



Kimani & 2 others v Karoki; Kariyi & another (Interested Parties) (Environment & Land Case 690 of 2012) [2024] KEELC 4728 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 690 OF 2012**

OA ANGOTE, J

JUNE 13, 2024

BETWEEN

MARY WANJIRU KIMANI 1ST PLAINTIFF

PATRICK MACHARIA KOORO 2ND PLAINTIFF

RUTH WANJIKU KOORO 3RD PLAINTIFF

AND

RAHAB MWIHAKI KAROKI DEFENDANT

AND

JEFFERSON MUNGAI KARIYI INTERESTED PARTY

MAMUKA VALUERS MANAGEMENT LIMITED INTERESTED PARTY

JUDGMENT

1. Vide a Plaint dated 10th October, 2012, the Plaintiffs seek the following reliefs as against the Defendant;
 - a. An order of permanent injunction do issue to restrain the Defendant by herself, her servants, workmen, agents or otherwise howsoever from dealing with the suit property by purporting to collect rent, sell, charge and/or mortgage, accessing, remaining onto, getting ingress into or trespassing into the suit property known as L.R No 209/2360/1, Race Course Road, Nairobi and/or from destroying or otherwise from erecting or causing to be erected any structure thereon whether temporary or permanent in nature or from in any way interfering with the Plaintiffs peaceful possession and enjoyment of the said property.
 - b. An order that the Defendant renders accounts since April, 2008.



- c. That the monthly revenue at a rate of Kshs 2, 300,000/= per month from April 2008 to the date be remitted to the Plaintiffs.
 - d. An order that the Plaintiffs be allowed to appoint their own agent to manage the suit property.
 - e. General damages for trespass injury and/or damage to the suit land.
 - f. Costs of the suit with interest thereon at Court rates.
 - g. Any other reliefs that the Court deems fit to grant.
2. It is the Plaintiffs' case that at all material times, they, together with the 1st Interested Party, were and still are the registered proprietors of all that parcel of land known as L.R No 209/2360/1 Race Course Road(hereinafter the suit property); that they purchased the suit property from Kartar Singh, Gurbachan Singh, Jaswinder Singh and Chattar Singh for the sum of Kshs 30,000,000 which they contributed for as follows; Patrick Macharia Kooro and Ruth Wanjiku Kooro-one third; Mary Wanjiru Kimani-one third and Jefferson Mungai Kariiyu-one third.
 3. The Plaintiffs averred in the Plaint that sometime in April, 2008, the Defendant fraudulently and/or illegally took control of the suit property installing her agent to manage and collect rent therefrom; that the Defendant was aware and/or ought to have known that they owned the property and that their attempts to take back control of the property have been futile on account of the Defendant's intermeddling and continual claim to ownership of the property.
 4. According to the Plaintiffs, the Defendant has collected rent since April, 2008 being Kshs 2, 300,000 per month which rent she has refused to remit to them; that her actions aforesaid constitute malice, illegality and trespass, the particulars of which include interfering with the suit property; trespassing onto the suit property; illegally collecting rent from the suit property and illegally opening and operating a bank account in the names of Kimani and Others for purposes of banking revenue from the suit property.
 5. Vide her Defence dated 27th November, 2012, the Defendant denied the assertions as set out in the Plaint stating that if the Sale Agreement was entered into as alleged, the same was not validly executed as required by law and that all the allegations of malice, illegality and bad faith pleaded therein are unmerited.

Hearing and Evidence

6. The matter proceeded for hearing on 7th June, 2022. PW1 was Mary Wanjiru Kimani, the 1st Plaintiff, who adopted her witness statement dated 23rd October, 2019 as her evidence in chief and produced the documents filed on 13th February, 2019 and 23rd October, 2019 as PEXHB1 and PEXHB2 respectively.
7. It was her evidence that her, together with her co-Plaintiffs and the 1st Interested Party purchased the suit property; that the Defendant was not one of the purchasers; that the Defendant vide her agent told the tenants on the property that she had been assigned to manage the suit property from the previous landlord and that the Defendant's agent further informed the tenants that they should pay rent into a new account which they provided.
8. According to PW1, she has never instructed Mongoose to collect rent for them; that the Defendant has never been a landlord; that Superiorfone Holdings Limited's director is the Defendant and its second director is the 1st Interested Party; that it is the two who were giving authority to the agent to collect rent from the suit property and that the rent was never remitted to them.



