfer to the retiring member, and the retiring member shall be bound, upon payment of the price so fixed, to transfer the share to such purchasing member, who shall be bound to complete the purchase within seven days from the expiration of such last – mentioned notice of transfer.***
>
> ***16. The Directors shall, with a view to finding a purchasing member, offer any shares comprised in a sale notice in the first instance to the existing holders of the shares of the Company (other than the retiring member) in proportion as nearly as may be to their holding of shares and shall limit a time within which such offer may be accepted; and the Director shall make such regulations as regarding the finding of purchasing member for any shares not accepted by a member to whom they shall have been so offered within the time so limited as aforesaid as they think just and reasonable".***

That is to say that under clause 14 of the Memorandum of Association of the 1st respondent a member of the 1st respondent or any other person who proposed to transfer any shares was required to give a written notice to the 1st respondent of his desire to transfer the same. The notice had to give specifications on the number of shares desired to be transferred and the asking price for the same. Such a notice could not be withdrawn except with the approval of the directors.

Under the following clause the directors of the 1st respondent were required on receipt of the said notice to find a holder of shares willing to purchase the shares on offer and the retiring member was bound to transfer to the purchasing member. It was a requirement under clause 16 of the Memorandum of Association for the directors to offer the shares of the retiring member in the first instance to the existing members of the 1st respondent.

What was the evidence led before the trial court on this aspect?

We have already seen that Hon. Mwai Kibaki denied ever being notified of any intention by a member to transfer shares.

Peter Ndiritu Munuhe (3rd respondent) who rose to the position of Secretary of the Board after the elections held on 13th October, 2007 gave evidence on how he purchased shares of the 1st respondent from various persons. In his own words:

> ***"We did not know that there was a Memorandum of Association; we did not know that shares could only be transferred as per the memorandum. I do not know whether a sale notice was assured*** *(sic)* ***as per paragraph 14 of the Memorandum of Association. I do not know whether a valuation was undertaken. We were not told that there was need for valuation. I do not know whether notice was circulated to all members.***
>
> ***The procedure in Article 16 was not followed by Mr. Kanji. The shares were sold on the basis of willing buyer willing seller".***

He admitted in cross-examination that when transfer of shares was undertaken some of the members of the company including Hon. Mwai Kibaki were not given notice.

Another witness called for the 1st respondent, James Kanyi Kimondo was elected to the important office of Chairman of the Board of Directors of the 1st respondent at the meeting held on 13th October, 2007. He testified of how he acquired shares on the 1st respondent. Importantly he says:

> ***"I can see the Certificate of Incorporation of the plaintiff at page 8 of the bundle. I have seen page 11 today. I am seeing it for first time. I do not know that companies are governed by Articles of Association. We did not use the Memorandum and Articles of Association to transact the purchase".***

That was the evidence that was before the learned Judge on the issue of transfer of shares. She analyzed the same and traced the history of how some of the respondents acquired their shares. At paragraph 63 J of the judgment the learned Judge accepted that aspects of the company's Memorandum and Articles of Association were not complied with when shares were transferred. The learned Judge recognized that some shareholders of the 1st respondent 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 an opportunity to exercise their rights to buy the shares of outgoing shareholders. The learned Judge also recognized that transfer of shares of deceased members of the 1st respondent was effected in disregard of the law regarding the law governing the estates of deceased persons. According to the learned Judge those were tolerable flaws as new members of the 1st respondent were accepted as shareholders of the 1st respondent and, save for Hon. Mwai Kibaki, the other shareholders knew of what was going on and participated in the same and executed documents. The learned Judge considered various cases including this Court's decision in the case of ***Arthi Highway Developers Limited v West End Butchery Ltd. & 6 Others*** ***(2015) eKLR*** and Section 75 of the Companies Act (repealed) where it was held *inter alia* that failure to follow procedures set out in Memorandum and Articles of Association on transfer of shares invalidated a transfer. The learned Judge distinguished the said case ***Arthi Highway Developers Ltd*** (supra) by holding that in ***Arthi*** fraud had been pleaded and proved and held that in the case before her fraud was neither pleaded nor proved against the new shareholders. According to her although internal procedures of the 1st respondent had not been complied with without fraud being alleged or proved against a new shareholder, the new shareholders were entitled to presume that internal affairs of the 1st respondent had been complied with. In the same regard the learned Judge considered and held that the equitable doctrine that the law will regard that which ought to have been done to have properly done was applicable in the case before her. According to the learned Judge :

