



Thika Greens Limited v Decko Africa Limited & another; Water Falls Welfare Group (Third party) (Environment & Land Case 36 of 2019) [2023] KEELC 229 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 36 OF 2019
LN GACHERU, J
JANUARY 26, 2023**

BETWEEN

THIKA GREENS LIMITED PLAINTIFF

AND

DECKO AFRICA LIMITED 1ST DEFENDANT

SAFARICOM PLC 2ND DEFENDANT

AND

WATER FALLS WELFARE GROUP THIRD PARTY

JUDGMENT

1. The Plaintiff herein brought this suit against the Defendants herein sought the following orders against them Jointly and Severally; -
 1. A permanent injunction do issue restraining the 1st and 2nd Defendants by themselves, their servants, employees, agents, and or any other person acting on their behalf from trespassing, encroaching, installations of Fiber Network, and or conducting any works on the Plaintiffs property known as Land Reference Number 28239 (Original Number 131131) Murang’a County or on any other property belonging to the Plaintiff.
 2. A mandatory injunction do issue against the 1st and 2nd Defendants jointly and severally, their agents, servants, and /or employees compelling them to remove all fiber installations and any other materials erected on the way leave comprised in the Plaintiff’s phase 1 known as Land Reference Number 28239 (Original Number 131131) Grant Number132402 situate within Murang’a County.



3. General damages for trespass and violation of property rights.
 4. Costs and interests.
 5. Any other or further relief as the Court may deem fit to grant.
2. It is the Plaintiff's averment that at all material times, the Plaintiff was the registered owner of all that parcel of land known as Land Reference Number 28239 (Original Number 131131) measuring 166 hectares, in Muranga County. That the 2nd Defendant is a telecommunications Company involved in many ventures including provision of Fiber network to homes, offices and businesses.
 3. That at all material times with respect to the subject matter herein, the 1st Defendant is a contractor retained by the 2nd Defendant to illegally install fiber networks on the Plaintiff's land. That the Plaintiff purchased the suit land with the sole intention of creating a controlled development comprising of 960 plots, for the development of single dwelling homes, to be sold to members of the public willing to abide by its controlled plan. That the process of selling the said plots and processing ownership documents is still ongoing. That out of the 960 plots, only a few thereof consisting 1/6 of the total plots have been sold, developed, and have residents living in them.
 4. That the Plaintiff incorporated Waterfalls Country Homes Management Limited, at the outset with the intention that it will take over management of the estate once it has transferred all the plots to their respective owners; That the said Management Company was also to hold the reversionary interests in the land. That the Plaintiff still has control of the Management Company and has not handed over management responsibilities to any other person pending the finalization of the process.
 5. That in the month of October 2019, the 2nd Defendant expressed interest to supply fiber networks to some of the residents living in the estate. That being a private development, the 2nd Defendant needed permission and authority of the Plaintiff to access and install the same. That on 28th October 2019, a meeting attended by representatives of the Plaintiff, 1st Defendant and the 2nd Defendant was held and in the said meeting the 1st and 2nd Defendants sought permission to access the property and subsequently install fiber network. That the Plaintiff raised reservations and objections and categorically denied the 1st Defendant permission to proceed with the installation of overhead poles and further required the 2nd Defendant to write formal letter requesting to be allowed to provide internet services to the development. That on 30th October 2019, the 2nd Defendant sent an email to the Plaintiff containing an acceptance letter. It is the Plaintiff's averment that on 8th November 2019, it wrote a letter the 2nd Defendant reiterating its position as was advanced in the meeting of 28th October 2019, and consequently it did not sign the Acceptance letter.
 6. Further that on 9th November 2019, without permission, authority, and/or consent, and against its written advice, the 1st Defendant on the instructions of the 2nd Defendant trespassed on the Plaintiff's development and started construction and installation activities for fiber network and in particular interfered with the Plaintiff's wayleave plan. That the Defendants actions amounted to trespass, which was particularized. That as a result of the trespass of the 1st and 2nd Defendants, the Plaintiff suffered loss and damages. That the Plaintiff protested the forced entry of the 1st and 2nd Defendants via a letter addressed to the Chief Executive Officer of the 2nd Defendant, but the said letter has not been responded to date. That the actions of the 1st and 2nd Defendants on the Plaintiff's land contravened Sections 24 and 25 of the [Land Registration Act](#), which guarantees quiet possession and violated its proprietary rights granted under Articles 40 and 65 of the Constitution of Kenya.
 7. Based on the foregoing, the Plaintiff prayed for Judgment against the Defendants jointly and severally.



8. The Plaintiff's claim is opposed by both the 1st and 2nd Defendants severally.
9. The 1st Defendant opposed the Plaintiff's claim via Statement of Defence dated 23rd November 2020. The 1st Defendant denied all the allegations set out in the Plaint, save for Paragraphs 1,2, and 3. The 1st Defendant averred that following the expression of interest from the owners of Waterfalls Country Homes Estate (Phase 1) and the receipt of instructions from the 2nd Defendant, it conducted a feasibility study and established the viability of undertaking the project of installing fiber network in the said estate. That after establishing the viability of the project, it began to install the fiber network to enable the 2nd Defendant provide internet connectivity services to the residents of Waterfalls Country Homes Estate (Phase 1). That the installation works it conducted were not illegal, and all the relevant permits and consents of the home owners and the developer were obtained prior to installation. That Waterfalls Country Homes Estate (Phase 1) upon which the fiber network was installed has already been fully sold.
10. Further, that by its own admission, the 1st Defendant is holding the reversionary interest in trust for the residents of Waterfalls Country Homes Estate and is managing the Management Company on behalf and for the benefit of the residents. That on 3rd October 2019, the 1st Defendant had a meeting with James Wambugu, a Director of the Plaintiff and subsequently sent him a letter of approval together with proposed designs via email. That on 7th October, 2019, the said James Wambugu called the 1st Defendant via Emily Brenda Achieng and he gave consent for the works to begin. That on 9th October 2019, the 1st Defendant had a ground breaking ceremony and the said James Wambugu was in attendance in his capacity as the Plaintiff's Director and Project Manager. That the 1st Defendant commenced implementation of the project by erecting poles in accordance with the approved designs.
11. That on 10th October 2019, the works were temporarily halted to allow James Wambugu to confirm the distance left in between the poles erected by the 1st Defendant for safety reasons. That works resumed on 11th October 2019, and continued uninterrupted until 23rd October 2019. However, 23rd October 2019, in a turn of events, the said James Wambugu called the 1st Defendant, and informed them that works had to stop claiming trespass and that there was a higher authority that needed to approve the works. That the 1st Defendant was at all times not aware of the higher authority as the said James Wambugu had represented himself as having authority over the suit property.
12. That throughout the implementation of the project, the management of the Plaintiff were aware of the said implementation as they were on site on various occasions. That the 1st Defendant sought and had a meeting with the management of the Plaintiff and the 2nd Defendant on 28th October 2019. Subsequently, the 1st Defendant received a letter from the Waterfalls Welfare Group comprising of residents and home owners of the suit land dated 31st October 2019, giving consent to proceed with the project. That pursuant to receiving the consent, the 1st Defendant resumed the project implementation until 14th October 2019 when a Court order was served upon them. That the installation of fiber networks only serves to elevate the desirability of the project and that it was unfair for the Plaintiff to allow the 1st Defendant to invest heavily on the installation of fiber networks and then change their minds halfway. That the Plaintiff is being dishonest as to the allegations made and it was put to strict proof of the same.
13. The 2nd Defendant similarly filed its statement of Defence dated 19th November 2020. It is the 2nd Defendant's averment that it is a stranger to the allegations made in the Plaint and did put the Plaintiff to strict proof of the same. That on or about June 2019, the proprietors and residents of Waterfalls Country Homes Estate (also known as Thika Greens Phase 1) through their Estate Management Company, engaged them with a view to procuring internet fiber connections to their respective homes



- within the estate. That on 3rd and 4th October 2019, the Plaintiff through its Project Manager was forwarded all the project approvals and designs highlighting the scope of works and security concerns and neither the Plaintiff nor its employees or agents raised any objection. That in fact, the Plaintiff went further to participate in a toolbox talk related to the specific job. That contrary to the Plaintiff's allegations, the meeting of 28th October 2019, was to seek permission to access the Plaintiff's property because at the time, they had already commenced the pole installation process two weeks prior. That 145 bonafide legal owners of the properties in the estate had requested the 2nd Defendant's to install fiber networks and they had signed a register in support of the 2nd Defendant's installation.
14. In addition, that on 3rd October 2019, the Plaintiff through its project manager granted the Defendants access and consent to proceed with installation of the fiber network. That the Plaintiff had at all times been involved in the project from its inception. That the implementation process commenced on 9th October 2019, and proceeded uninterrupted until 23rd October 2019, when the Plaintiff unlawfully halted the project. That the residents of the estate vide a letter dated 30th October 2019, and 31st October 2019, gave the Defendants consent to proceed with the implementation process. That the right of approval and consent of the residents of the estate as the bonafide legal proprietors of their respective parcels of land upon which wayleaves the 1st Defendant was erecting poles is safeguarded by Section 25 of the [Land Registration Act](#) and the Plaintiff cannot claim exclusivity to the said right.
 15. Via a ruling delivered by this Court on 14th January 2021, the 1st Defendant herein was granted leave to include and serve a Third-Party Notice upon the 3rd Party herein. In the said 3rd Party Notice dated 25th January 2021, the 1st Defendant claimed indemnity and /or contribution against the 3rd Party on grounds that;
 - a) The members of the 3rd party are the owners of the residential properties known as Waterfalls Country Home Estate on Land Reference No. 28239 (Original Number 13131) Grant Number 312402 situate within Murang'a County and the beneficial owners of the wayleaves and common areas at Phase 1 of the referenced property.
 - b) That the members of the 3rd Party via a letter dated 31st October 2019, authorized the 1st Defendant to enter the suit land and install infrastructure for fiber connection and supervised the same.
 - c) That as a result the 1st Defendant is entitled to indemnity and/or contribution from the 3rd party to the extent of any loss it might suffer as a result of the instant suit.
 16. The 3rd Party herein opposed the Third Party Notice via a Statement of Defence to the 3rd Party Notice dated 22nd February 2021. The 3rd party denied every allegation made in the Third Party Notice and the Plaintiff and put the 1st Defendant and the Plaintiff to strict proof of the same. It is the 3rd Party's averment that its members are proprietors and/or residents of Thika Greens Phase 1 also known as Waterfalls Country Home Estate situate on Land Reference No. 28239 (Original Number 13131) Grant Number 312402, situate within Murang'a County. That the 3rd party is a self-help group incorporated by the residents of Thika Greens Phase 1 also known as Waterfalls Country Home Estate. That the 3rd Party was formed for the purpose of representing the interests of residents as they await transfer of shares in to the Management Company of the estate being ****Waterfalls Country Home Estate Limited** by the Plaintiff which has been delayed unnecessarily by the Plaintiff.
 17. That on various dates the Plaintiff entered into agreements for sale with members of the 3rd Party with the intent of creating and developing a gated community after the purchased various portions of land within Land Reference No. 28239 (Original Number 13131) Grant Number 312402, situate within Murang'a County. That after the purchases, the members of the 3rd party acquired title of their own



individual parcels via the registration of subleases. That by virtue of the said subleases, the members of the 3rd Party have proprietary interests in the suit land as well as rights to use the common areas. That the 3rd Party did authorize the 1st Defendants to enter onto the suit land for purposes of laying fiber network cables with the full knowledge, approval and participation of the Plaintiff. That the suit against the 1st Defendant is vexatious and an abuse of the Court process and should be struck off with costs to the Defendants and the 3rd Party. That there is no liable claim capable of being tried between the 1st Defendant and the 3rd Party as it is trite that that once a principal has been disclosed, one is estopped from suing the agent.

18. The Plaintiff responded to the statements of Defence filed by the 1st and 2nd Defendants respectively via a Reply to Statement of Defence of the 1st and 2nd Defendants respectively both dated 4th February 2021. The Plaintiff therein denied all the allegations made in the Statements of Defence and reiterated the contents of its Plaintiff.
19. The matter proceeded to Viva Voce evidence wherein the Plaintiff called one witness, and the Defendants each called one witness and so did the 3rd Party.

Plaintiff's Case

20. Pw 1 David Nduhiu Ndiang'ui, the Logistics Manager working at Thika Greens Limited stated that he was authorized to represent the Company in the suit. He adopted his witness statement dated 14th November 2019, as his evidence in chief. In addition, he produced the Documents contained in his list of documents dated 14th November, 2019, as exhibits and the same were marked PEXB 1-PEXB 8.
21. On cross examination, he testified that the Plaintiff is the registered owner of LR. 2800239. That the Plaintiff is the owner of the suit land, but it had sold 960 plots which is a ¼ of the plots to various purchasers. That the suit property has been subdivided and there are other people with interest over the suit land. That the suit land was acquired to build controlled residential houses. That the said residential houses were built by the purchasers and not the Plaintiff. That there is only one entrance to the suit land and the entrance is manned by security employed by the Plaintiff. That he was aware of the installations done by the 1st and 2nd Defendants, and there were poles for the installation of fiber network. That he had not seen any damages on the perimeter walls of the Plaintiff. That the Plaintiff had a management office with employees and he was not one of the employees. That the employees are Benjamin and Terry Mburu. That James Wambugu is a Project Manager of Thika Greens Ltd. and he is also stationed at the offices of Thika Greens.
22. Further that the installations started in late October 2019, and he could not remember the actual dates. That he raised the objection immediately when the installations began, and he could not remember the exact date. That any development on the suit land has to get consent from the Plaintiff and no complaints had been made by the residents over the installations done. That he had not received any complaints from the 960 residents over the installation, and he did not know if they had consented to it. That he had seen a letter from Waterfall Welfare Group, and he did not know of the existence of such a group. That the shareholders of the Management Company were Thika Greens Limited, and every buyer acquires a share in the Management Company once they buy a plot. That the Management Company does not own the Wayleaves as they are owned by the Plaintiff. That the Plaintiff will transfer reversionary interests in the land to the Management Company.
23. That they have the mother title, which they hold in trust for the purchasers of the plots. That the purchasers do not control what happens in the Company. That he knew James Wambugu, as an employee of the Plaintiff and he was present during the ground breaking. That James Wambugu did not inform him of the installations and he was informed by the Security guards. That on Page 22 of his



- bundle of documents, there were minutes and James Wambugu was in attendance of the same. That the meeting was held after the encroachment had happened and it was for the purpose of asking the 1st and 2nd Defendants to formerly apply to use the wayleaves. That on Page 13 of the 1st Defendants bundle of documents, there was an email addressed to James Wambugu and its contents was not made aware to him. That he did not know if James Wambugu had had a conversation with the 1st Defendant. That there was a service provider for internet at Thika Greens and the service provider was using KPLC poles to install.
24. On cross examination by the 2nd Defendant, he stated that he had authority to represent the Company, but he had not presented it to Court. That he also did not have a Board Resolution to show authority. That he had no authority to sign the Verifying Affidavit attached to the Plaint. That he knew James Wambugu, who was the Project Manager of the Plaintiff. That James Wambugu had authority to represent the Company on matters projects. That the 1st Defendant entered the suit land without authority. That on page 2 of the 2nd Defendant's bundle, there was an was an email between James Wambugu and Brenda and he could not give evidence on it as he was not aware of it
25. That James Wambugu was their employee and had authority to act where projects were concerned and installation of fiber was a project. That on 3rd October 2019, the said James Wambugu was in communication with a representative of the 2nd Defendant. That they got wind of the project in October 2019. That there are 960 and all the 960 of them had been sold out but not all the transfers had been effected. That the 1st phase is known as Water falls. That he did not know the current service provide for internet and they were utilizing KPLC Poles.
26. On cross examination by the 3rd Party, he testified that the Plaintiff had not transferred shares in the Management Company to the Residents, and that Plaintiff was the registered owner of the mother title. That James Mbiu is a resident of Thika Greens. That he was aware of the subleases signed with Third Parties. That the purpose of the Management Company was to manage the estate on behalf of the developer. That the developer is the majority shareholder in the Management Company, and each owner had one share each. That the Developer had not transferred all the shares to the purchasers of various plots. That the common area, Wayleaves and pathways are managed by the Management Company.
27. That the 1st Defendant trespassed on the land of the Plaintiff and they had no authority to enter the suit land. That the residents were maintaining the common areas through the payment of service charge. That he had not read the sub leases and he was in no position to respond to any issues concerning them. That an individual cannot give permission for the use of common areas. That he was not aware that the Plaintiff had given consent to the 1st Defendants to install fiber on the suit land. That permission was sought after thy had entered the suit land. That he did not know if the 1st Defendant had been invited by the Residents. That they saw the Defendants on site on a Saturday, and they stopped them as they did not have authority to do installations on the suit property. That they had not heard any talks with the residents about the impugned installations.
28. On reexamination, he testified that the Management Company was known as Waterfalls Country Homes Limited and Waterfalls Welfare Group. That the agenda of the meeting was installation of overheads and the way forward. He reiterated that the Defendants had no permission to enter the suit land and access the Way leaves.

1st Defendants Case

29. Dw 1 Emily Brenda Achieng, the Acquisition Personnel for the 1st Defendant stated that she had authority to represent the 1st Defendant. She adopted her Witness Statement dated 23rd November,



2020, as her evidence in chief and produced the documents contained in the list of documents dated 23rd November 2022, as Defence Exhibits 1-5.

30. On cross examination by the Plaintiff, she stated that the 1st Defendant was invited into the estate by the Residents of Waterfalls Estate, who expressed interest to have internet installed in their homes. That the residents and members of the 3rd Party gave consent for the installation of internet. That initially they were not aware that the Plaintiff owned the suit land, but once they became aware, they sought the requisite consent and it was granted. That the consent granted by the Plaintiff was not written but verbal. That on Page 13 of her list of documents was an email dated 3rd October 2019, requesting the recipient to sign a document and send back a scanned copy. That the document was not signed and communication was done on phone. That the WhatsApp communication only had an email address and no consent. That they moved on with the project after the WhatsApp communication. That there was a verbal consent given, though the same was neither written nor communicated on WhatsApp. That the photo during ground breaking was evidence that consent was obtained.
31. Further that the meeting of 28th October 2019, was held after they had already accessed the property. That the minutes of the meeting showed that the Plaintiff did not give permission to the 1st Defendant to access the suit land. That the 2nd Defendant was to do a formal letter which was not done. That after the meeting of 28th October, 2019 the Plaintiff did not give Consent/Authority, but Waterfalls Welfare Group gave authority on 31st October 2019. That according to her, Thika Greens gave consent to install fiber network on the suit land. However, the consent dated 31st October 2019, was issued by Waterfalls Welfare Group. That the consent was supposed to be signed by the owners of the suit land as the same was private land and they needed authority from the owner to enter.
32. On cross examination by the 2nd Defendant, she testified that they got verbal consent from James Wambugu, the Project Manager of the Plaintiff on 7th October 2019. That the said James Wambugu was present for the ground breaking on 9th October 2019. That from 9th October 2019, to 23rd October 2019, the 1st Defendant undertook installation of the overhead lines without any interference from the Plaintiff. That on 10th October 2019, James Wambugu halted the works as he wanted to confirm the distance between KPLC Poles and Safaricom Poles for security concerns. That from 11th October 2019, to 23rd October 2019, the 1st Defendant continued with installation without interruption. That the 2nd Defendant was granted access to the suit land by the Plaintiff from 11th October 2019 to 23rd October 2019. That it is the residents of Waterfalls who signed and consented to the installation and Safaricom fiber network was being installed in their homes.
33. When cross-examined by counsel for the 3rd Party, she testified that they had consent to enter the suit property given by James Wambugu, a fact the Plaintiff was aware. On re-exam, she told this Court that they received consent verbally and by conduct in the sense that they were allowed by the security for the estate to freely enter in and out of the suit property. That they undertook their activities engaging as it was, but they were never stopped and she reiterated that James Wambugu was involved in the installation. It was her testimony that the Plaintiff was aggrieved by the consent of the third parties and should have therefore sought after them.

2nd Defendat's Case

34. Dw2 Cyrus Omondi Auma, an Engineer working with the 2nd Defendant's Department of Home Solutions, adopted his written witness statement dated 22nd July, 2022 as evidence in chief and relied on the documents contained in the List of Documents dated 24th February, 2022.



35. On cross examination by the Plaintiff, he testified that on page 56 of his bundle of documents, the Company referred to was Waterfalls Country Homes Management Limited the Management Company. That the Company on Page 55 of the same bundle was Thika Greens Limited and that at Page 29, the letter head is Water Falls Welfare Group which is not similar to the first 2 Companies. That consent to proceed with installation was from Water Falls Welfare group. That approvals for installation were given as stated in Paragraph 6 of his statement, but he did not see those approvals. That the Project was stopped on 23rd October 2019, after the Plaintiff objected to its continuation and it did not resume. That the meeting of 28th October 2019, did not require consent, as consent had already been granted. However, in the minutes of 28th October 2019, Agenda 1 was permission to access the site and Paragraph 9 of 2nd Defendant's Defence denies that they did not seek permission. That he had been involved in the installation of various projects and the procedure is to seek consent to access and where consent is denied, they simply stop the Project.
36. On cross examination by the 1st Defendant, he testified that the 2nd Defendant invested about Kshs. 10 million That it was not fair for the Plaintiff to withdraw consent after they had invested heavily in the project. That they had consent, but the said consent was later withdrawn. That after consent was withdrawn, they got consent and the right of access from the residents of Thika Greens who had formed a residents Welfare Group called Waterfall Country Homes.
37. When cross examined by the 3rd Party, he stated that their client was the 3rd Party who are the residents of Waterfalls Estate. That the Plaintiff took part in the installation before he withdrew consent and he was aware of who had authorized consent. That the Plaintiff was at all times aware of the consent and the installation of the project.

3rd Party's Case

38. Dw 3 Joseph Thiongo Chege, testified that he lived in Thika Greens Phase 1 also known as Waterfalls Country Homes. That he was in Court on behalf of the residents of Phase 1, and he had authority dated 21st February 2021. He adopted his Witness Statement dated 22nd February 2021, as part of his evidence in chief. He also produced the documents contained in his list of documents dated 22nd February 2021, which were marked Exhibits 1-7.
39. It was his testimony that Waterfalls Welfare Group is a welfare of the residents of Water Falls Country Homes and he had evidence to prove they had bought land within the suit land being referred to as Thika Greens. That there was supposed to be a Management Company, but since they had not gotten shares in it yet, they had formed Waterfalls Welfare Group in the meantime. That all the proprietors of the various plots forming part of the suit land were automatic members of the welfare group as the Management Company was still pending. That the 1st and 2nd Defendants were known to them as suppliers of internet services and they had invited them to install fiber network.
40. That Thika Greens Limited, was at all times aware of the existence of the Welfare Group and the installation of fiber network in the estate. That the Welfare runs the affairs of Water Falls Country Homes Residents. That the residents of Waterfalls Country Homes were also joint owners of the common areas and they paid a monthly fee of Kshs. 5,000/= to maintain them. That the Plaintiff was aware that the 3rd Party had authorized the 1st and 2nd Defendants to install fiber networks/internet services. That there was no Management Company in place and it is them who gave consent to the 2nd Defendant.
41. On cross examination by the 1st Defendant, he testified that he lives in Thika Greens Homes, and he was aware of what happened during the installation of fiber network. That they are the ones who gave



- consent for the installation. That as per the sublease clause 1, they as Proprietors had a right to use the common areas. That he had a sublease and he had developed his land. That the Plaintiff wanted them to go through him to get consent, but they had directly given consent to the 1st and 2nd Defendants. That as residents, they were suffering without internet and a substantial amount of money had been invested to do the installation until the time it was stopped.
42. When cross examined by the 2nd Defendant, he stated that the 1st and 2nd Defendants were not trespassers and it was the 3rd party who gave them consent. That as the residents of the suit land, they were entitled to use the way leaves.
 43. On further cross examination by the Plaintiff, he stated that on Page 39 of his list of documents, the third party was not listed in the document. That from the consent document, the 1st and 2nd Defendants were supposed to get consent from the lessor, estate management, and, owners/occupiers of the homes. That from the said document, Waterfalls Welfare Group had no right to give consent. That the owners of the various plots had rights, but not the welfare group. That the Management Company was yet to be operationalized even though Thika Greens phase 1 had been sold 100 %. That Waterfalls Welfare Group had a right to give consent to access the property as it was a representation of the Management Company.
 44. On re-examination, he stated that both the Welfare Group and the Management Group had the same members and shareholders respectively. That the Welfare Members are the owners of the various properties on the suit land, and it was formed as there was a delay in operationalizing the Management Company. That the said welfare was not a Company, but an association of the owners of Welfare County Homes.
 45. On 25th July 2022, the parties were directed to file and exchange written submissions.
 46. The Plaintiff filed its written submissions dated 29th August 2022, through the Law Firm of Oyugi & Co Advocates and raised two issues for determination.
 47. The Plaintiff submitted that the Defendants encroached onto the Plaintiff's property and committed acts of waste that were averse to their proprietorship rights. That the Defendants, their agents and employees entered into the Plaintiff's property without consent and the same was not contested or denied. That the Defendants failed to discharge their legal burden of proof as they failed to prove to the Court that they had acquired consent from the Plaintiff to access the Plaintiff's land. Reliance was placed on the case of *Mbuthia Macharia v Annah Mutua & another* [2017] eKLR, where the Court of Appeal stated that the legal burden of proof is discharged by way of evidence and the opposing party has a corresponding duty of adducing evidence in rebuttal.
 48. It was its further submissions that there is no contractual relationship between the 3rd Party and the Plaintiff and therefore the 3rd Party has no rights contractual or otherwise to exercise over the Plaintiff's land. That the Plaintiff entered into individual contracts with specific persons and hence the 3rd Party is a complete stranger pursuant to the doctrine of privity of contract. Reliance was placed on the case of *Securicor Guards (K) Limited v Mohammed Saleem Malik & Another* [2019]eKLR, among others where the Courts defined the doctrine of privity of contract and stated that as a general rule, at common law, a contract cannot confer rights or impose obligations on strangers to it.
 49. That the lease agreement had appointed a Management Company and the 3rd Party had absolutely no status or interests in the suit land. In brief they were a 'none entity' in as far as the suit land was concerned. That as result, the 3rd Party could not give consent to the Defendants as they purported to have done and their actions were therefore null and void. That not even the individual proprietors and residents have rights to grant access to the premises or the easements for purposes of what the



- Defendants were installing. That such rights were the reserve of the lessor and the estate Management Company.
50. Based on foregoing, the Plaintiff submitted that they are entitled to the prayers sought and to general damages of Kshs. 10,000,000/= for trespass and violation of property rights.
 51. The 2nd Defendant filed their written submissions dated 9th October 2022, through the Law Firm of Kairo Mc Court & Co. Advocates, and raised 3 issues for determination.
 52. On whether the 2nd Defendant is liable for alleged trespass, the 2nd Defendant submitted that the Plaintiff's Project Manager gave consent verbally through its actions to the Defendants and therefore the Plaintiff acquiesced the Defendants actions. Reliance was placed on the case of Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu Chege 2019eKLR and the case of Peony Management Company vs. Destrio Oyatsi [2020]eKLR, where the Courts defined acquiescence as doing an act in another person's land without the right to do that act with the knowledge of the owner of the land who had power to act and prevent the act but elected not to in which case he was estopped from stopping what had been done. It was their further submissions that the Plaintiff did not in any way attempt to explain why they waited until 28th October 2019, to deny the Defendants access to the suit land.
 53. On whether the 2nd Defendant is an agent of a known principal, the 2nd Defendant submitted that the Plaintiff had admitted having sold various parcels of land subdivided from the suit land to different people and transferred title via sub leases. That the 1st Plaintiff was yet to transfer shares it holds in trust for the purchasers to the Management Company which will eventually hold reversionary interest in the suit land. That where a principal is disclosed and known, his/her agent should not be sued in the same cause as a Co-Defendant as he acts for and on behalf of the principal. That in the instant case, the Plaintiff knew the Defendants were engaged by the third parties but chose to sue the Defendants as a low hanging fruits. That on the strength of the lease agreement, the third party was entitled to engage the Defendants for the provision of internet services.
 54. The 2nd Defendant urged the Court to dismiss the instant case with costs as the Plaintiff had failed to prove his case.
 55. The 3rd Party on the other hand filed its written submissions dated 7th October 2022, through the Law Firm of Nderu Ngaruni and Kimeru Advocates. The 3rd Party submitted that that the Defendants actions did not amount to trespass. That the main issue of contention based on the definition of trespass is whether the Plaintiff gave the Defendants consent to access the suit land and install internet. That the Defendants got consent from the Plaintiff albeit being oral. That the Plaintiff's Management was at all times aware of the works carried out by the Defendants prior to the installation. That the Plaintiff's Project Manager was present during the ground breaking ceremony by the Defendants and the Plaintiff's Management was present throughout the project. That the Plaintiff willingly gave consent to the 1st and 2nd Defendant to access the suit land until 28th October 2019, when the project was halted.
 56. Further, the 3rd party submitted that together with the Plaintiff, they had an interest in the suit land as evidence by the sublease produced in Court. That the 3rd Party was acting well within its rights when it granted consent to the Defendants to continue with the installation. That the Plaintiff's decision to halt the project and further claim that no consent was given appears as an afterthought and had no regard to the millions of shillings invested by the Defendants. Based on these, the 3rd Party urged this Court to find in their favour and dismiss the Plaintiff with costs.



57. The Court has carefully read and considered the pleadings by the parties, analyzed the evidence adduced, the rival Written Submissions and the relevant provisions of law, and finds that the issues for determination are;
- a) Whether the 1st and 2nd Defendants trespassed onto the suit property without authority of the Plaintiff
 - b) Whether the 3rd Party had capacity to give consent to the Defendants and whether they should indemnify the 1st and 2nd Defendants
 - c) Whether the Plaintiff's Claim is merited

a. Whether the 1st and 2nd Defendants trespassed into the suit property without authority of the Plaintiff.

58. This Court has been called upon to determine whether the 1st and 2nd Defendants trespassed onto the Plaintiff's land. Trespass is described under Section 3 (1) of the *Trespass Act*, as follows;

59. Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

60. In black's Law Dictionary 8th Edition, a continuing trespass is defined as: -

A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”.

The Court in the case of John Kiragu Kimani v Rural Electrification Authority [2018] eKLR, in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923, which defines trespass as;

“any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason”

61. To establish a claim for trespass, the Plaintiff has to establish firstly; that it owned the alleged piece of land or had possession of it. Secondly, it must proof that the Defendants intruded into the said land without its authority.

62. In the instant case, it is not in doubt that the Plaintiff is the registered owner of the property known as LR No 28239, situate in Murang'a County, on which it has created a controlled development comprising of 960 residential plots for the development of homes to be sold to desiring members of the public willing to abide by its controlled plan. It is also not in doubt that the Plaintiff has sold the plots to various people, and some of the proprietors have built homes and reside therein. In addition to the development, the Plaintiff has incorporated a Management Company namely Waterfalls Country Homes Management Limited, to take over the reversionary interests** in the land, maintain the common areas and handle management of the estate on behalf of the home owners upon completion and handover of the development.

63. The Plaintiff contends that it is in control of the development and management of the project, pending finalization and handover to the acquiring home owners and the Management Company. It was the further evidence of PW1 that they have since sold all plots and the transfer and registration process was ongoing and this was the reason why the Management Company was yet to be fully operationalized.



That the 1st and 2nd Defendants without its permission and consent and against their written advice, have trespassed onto their property and commenced the construction and installation activities of the fiber network and interfered with the Plaintiff's Wayleave plan.

64. The 1st and 2nd Defendants on the other hand have not denied entering upon the Plaintiff's suit property and beginning the installation of fiber networks. However, it is their contentions that they acquired consent from the Plaintiff until the said consent was unreasonably withdrawn and their installation works were halted. What then begs the question is whether indeed the Plaintiff gave consent to the 1st and 2nd Defendants to access and conduct installation works on the suit land.
65. The burden of proof lies on the Plaintiff to prove its case on the required standard. Section 109 of the *Evidence Act*, provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the case of *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR, the Court held that; -
- “As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact, which he desires the Court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides that the burden lies in that person who would fail if no evidence at all were given by either side.”
66. PW1 testified that that the Plaintiff is the registered owner of the suit land, but he had subdivided it into various plots which had been sold to various purchasers for the purposes of building residential homes. That he was aware of the installation works done which began in October 2019, and that the poles had been brought to the suit land, but he did not know how they got in. That at the time the installation works began, he raised an objection immediately. That any development on the suit land has to get the consent of the Plaintiff, which the Defendants failed to do. That the Defendants had gotten consent from Waterfalls Welfare Group, which was not known to him and did not have the status to allow the installations. That James Wambugu was the Project Manager of the Plaintiff and he had authority to represent the Company in all matters concerning projects and that the installation of fiber was a project. That the said James Wambugu did not inform the Plaintiff about the said installations. That after he objected, a meeting had been held with the Defendants in the presence of the said James Wambugu, which meeting was to inform the Defendants that they needed to formerly apply to be allowed to continue with the installation works. It was his contention that the instant dispute was as a result of the Defendants accessing the Plaintiff's land and installing poles without the authority of the Plaintiff.
67. In support of his case, the PW 1 produced the mother title of the suit land, which confirmed that the Plaintiff is indeed the registered owner of the suit land. He also produced the Minutes of the meeting held on 28th October 2019, between the Plaintiff and the Defendants and the sole agenda as shown there in was permission to access site from Thika Greens. As a follow up to the meeting, the 2nd Defendant wrote a letter dated 30th October 2019, to the Plaintiff requesting that the 1st Defendant be allowed to access the suit land for purposes of laying fiber. In response to the letter dated 30th October 2019, the Plaintiff wrote to the 2nd Defendant a letter dated 8th November 2019, denying the Defendants access and requiring that they comply with outcome of the meeting held on 28th October 2019. What followed was a letter dated 11th November 2019, addressed to the CEO of the 2nd Defendant complaining of the actions of forceful entry into the Plaintiff's land.



68. The 1st and 2nd Defendants on the other hand agreed that they had accessed the Plaintiff's land, but it is their contentions that they got consent from the Plaintiff. When put to task about the said consent, both DW 1 and DW 2 stated that they got oral consent to access the suit land, and proceed with installation works from one James Wambugu, verbally via a phone call. The Court notes that it has perused emails sent to one James Wambugu, by DW 1 dated 3rd October, 2019 and 4th October 2019. The Court notes that the said emails are sharing a scope of works and designs and in no way refer to consent. While the emails request that the documents attached there in be signed and sent back to the 1st Defendant, there was no evidence produced to show if indeed the said emails were responded to or if the documents attached therein were signed and returned to them for their records.
69. In addition, the 1st Defendant produced DEXB 10 and 11, the first being an extract of a WhatsApp conversation and the 2nd being a photo allegedly taken on the ground breaking day. The Court notes that nothing from the two documents directly or indirectly alludes to giving of consent by the Plaintiff. While the Defendants allege that one James Wambugu attended the ground breaking ceremony, it is not possible to tell from the photograph presented and even though this has not been controverted by the Plaintiff, attending a ground breaking cannot be said to be an action amounting to the giving of consent. The Court notes further that while the 1st and 2nd Defendants allege that they got consent from one James Wambugu, an employee of the Plaintiff, none of them called the said James Wambugu as a witness to corroborate their allegations.
70. Based on the foregoing, the Court finds that the 1st and 2nd Defendants had the onus of proving, on a balance of probability, that they indeed acquired consent from the Plaintiff to proceed with the installation works on the suit land. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 stated that:
- “In ordinary civil cases, a case may be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”*
71. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Court of Appeal held that:
- “Denning J. in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 while discussing the burden of proof had this to say;-
- That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”
72. This Court is guided by the above decisions and finds and holds that the 1st and 2nd Defendants failed to prove to the required degree that they got consent to access the suit land, and proceed with installation works from the Plaintiff and/or any of it authorized representatives.



b. Whether the 3rd Party had capacity to give consent to the Defendants and whether they should indemnify the 1st and 2nd Defendant?

73. Having concluded as above, the next issue for determination is the 3rd Party Notice filed by the 1st Defendant against the 3rd Party herein. It is the 1st Defendant's allegations that the 3rd Party is a Welfare Group comprising of members who are proprietors of the various plots contained in the suit land forming Thika Greens Phase 1. It is the 1st Defendant's further allegations that via a letter dated 31st October 2019, the 3rd party authorized him to enter the suit land and proceed with the impugned installation works. That as a result, they are entitled to indemnity by the 3rd Party to the extent of any loss they may suffer as a consequence of the instant suit.
74. The 3rd Party on the other hand states that its members comprise of the residents and/or beneficial owners of various plots subdivided from the suit land and also known as Waterfalls Country Homes Estate and they are holders of subleases to that effect. That the 3rd Party was formed with the mandate of representing the interests of the residents as they await allocation of shares in the Management Company incorporated by the Plaintiff. That by virtue of the proprietary interests of its members, the 3rd Party has interest in the suit land as well as a right to use the common areas. The 3rd party confirmed that it did authorize the 1st Defendant to enter into the suit land and proceed with fiber installation works with the full knowledge of the Plaintiff. That the 1st Defendant at all times acted as an agent of the 3rd Party and cannot be said to have trespassed.
75. This Court is invited to determine whether the 3rd Party had capacity to give consent to the 1st and 2nd Defendants to access the suit land and carry out installation of fiber network. In the Court of Appeal case of Samuel Mwangi Jeremiah M'itobu [2012] eKLR, the Court held as follows,
- “The learned Judge of the High Court erred in his conclusion that only an “owner” of land had the right to sue in trespass. That is clearly not so. As Winfield and Jolowicz state in their book “Tort” (12th Edition @ p. 361): “Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person's right to possess (the “jus tertii”) unless he can prove that he acted with that person's authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.”
76. Further, In the case of Charles Ogejo Ochieng v Geoffrey Okumu, [1995] eKLR, the Court held that trespass is an injury to a possessory right and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of trespass.
77. This Court has already found herein above that the Plaintiff is the registered owner of the suit land. The only other person who can sue or initiate a suit for trespass is one who has possession of the land in question. The 1st and 2nd Defendants have stated that they got consent from the 3rd Party and in support to their claim, they have produced a letter dated 28th October 2019, and another dated 31st October 2019, written by the 3rd Party bearing the subject ‘consent to proceed with installation of Safaricom fiber to the Waterfalls Country Home Estate (the Estate)’ and addressed to the 2nd Defendant. To be able to determine if the 3rd Party had capacity to issue consent, this Court has to establish if the 3rd Party had possession of the suit land.



78. As evidenced by its Certificate of Registration issued on 24th Jan 2018, the 3rd Party is a Self-help group registered under the Ministry of East African Community, Labor and Social Protection. The 3rd Party did not produce its Constitution in Court and therefore this Court cannot be able to decipher its mandate and responsibility. In addition, the 3rd Party did not produce any sale and/or lease agreement entered into between itself and the Plaintiff and it is therefore evident that the 3rd Party is not by itself in possession of the suit land.
79. The 3rd Party however avers that it has capacity to give consent to the Defendants to access the suit land and install fiber on grounds that its members are proprietors and residents of the various plots subdivided from the suit land. While this Court has perused the Certificate of Registration of the 3rd Party and a list of its members, is not well guided to know if the said members are actual residents and proprietors, as the sale agreements and /or lease agreements have not been produced as evidence before this Court to show the nexus between the members of the 3rd Party and the ownership/possession of the suit land.
80. In addition, the suit land as per the evidence of PW1 is subdivided into 960 plots, all of which have been bought, while the list of members of the 3rd Party produced contains only 164 names, which is not even quarter of all the owners/residents of the suit land.
81. The upshot of the foregoing is that the 3rd Party has no verifiable interest in the suit land, and it follows therefore that it lacks capacity to give consent to any third party to enter unto the suit land, and perform any installation works as it did in the instant case.
82. This Court having found that the 3rd Party lacked capacity to give consent to the 1st and 2nd Defendants, will proceed to determine whether the third party should indemnify the 1st and 2nd Defendants.
83. The first issue to determine before discussing indemnity is whether the 3rd Party Water Falls Welfare Group has capacity to sue and to be sued.
84. It is trite law that Societies are not legal entities capable of suing and being sued in their own names. Unincorporate bodies registered under the *Societies Act* have no legal capacity to institute proceedings in any Court in their own names and cannot maintain such proceedings. Registered Societies can only sue through Trustees, or in the names of their officials in a representative capacity. In *Eritrea Orthodox Church v Wariwax Generation Ltd.* [2007] eKLR the Court held as follows:
- “There is no doubt that the Plaintiff is non-incorporated body of many members registered under the *Societies Act*, Cap 108 of the laws of Kenya. That is how it has indeed described itself in paragraph 1 of the plaint. Nor does the plaint clothe the Plaintiff in any other way or with any other name or capacity. It will therefore be so treated. It is now trite law that a society registered under the said Act is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings. It is an ordinary society whose members, if they wish to sue, can do so only under a representative capacity under Order 1 rule 8 of Civil Procedure Rules.”
85. In the case of *Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank* [1992] eKLR, Bosire, J. (as he then was) stated as follows:
- “The position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the Civil



Procedure Rules. In the instant matter the suit was instituted in the name of the religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name.”

86. Based on the foregoing and guided by the above decisions, it is the finding of this Court that the 3rd Party as registered is an unincorporated body and has no capacity to be sued in its own name. Therefore, it follows that any suit instituted against them for indemnity is null and void from the beginning and cannot be sustained by this Court.

c. whether the Plaintiff’s Claim is merited.

87. The Plaintiff’s claim against the 1st and 2nd Defendants is for; a permanent injunction restraining them from accessing the suit land and conducting any installation works, a mandatory injunction compelling them to remove all fiber installations and any other materials erected on the suit land and general damages for trespass and violation of property rights.
88. This Court has already herein above found that the 1st and 2nd Defendants accessed and began fiber installation works on the Plaintiff’s land without consent and that their actions amounted to trespass. Be that as it may, this Court notes that while the mother title of the suit land belongs to the Plaintiff, by the admission of PW 1, the suit land has been subdivided into 960 plots all of which have been sold to various proprietors. The 960 plots are for residential use and some subleases have been registered, while the remaining ones are in the process of being registered. This Court notes further that while a Management Company being Waterfalls Country Homes Management Limited, has been incorporated, the same is not fully operational yet as the Plaintiff is yet to cede control of the same to the purchasers of the 960 plots as required by law. Therefore, it is clear that the 960 proprietors of the plots have equal interest in the suit land comprising of 960 plots and the common area as the Plaintiff and by extension the Management Company.
89. This Court is cognizant of the importance of internet services in today’s world, especially in the aftermath of the Covid 19, which forced many operations and access of services, even the most basic ones to be pushed online. This Court has also perused a list produced by the 1st Defendant containing the names of residents who had in their own individual capacities consented to the installation of fiber network on the suit land for their use. It would therefore be untenable to issue a mandatory injunction compelling the Defendants to remove all the fiber installations and/or any other materials erected on the suit land.
90. Having carefully analysed the evidence as above and having found so, the Court finds and holds that the Plaintiff has proved its case against the 1st and 2nd Defendants on the required standard of balance of probabilities.
91. Consequently, judgement is entered for the Plaintiff against the 1st and 2nd Defendants Jointly and Severally on the following terms;
1. A declaration be and is hereby issued that the 1st and 2nd Defendants, trespassed unto the Plaintiff’s land.
 2. A permanent injunction be and is hereby issued restraining the 1st and 2nd Defendants by themselves, their servants, employees, agents, and or any other person acting on their behalf from trespassing, encroaching, installations of Fiber Network, and or conducting any works on the Plaintiff’s property known as Land Reference Number 28239 (Original Number 131131) until they have acquired consent from the relevant parties, which consent shall not be unreasonably withheld.



3. Having found that the 1st and 2nd Defendants trespassed on the Plaintiff's land, the Plaintiff is granted General Damages of 500,000/= for trespass.
4. The 1st and 2nd Defendants will pay costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF JANUARY, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Plaintiff – Absent

Mr Gichuhi for the 1st Defendant

Mr Manda for the 2nd Defendant

M/s Nderu for the 3rd Party

L. GACHERU

JUDGE

26/1/2023