9. During cross-examination, PW1 stated that the correspondence to the tenants from Superiorfone Holdings Limited makes reference to 'owner of the land' and not Rahab; that they have not sued Superiorfone Holdings but its director; that she has not produced the CR-12 for Superiorfone Holdings for the year 2013; that it is the Defendant who introduced them to the sellers and they each remitted to her the purchase price for onward transmission to the seller.
10. PW1 stated that the assertion in her statement that she transferred Kshs 8,000,000 to the Defendant is erroneous; that the same was transferred from her account by Rahab without her consent; that she does not have the cheque leaf for the Kshs 2,000,000 that she paid to the Defendant and that the property has never been transferred into their names from the vendors' names and that the company, Superiorfone Holdings, paid the purchase price on their behalf.
11. It was her further evidence that the Defendant opened the account, Kimani & Others in her name; that she (PW1) never wrote to the bank asking about the bank details; that she did not seek the 1st Interested Party's consent to file the suit because he is the Defendant's son; that she does not have documents backing Mamuka's valuation report and that the Defendant is the owner of all three companies, Superiorfone Ltd, Superiorfone Communications Ltd and Superiorfone Holdings Company Ltd.
12. PW2 was Ruth Wanjiku, the 3rd Plaintiff. It was her evidence that she is the 2nd Plaintiffs' wife and that the 2nd Plaintiff passed on in November, 2020. She adopted her witness statement dated 12th June, 2022 as her evidence in chief.
13. It was her evidence that the Defendant is her cousin and that they agreed that she would buy the suit property for her and her husband since they were residing in the United States; that this was to be done through sending money to her account for onward transmission to the vendor; that her and her husband paid 110,000 USD; that this amount was paid through transfers to the Defendant's bank in the sums of USD 17,000, 16,000, 15,000, 45,000, 16,000 and 11,000.
14. PW2 stated that after purchasing the suit property on their behalf, the Defendant refused to give them the rental proceeds; that the people who sold them the suit property have not raised any claim to it neither does the Defendant; that the Defendant began collecting the rent in the year 2008 and that they are not disputing the 1st Interested Party's ownership of the property.
15. In cross-examination, PW2 stated that the Defendant was overseeing the purchase of the suit property on their behalf; that the transfer forms adduced have not been signed by her; that the copy they signed was left with the bank in the USA; that as per the exchange rate, USD 110,000 was equivalent to Kshs 11,000,000/=; that the Defendant collected rent through her company, Superiorfone Limited; that they have not sued the company nor adduced evidence that she is a Director thereof and that they have not produced the CR12 for Superiorfone Communications Ltd.
16. It was the evidence of PW2 that the estimate from the Court appointed administrator shows how much the Defendant must have collected since 2008; that Superiorfone Holdings and Superior Communications are sister companies and that the Defendant has admitted that she owns 90% of Superiorfone Communications Limited.
17. PW3 was Abel Keli Wigura, a valuer by profession. He adopted his witness statement dated 24th October, 2019 as his evidence in chief. It was his evidence that he was appointed by the seller to procure a buyer; that they met the Defendant who directed them to the Plaintiffs and the 1st Interested Party and that the sale took place and the seller received consideration.



18. He averred that the seller is not claiming anything; that Kshs 1, 800,000 commission was to be paid to him by the purchasers within 7 days of the issuance of the grant but he has yet to receive the money; that the transfer has never been registered and that possession of the property was given to the 1st Plaintiff.
19. It was his evidence during cross-examination that he is a lawyer by profession but not an Advocate; that he procured a buyer but does not have a letter of instructions; that the 1st Plaintiff was vested the property by the sellers; that he is not a registered agent and that he is not aware that he is not supposed to demand to be paid.
20. PW4 was Jonah Kariuki, a property agent. He adopted his witness statement signed on 23rd October, 2019 as his evidence in chief. It was his testimony that he was the sellers' agent in the sale of the suit property; that the Defendant was introduced to him and she informed him about the parties who were interested in purchasing the suit property; that she introduced him to the Plaintiffs and not the 1st Interested Party and that the sale took place at the premises and the premises were handed over to the 1st Plaintiff.
21. During cross-examination, he stated that that he is not a registered agent; that he was not privy to the payments of the purchase price and that that it is Rahab who signed the sale agreement on behalf of the purchasers.
22. DW1 was Rahab Mwihaki Karori, the Defendant herein. She adopted her witness statement dated 4th November, 2019 as her evidence in chief. It was her evidence that the purchase of the suit property was made through a Sale Agreement dated 17th September, 2007 which was duly executed by the vendors; that the 1st Interested Party is her son and was out of the Country at the time of the purchase and that she conducted the transaction on his behalf.
23. DW1 stated that as per the agreement, the purchase price was Kshs 30,000,000; that on 17th September, 2007, Superiorfone Communications Limited, which she jointly owned in 90% equity issued two cheques of Kshs 11, 500,000 in favour of the vendors' advocates in accordance with clause 4(b) of the Sale Agreement.
24. It was her testimony that on 24th September, 2007, she wrote to the vendors' Advocate forwarding a cheque for the sum of Kshs 15, 000,000 being the balance of the purchase price and the estate agent's commission and that on 18th September, 2007, M/S Otieno Omunga Advocate wrote to the purchasers' Advocate acknowledging receipt of the aforesaid deposit.
25. It was the evidence of DW1 that the vendors' Advocate wrote to the purchasers' Advocate indicating that extension of the lease had been commenced; that the extension of the lease was concluded on 7th May, 2008 and a letter of offer issued in the names of the vendors and that a new grant was thereafter issued in the names of the vendors on 10th June, 2011.
26. She stated in cross-examination that Superiorfone Communications Ltd is her company and participated in the purchase of the suit property; that it paid for the land through issuance of cheques; that it paid for the land because one of the Directors of Superiorfone Ltd, the Interested Party, was buying the land; that she was given Kshs 800,000 by the 2nd and 3rd Plaintiffs which amount was less than the purchase price; that she never received the Kshs 4 million in cash as alleged and that Ann was a staff member at Superiorfone Communications Limited.
27. It was her further evidence on cross-examination that she does not lay any claim to the suit property; that the 2nd and 3rd Plaintiffs wired to her a portion of the purchase price; that there is no claim from the seller; that Superiorfone Ltd is co-owned by herself and her five children; that she knows



- Moongose Property Limited who were managing the land; that she did not appoint them; that it is the 1st Interested Party who appointed Moongose and it collected rent alongside the 1st Plaintiff and that the CR-12 of Superiorfone Holdings shows that it is owned by her and her children.
28. It was her evidence in re-examination that she paid the full amount on behalf of the 1st Interested Party; that the 1st Plaintiff confirmed that the 2nd and 3rd Plaintiffs had given her the mandate to manage the land; that she does not know Superior Holdings but knows Superiorfone Ltd; that Superiorfone Limited has never been sued; that all her actions were undertaken with instructions and that the money collected by Moongose Limited was never sent to her.
 29. DW2 was Jefferson Mungai, the 1st Interested Part. He adopted his witness statement dated 4th November, 2019 as his evidence in chief and produced the documents of an even date as DEXHB1-13.
 30. It was the evidence of DW2 that he is one of the purchasers of the suit property and DW1's son; that the purchase of the suit property was made through the sale dated 17th September, 2007, executed by the purchasers; that he was out of the Country during the sale and consequently, DW1 conducted the transaction on his behalf and that none of the parties disputed her participation in the transaction.
 31. It was his statement that the agreed purchase price was Kshs 30,000,000; that on 17th September, 2007, Superior Communications Limited, issued two cheques of Kshs 11, 500,000 in favour of the vendors Advocates pursuant to the Sale Agreement in the sums of Kshs 2, 850,000 and Kshs 8, 650,000 respectively and that on 24th September, 2007, DW1 wrote to the purchasers' Advocates forwarding the amount of Kshs 15,000,000 being the balance of the purchase price and the estate agent's commission.
 32. According to DW2, there was a prohibition order issued in favour of the County Council of Nairobi for non-payment of rates; that the purchasers Advocates applied to the Court for raising orders which were granted on 23rd September, 2010; that following the delay in completion and inconsistencies in releasing payments, Harji Sehmi lodged complaints with the Office of the Attorney General and that a suit being HCCC No. 634 of 2013 was filed in that respect and subsequently settled.
 33. In cross-examination, DW2 admitted to owning Superiorfone Communications Ltd together with his mother and sisters. He stated that he is not aware of the letter granting PW1 authority to manage the suit property; that there is no stamp indicating the cheques for the payment of the suit property were received; that his mother collected rent on his behalf but he doesn't know how much she collected and that he is aware that she was restrained by the Court.
 34. It was the evidence of DW2 that he is claiming the entire suit property but he has no counterclaim; that all the monies were paid on his behalf by the Defendant; that Superiorfone paid the deposit of Kshs 11million; that Otieno & Co Advocates acknowledged receipt of Kshs 11million; that it was Superiorfone that was collecting rent and not his mother and that the issue of shareholding is not in the Plaint.

Submissions

35. The Plaintiffs' Counsel submitted that the 1st Interested Party has not made any claim or counterclaim against the Plaintiffs and the contention that he is claiming the entire suit property has no basis and that as a stated by the Supreme Court in Raila Amolo Odinga & Anor vs Independent Electoral and Boundaries Commission & 2 Others[2017] eKLR, pleadings form the basis of a party's claim and in the absence of pleadings, no evidence adduced by the parties can be considered. Counsel also cited the cases of Jeremiah Nyagwara Matoke vs Independent Electoral and Boundaries Commission & 2 Ors[2018]eKLR.



36. It was submitted that the Plaintiffs' ownership of the suit property is undisputed; that despite the foregoing, the Defendant illegally took over the property and began collecting rent therein which constitutes trespass, defined by the Court in *Ochako Obinchu vs Zachary Oyoti Nyamogo* [2018] eKLR as unjustifiable intrusion by one person upon the land in possession of another and that subsequently, permanent injunctive orders should issue.
37. Counsel noted that the Defendant, having failed to disprove the fact that she collects an average of Kshs 2, 300,000 per month, the claim against her in this respect is merited. Counsel cited the cases of *Kenya Akiba Micro Financing Limited vs Ezekiel Chebii and 14 Others* [2012] eKLR and *Ram International Limited vs Masai Mara University* [2021] eKLR in support therein.
38. Counsel posited that the Court in *Gabriel Njuguna Njoroge vs David Lobongon Tioko* [2017] eKLR found that the Plaintiff was entitled to the rent being collected by a trespasser and that the Plaintiffs are entitled to general damages to the tune of Kshs 20,000,000. Reliance in this respect was placed on the case of *Park Towers Limited vs Moses Chege & 7 Others* [2014] eKLR.
39. Counsel submitted that the Plaintiffs are also entitled to mesne profits from April, 2008 when the trespass commenced to when the Defendant relinquished control totaling Kshs 271, 400,000; that on 12th August, 2016, the Court appointed Mamuka Valuers Management Limited and designated a receiving account; that the account is in the joint names of the parties Advocates and that the aforesaid receivers should be directed to render an account of the monies collected.
40. The Defendant's Counsel submitted that Section 3(1) of the *Trespass Act*, defines trespass as the entry, remaining upon, and interference in the property without the owner's consent; that the burden of proof in a claim for trespass lies on the party claiming so and that while the Defendant has indeed been on the property severally, it has been with the permission of the Plaintiffs who appointed her as their agent and that whereas they revoked the Power of Attorney appointing her, she still had the permission of the 1st Interested Party, a co-owner of the suit property.
41. According to Counsel, the alleged intermeddling was by a Company called Superiorfone Holdings Ltd and not the Defendant; that it is trite that a company is a different legal entity from its Directors/ Shareholders and that the Court in *Ukwala Supermarket vs Jaideep Shah & Another* [2022] eKLR, restated the leading case of *Salomon vs Salomon* which affirmed that a company is a judicial person. Reliance in this respect was also placed on the case of *Kolaba Enterprises Ltd vs Shamsudin Hussein Varvani & Another* (2014) eKLR.
42. According to Counsel, the claim for special damages was not specifically proved; that if indeed such rent was ever collected, the same was not by the Defendant but different legal entities who could have been sued in their own right and that there is subsequently no basis to demand the same from the Defendant; that the Report by the 2nd Interested party is not sufficient proof of special damages having not been produced by the maker and not subjected to cross-examination and that further, the Report has no attachments to confirm the authenticity of the figures stated therein.
43. The 1st Interested Party filed submissions on 7th March, 2024. Counsel submitted that the Plaintiffs and the 1st Interested Party purchased the property as joint owners purchasing a joint unit; that the Plaintiffs did not however pay their agreed share leaving the Defendant, acting on behalf of the 1st Interested Party, to pay the bulk of the purchase price; that ownership of the suit property is dependent on the actual contribution by the purchasers and that this is nonetheless not an issue before the Court.
44. Counsel posited that while alleging that the Defendant collected rent through Superiorfone Communications Limited, they did not enjoin it; that as affirmed by the Court of Appeal in *Victor*



Mabachi & Another vs Nurturn Bates Ltd, [2013] eKLR, quoted in Ganesh Engineering Works Limited & 3 Others vs Yamini Builders Limited [2021]eKLR, a company is a separate and distinct entity and that where rent is collected through a company, the company ought to be made a party to the suit to enable it respond to the allegations raised and if possible, render accounts.

45. Counsel submitted that the 2nd Interested Party's failure to attend Court and produce the valuation report renders the same of no probative value. Reliance in this respect was placed on the case of Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others [2015] eKLR where the Court of Appeal observed that a document, adduced into evidence and not formally produced and proved constitutes hearsay, untested and an unauthenticated account. Counsel also relied on the Nigerian Case of Michael Hausa vs The State (1994) 7-8 SCNJ 144.
46. The Plaintiff filed rejoinder submissions to the Defendant and the 1st Interested Parties submissions both dated 8th March, 2024. Counsel submitted that the 1st Interested Party could not purport to give authority to the Defendant to enter and take over the property in which he only had a 2.5% stake.
47. It was submitted by the Plaintiffs' counsel that there is no evidence that the Defendant was granted any authority to collect rent and that as was held by the Court in Koloba Enterprises Ltd vs Shamsudin Hussesin Varvani & Another [2014]eKLR, the Court can pierce the veil of incorporation where the company is used as a vehicle to perpetuate fraud.
48. Counsel submitted that the report by the Court appointed receiver is an accurate and true report of the status of the monthly rent collection from the suit property and that the Defendant should have sought more information from the receiver if they needed the same through summoning the receiver as per Section 22(d) of the Civil Procedure Act.
49. According to Counsel, the 1st Interested Party has no claim before the Court; that the Supreme Court in Francis Kariuki Muruatetu & Anor vs Republic & 5 Others [2016]eKLR emphasized that issues for the Court's determination will always be the issues presented by the principal parties and that the 1st Interested Party sought to be enjoined on account of the fact that he was a part purchaser of the property, an undisputed fact.

Analysis and Determination

50. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
 - i. Whether the Plaintiffs have established the claim of trespass as against the Defendant and if so,
 - ii. What are the appropriate reliefs to issue?
51. The Plaintiffs instituted this case seeking inter-alia permanent injunctive orders restraining the Defendant from interfering with the suit property and more specifically from collecting rent thereon; an order for the rendering of accounts since 2009; an order that they be allowed to appoint their own manager and general damages for trespass.
52. It is the Plaintiffs' case that together with the 1st Interested Party, they are lawful owners of the suit property having jointly purchased the same; that despite their ownership, the Defendant has been illegally collecting rent from the suit property which rent she has refused to remit to them and that her actions aforesaid are illegal.



53. The Plaintiffs adduced into evidence the Certificate of Title in respect of the suit property; the sale agreement dated 17th September, 2007; a demand letter to the Defendant dated 24th October, 2011; letters dated 20th January, 2012 and 6th May, 2013 to the tenants and the Ruling of this court.
54. They also adduced into evidence letters from Mamuka Valuers dated the 16th August, 2016 and 4th May, 2017; CR-12 dated 14th March, 2017 for Superiorfone Holdings Ltd, Mamuka Valuers report dated December, 2016; Ruling and Order dated 15th January, 2018 and a warrant of arrest dated 5th February, 2018 against the Defendant and Anne Munjiru.
55. They further produced the letter dated 19th September, 2007 transferring ownership of the property to the 1st Plaintiff, 1st Plaintiff's bank statement for the period 1st December, 2007-5th June, 2008; Wire transfer forms from the 1st Plaintiff to the Defendant, Bank Statement for Kimani & Others for the period of 29th April, 2008 - 13th May, 2008 and wire transfer forms from the 2nd Plaintiff to the Defendant.
56. On its part, the Defendant denies the allegations as set out in the Plaint. She states that she represented her son, the 1st Interested Party, in the purchase of the suit property; that she paid the purchase price through her family's company Superiorfone Communications Limited; that she never trespassed onto the land and had authority to access it and that there is no evidence that she has ever collected any rent or that any rent collected was sent to her account.
57. The 1st Interested Party supported the Defendant's position asserting that she represented him in the purchase of the suit property; that the purchase price was paid through their company Superiorfone Communications Limited owned by himself, his mother and his siblings; that him, together with the 2nd and 3rd Plaintiffs, had granted his mother permission to enter into the suit property and that even after the Plaintiffs withdrew their consent, the Defendant retained his consent and as such her entry into the property did not constitute trespass.
58. In light of the foregoing narration, the Court deems it crucial to first delineate the role of an Interested Party in proceeding such as herein. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 defines an Interested Party as:
- “a person or entity that has an identifiable or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation.”
59. In *Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 Others*, [2015] eKLR, the Supreme Court stated:
- “...an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”
60. The role of an Interested Party in proceedings is peripheral as was expressed by the apex Court in *Francis Karioko Muruatetu & Another vs Republic & 5 Others* [2016] eKLR. The Court stated thus:
- “any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the



primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court”.

61. It is apparent from the foregoing that an Interested Party is not precluded from testifying or giving evidence as the Plaintiffs’ Counsel appears to suggest. However, an Interested Party is precluded from raising new issues. The Court notes this and will duly disregard any issues it deems new issues raised by the 1st Interested Party.
62. The Plaintiffs’ claim herein is founded on the tort of trespass. Black’s Law Dictionary 10th Edition defines trespass to land as a person’s unlawful entry on another’s land that is visibly enclosed. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership.
63. In the case of *Municipal Council of Eldoret vs Titus Gatitu Njau* [2020] eKLR, the Court of Appeal favorably cited the case of *M’Mukanya vs M’Mbijiwe* (1984) KLR 761, wherein the ingredients of the tort of trespass were stated as thus:

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.

In the said case, the Court of Appeal further cited an excerpt from *Winfield & Jolowicz on Tort*, Sweet & Maxwell, 19th Edition at page 428 which stated as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”

64. It is clear from the foregoing that the first hurdle in a claim for trespass is proof of ownership of property. Ownership of property is proved by way of title, or other relevant documents like a letter of allotment or a sale agreement.
65. The Court has keenly considered the evidence. The Plaintiffs lay claim to the suit property by way of purchase. They contend that together with the 1st Interested Party, they jointly purchased the suit property. In support of their claim of ownership, they have adduced the Sale Agreement dated 17th September, 2007, and the title to the suit property albeit still in the names of the original owners.



66. The 1st Interested Party also places reliance on the Sale Agreement of 17th September, 2007, the Certificate of Title for the suit property in the names of the original owners as well as cheques evincing payments for the suit property. As regards the question of ownership, the Defendant admittedly lays no claim to the suit property.
67. All the parties are in agreement that the vendors have no further claim on the suit property. This was revealed in the testimonies by DW1 and DW2. PW3 and 4, agents acting on behalf of the vendors in the sale of the suit property also testified to the same effect. The evidence adduced by the Interested Party equally shows that a suit was filed in respect of the proceeds of the sale of the suit property being ELC 634 of 2013 and the same was settled by consent.
68. The Plaintiffs assert that the Defendant has trespassed onto the property and is illegally collecting rent thereon. As regards entry into the suit property, the Defendant does not deny the same. She asserts that she had due permission to enter the property from the 2nd and 3rd Plaintiffs and the 1st Interested Parties in the course of her actions as their agent.
69. She admits that the 2nd and 3rd Plaintiffs revoked their authority granted to her but this notwithstanding, she still had the 1st Interested Party's consent.
70. As aforesaid, it is not disputed that the 1st Interested Party participated in the purchase of the suit property. He is therefore one of the owners of the suit premises. This being so, can the Defendant be a trespasser where she has one of the owner's permission to enter the property as herein?
71. In answering this question, the Court must look into the nature of the Plaintiffs' and the 1st Interested Party's ownership of the suit property. Joint ownership of a property is in two forms, joint tenancy or tenancy in common. The distinction between the two concepts was stated by Sir Robert Megarry and Sir William Wade in "The Law of Real Property; Sweet & Maxwell, Eighth Edition Pages 496 to 503" thus:
- “A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...” Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.” A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”...In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words they have separate interests only that it remains undivided and they hold the interest together.”
72. Looking at the Sale Agreement, it is not indicated that the purchasers own the property in any distinct and separate shares. Consequently, the Court will have to make a finding on the proportion that each one of them is entitled to, based on their contribution in respect of the purchase price. That is an issue that must be addressed considering that this court restrained all the parties from dealing with the suit property, and appointed an independent person to administer it.



73. Regarding whether trespass can lie as against a co-owner of property by another, the Court in *Cornella Nabangala Nabwana vs Edward Vitalis Akuku & 2 Others* [2017] eKLR stated thus;

“The four unities of a joint tenancy are the unities of possession, interest, title and time. The unity of possession implies that each joint tenant is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others. No one joint tenant has a better right to the property than another, so that an action for trespass or for rent or for money had and received or an account will not normally lie.”

74. In view of the foregoing, no claim of trespass can lie as against the Defendant entering the property as an agent of the 1st Interested Party.

75. As to the claim of collecting rent, it is the Plaintiffs’ case that the Defendant has been collecting rent from the year 2008. They state that the Defendant’s agent informed the tenants that there had been a change of management and issued them with a new account number. They assert that the Defendant has been collecting rent through her company Superiorfone Communications Limited/Superiorfone Holdings Limited.

76. This is disputed by the Defendant who states that she has not been collecting rent; that she is not the company and there is no evidence that monies collected by the company were forwarded to her.

77. The Plaintiffs have adduced in evidence the CR-12 for Superiorfone Holdings Company Ltd. Indeed, the Defendant is a Director therein. She equally admits to being one of the director in Superiorfone Communications Ltd.

78. However, it is trite that a company is distinct from its directorship and shareholding. This principle, flowing from corporate personality, was established in the well-known case of *Salomon vs Salomon* [1897] AC 78 where the House of Lords held that a company is in law a separate person from its members.

79. The Court of Appeal in the case of *Victor Mabachi & Another vs Nurturn Bates Ltd* [2013] eKLR affirmed this position stating:

“[A company] as a body corporate, is a *persona juridica*, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”

A company as corporate person can act through its agent and the 1st appellant was such an agent. Once again, the general principle is that the agent of a disclosed principle cannot be sued. In *Anthony Francis Wareheim t/a Wareham & 2 Others v Kenya Post Office Savings Bank*, NRB CA Civil Application Nos. Nai 5 & 48 of 2002, the Court of Appeal unanimously held that, “It was also *prima facie* imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued.” Once it was clear that the 1st appellant was acting on behalf of the 2nd appellant, it could not be sued and the suit against him could only be dismissed.”

80. It is apparent that any claim against the company must be brought against it. Counsel for the Plaintiffs submitted that there are exceptions to the rule in *Salomon vs Salomon*(*supra*) and asked this Court to invoke the same. Indeed, there are circumstances where the Court will disregard the corporate



personality of an entity and seek out its directors. Para 90 of Halsbury's Laws of England 4th Edition Volume 7 (1) provides:

“Notwithstanding the effect of a company's incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company.”

81. In this case however, the company is not a party to these proceedings and no orders can be made against it in this respect.
82. Even if the Court was to hold that the Defendant was personally responsible for the actions of the company, the Court notes that there is no direct evidence showing movement of monies to the company's accounts, or from the company's account to the Defendant.
83. The Plaintiffs seek to rely on the valuation report by Mamuka Valuers. This report shows an estimate of monies received from the tenants. It was PW2's evidence that the estimate from the Court appointed administrator shows how much the Defendant must have collected since 2008. The report does not however prove receipt of any monies by the Defendant.
84. The Plaintiffs also make reference to the account of Kimani & Others in which they allege the Defendant deposited revenue from the suit property. They have provided an excerpt of the statement. However, it is unclear whether indeed the account is owned by the Defendant.
85. The investigations by the Plaintiffs on how much money was received from the suit premises since 2008, and to whom the monies were actually paid was poorly done, if at all. The failure to sue the company which purportedly received the said monies was fatal to the claim of rendering accounts and refund.
86. Ultimately the Court finds that the Plaintiffs have not established the claims for trespass, or of rendering of accounts by the Defendant.
87. As aforesaid, the Plaintiffs have sought permanent injunctive orders as against the Defendant, rendering of accounts by the Defendant, mesne profits at a rate of Kshs 2, 300,000 per month from April 2008 to the date and an order that they be granted an opportunity to appoint their own estate manager.
88. Having failed to establish trespass and collection of rent by the Defendant, the Plaintiffs are not entitled to permanent injunctive orders. Further still, the Defendant retains the 1st Interested Party's permission to enter into the suit property and on that basis no injunctive orders can lie against her as an agent of the 1st Interested Party. As to the question of mesne profits, and damages for trespass, they equally fail.
89. On the question of appointing an estate manager to manage the property, this is indeed within the Plaintiffs rights. However, this must be done with the inclusion of the 1st Interested Party as a joint owner. Therefore, this is not an order that the Court can grant.
90. It is not in dispute that the suit property is a commercial premise and rents are being collected therefrom. It is crucial that the question of ownership of the suit property and entitlement of the



monies held in the account herein and rental proceeds going forward is determined for a holistic determination of the matter.

91. Vide its orders of 11th August, 2016, the Court appointed Mamuka Valuers (Management) Limited as the sole property agent for purposes of managing the suit property and collecting rent. The Court directed that they remit all net proceeds in Co-operative Bank A/C 01109696164700, NBC Nairobi.
92. As per the Court records, this is the prevailing situation as regards rental proceeds from the suit property. Unfortunately, the agent, the 2nd Interested Party herein, did not participate in the proceedings and apart from their report dated 16th August, 2016, the Court is not privy to the particulars of the monies held by them.
93. Nonetheless, it is not disputed that the purchase price for the suit property was Kshs 30,000,000, an amount admittedly fully paid. The Sale Agreement did not indicate precisely what amount each purchaser was to contribute. Vide their testimonies, the parties affirm that the contribution was to be made equally towards the purchase price. This means each of the three purchasers [Patrick Macharia and Ruth Wanjiku Kooro as one] was to contribute Kshs 10,000,000 each.
94. Beginning with the 1st Plaintiff, it was her evidence that she paid Kshs 10,000,000. Kshs 8,000,000 to the Defendant's account and Kshs 2,000,000 by way of cheque. In this respect, the 1st Plaintiff adduced into evidence an excerpt from her bank account statement. It shows the amount of Kshs 8,000,000 as well as the amount of Kshs 2, 000,000 as having been paid out.
95. It is however unclear from that statement where the monies were sent. The 1st Plaintiff therefore did not establish by way of evidence that she remitted any monies to either the Defendant or the vendors as her contribution towards the purchase price.
96. PW 2 testified that she and her husband paid USD 110,000 as against DW1's claims that she sent her USD 80,000. PW2 adduced into evidence excerpts from wire transfer forms indicating payments to the Defendant and 1st Interested Party in the sums of USD 17,000, 16,000, 15,000, 45,000, 6000 and 11,000. According to the Central Bank of Kenya, as at October 2009, the USD to Kshs exchange rate was 1 USD-75.244 Kshs. This means the 2nd and 3rd Plaintiffs paid the sum of approximately Kshs 12,100,000.
97. The 1st Interested Party contends that he paid monies through the Defendant and/or the company Superiofone Holdings. However, the Court notes that all the monies in respect of the sale of the suit property was paid through the Defendant in her personal capacity or through her various companies, that is Relax safaries and/or Superiofone Communications Ltd.
98. In this respect, the 1st Interested Party's contribution is not distinguishable. DW1 stated that the 1st Interested Party paid the full amount on behalf of the 1st Interested Party.
99. The 2nd and 3rd Plaintiffs having established payment of approximately Kshs 12,000,000, out of the purchase price of Kshs 30,000,000, the 1st Interested Party's contribution, through the Defendant, can only be to the tune of Kshs 18,000,000.
100. Ultimately the Court finds the ratio of contribution by the parties and subsequently their entitlement to the rental proceeds to be at the ratio of; 2nd and 3rd Plaintiffs-40% 1st Interested Party-60%
101. In the end, the Court makes the following final determination;

****i. The Plaintiffs suit be and is hereby dismissed.****



ii. The ownership of the suit property shall be held by the 2nd and 3rd Plaintiffs on one part and the 1st Interested Party on the other part in the ration of 40:60.

iii. Upon rendering of accounts by the court appointed administrator within 30 days, the rental proceeds held in Co-operative Bank A/C XXX, NBC Nairobi shall be distributed between the 2nd and 3rd Plaintiffs on one part and the 1st Interested Party on the other part in the ration of 40:60.

iV. The rental proceeds shall henceforth be distributed between the 2nd and 3rd Plaintiffs and the 1st Interested Party in the ration of 40:60.**

SUBPARA. **v.

The court appointed administrator shall cease managing the suit property within 30 days, and shall hand over the premises to the 1st Interested Party and the 2nd and 3rd Plaintiffs.**

vi. The Plaintiffs shall pay the Defendant and the 1st Interested Party the costs of the suit.

Dated, signed and delivered virtually in Nairobi this 13th day of June, 2024.

O. A. Angote

Judge

In the presence of;

Mr. Thiongo for 1st Interested Party

Mr. Rono for Defendant

Mr. Isahi holding brief for Nganga Mbugua for Plaintiffs

court Assistant: Tracy

ELC NO. 690 OF 2012

JUDGMENT