> ***"If this Court were to accede to the defendants' protest concerning the transfer of the shares when they were in the respondent's 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 to show that the requirements of the company were not complied with in transfer of shares do not impose any obligation on prospective shareholders to ensure compliance with the said procedure the burden to be on the director of the company (the defendants herein)***".

The upshot of the learned Judge's findings on this aspect was therefore that the changes effected to the Memorandum and Articles of Association of the 1st respondent were valid.

We think that based on the material placed before the learned Judge, the holding is, with respect, erroneous and contrary to company and written law and would create a dangerous precedent to the administration and management of corporate entities. The learned Judge employed equitable principles that were not and could not apply in the case before her where there was express statutory law governing how shares should be transferred from existing members either to other members or to outsiders. The Companys' Law Cap 486 Laws of Kenya (repealed) and the Memorandum and Articles of Association of the 1st respondent had specific and definite procedure on how shares in the 1st respondent could pass from a member to another member or to a new member. Where, as here, such express conditions existed had to be complied with strictly. The evidence produced through the witnesses called by the 1st respondent which we have set out in this judgment was to the effect that new members (if they can be so called) heard about existence of a corporate body, the 1st respondent, and believed that that corporate body owned the suit premises and that, upon this belief, and without carrying out any due diligence on the 1st respondent they walked into the 1st respondent, allegedly bought shares and believed to have become shareholders and owners of the suit land. According to them they did not know that there was a process to be followed to acquire shares. The learned Judge was in error to accept that position as ignorance could not be tolerated in a serious issue like the matter before the trial court. It was incumbent on any new shareholder to carry out necessary due diligence and know with exactitude the process necessary to be admitted to be a member of the 1st respondent. Without that, and in the face of flagrant disregard of procedures set out, the "new" members did not acquire any rights in the 1st respondent that were known or could be recognized in law.

We agree with the submissions of Mr. Kamau Kuria for the appellants as supported by Mr. Mindo for the 8th -10th respondents that for the other respondents to allege to have acquired shares in the 1st respondent without notice to existing shareholders did not acquire any rights

known to law and they were imposters to the 1st respondent and it does not matter that returns were made to show them as shareholders of the company. The shareholding of the company did not change, but remained as per the original Memorandum and Articles of Association and the list of subscribers set out in the Memorandum and Articles of Association incorporated on 17th day of June, 1983.

The long and short of our findings is that we are satisfied that the approach adopted by the learned trial Judge in the matter before her was wrong. She mixed up shareholding of a company with an asset which was totally unrelated to a corporate body (1st respondent) and she allowed persons to allege to have acquired rights in the 1st respondent or own the suit land when there was flagrant abuse of procedure set out in law. Those persons did not acquire any rights in the 1st respondent and the alleged transfer of shares to them was invalid, null and void. In addition, the suit land did not at any time pass from the original proprietors of the land as shown in Certificate of Lease issued in 1976 as renewed in the year 2012. In sum, the suit at the High Court should have been dismissed and the counterclaim should have succeeded. These will be the orders of the Court.

The appeal and cross appeal are hereby allowed. The suit property Title ***No. Nyeri Municipality/Block 1/94*** belongs to the proprietors as shown in Certificate of Lease dated 5th May, 1976 as extended by the Certificate of Lease issued on 19th November, 2012. The shareholders of the 1st respondent are the subscribers to the Memorandum and Articles of Association issued in 1983.

The appellants and the 8th -10th respondents having succeeded in the appeal and the cross appeal are entitled to costs which we hereby grant to them.

Dated and given at Nyeri this 21st day of March, 2018.

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR