



Edco Afric Limited & another v Kirigia & 2 others (Environment & Land Case 704 of 2011) [2023] KEELC 19343 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEELC 19343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 704 OF 2011**

**JO MBOYA, J
AUGUST 10, 2023**

BETWEEN

EDCO AFRIC LIMITED 1ST PLAINTIFF

DR. MWANIKI DINGURI NICK 2ND PLAINTIFF

AND

BONIFACE NDEGE KIRIGIA 1ST DEFENDANT

SPERANZA MUTHONI NDEGE 2ND DEFENDANT

REGISTRAR OF TITLES 3RD DEFENDANT

JUDGMENT

Introduction And Background

1. The instant suit was filed by and on behalf of the two Plaintiffs, wherein same sought for a plethora of reliefs pertaining to and concerning ownership and transfer of L.R No's 7741/348 and 7741/349, Kitsuru, within the City of Nairobi.
2. However, during the pendency of the suit, the 2nd Plaintiff herein passed on and no substitution was carried out and undertaken on his behalf. Be that as it may, on the 2nd November 2021, Learned counsel for the Plaintiffs' sought for and obtained an order marking the suit on behalf of the 2nd Plaintiff as having abated.
3. Back to reliefs sought at the foot of the Plaint dated the 13th December 2011, wherein the Plaintiffs, including the Deceased herein, had sought for the following reliefs;
 - i. An Injunction to permanently restrain the Defendants whether by themselves, their servants, employees and/or agents from selling, alienating, transferring



and/or in any other manner whatsoever dealing in title LR. No's 7741/348 and 349; other than transfer to the Plaintiffs and or their nominees.

- ii. An order to cancel the transfer registered on 29th December 2006; in favor of the 1st and 2nd Defendants and which order to be effected by the 3rd Defendant.
 - iii. Rectification of the Register to have the 1st Plaintiff or its nominee as the registered proprietor.
 - iv. A declaration that the 1st Plaintiff is the Legal Proprietor of L.R Nos.7741/348 and 349- Kitusuru.
 - v. The sum of Kes.50 Million in Special damages being the market price of the property at the time of filing this suit and/or the market price at the time of determination of this suit.
 - vi. Costs of the suit and interests on all awards.
 - vii. Any other/further reliefs that the honorable court may deem fit to grant.
4. Upon being served with the Plaint and Summons to enter appearance the 1st and 2nd Defendants duly entered appearance and thereafter filed their respective Statement of Defense. For good measure, the 1st Defendant filed Statement of Defense dated 15th July 2012 and whereas the 2nd Defendant also filed a statement of defense of even date.
 5. Nevertheless, the 3rd Defendant herein neither entered appearance nor filed any statement of defense.
 6. Be that as it may, upon the close of the pleadings herein the subject matter underwent the requisite pre-trial directions, wherein the Plaintiffs' and the 1st and 2nd Defendants confirmed having filed and exchanged their respective List and Bundle of documents; as well as the requisite witness statements.
 7. Furthermore, it is instructive to point out that even though the instant suit was filed on the 13th December 2011, the hearing in respect of the suit did not commence until on the 2nd of November 2021. Quit clearly, the instant suit took a great deal of time before same could come up for hearing.

Evidence By The Parties

a.Plaintiff's Case

8. The Plaintiffs' case revolves and/or gravitates around the Evidence of five witnesses, namely, Kwame Mwaniki, Gildine Karani Gatwiri, Julius Muvea Muhinde, Jacob Gitonga Kithaka and Elizabeth Magondu, who testified as PW1, PW2, PW3, PW4 and PW5, respectively.
9. It was the testimony of PW1 that same is a son of the late Dr. Mwaniki Dinguri Nick, now deceased, who was the 2nd Plaintiff herein. Further and in addition, the witness also pointed out that same is a Director of the 1st Plaintiff company.
10. Additionally, the witness averred that by virtue of being a director of the 1st Plaintiff company, same is therefore knowledgeable of and conversant with the facts pertaining to and concerning ownership of the properties known as L.R No. 7741/348 and 7741/349, respectively, which are the suit properties at the foot of the instant dispute.
11. It was the further testimony of the witness that the suit properties herein belonged to and were registered in the name of the 1st Plaintiff company; who remained as the lawful, legitimate and registered proprietor thereof up to and including the 29th December 2006.



12. On the other hand, the witness testified that on or about the 29th December 2006, the 3rd Defendant herein, who is the Registrar of Titles purported to effect a transfer pertaining to and concerning the suit properties, whereupon the suit properties were transferred to and registered in the names of the 1st and 2nd Defendants, respectively.
13. Nevertheless, the witness averred that the impugned transfer and registration of the suit properties to and in favor of the 1st and 2nd Defendants, respectively, was anchored and/or informed by a fraudulent Sale Agreement dated the 12th September 2006, which was purported to have been executed by and on behalf of the 1st Plaintiff. However, the witness added that the 1st Plaintiff herein never authorized the sale and or transfer of the suit property to and in favor of the 1st and 2nd Defendants respectively.
14. Further and in any event, the witness testified that the suit properties had hitherto been charged to and in favor of National Bank of Kenya Ltd for purposes of procuring and obtaining funding to a company known as Coda & Partners (Africa) Ltd; which is a sister company to the 1st Plaintiff herein.
15. On the other hand, the witness testified that the 1st Plaintiff company also did not make any Resolution to mandate and or authorize the sale of the suit properties to and in favor of the 1st and 2nd Defendants respectively. Similarly, the witness added that the 1st Plaintiff also did not make any resolution to facilitate the Discharge of Charge of the facility and the consequential transfer of the suit property whatsoever.
16. Notwithstanding the fact that the 1st Plaintiff company did not make any resolution to authorize the sale and/or transfer of the suit properties to and in favor of the 1st and 2nd Defendants; the 1st and 2nd Defendants herein fraudulently caused the transfer of the suit property to and on their favor, albeit without the authority of the First Plaintiff.
17. It was the further testimony of the witness that at the time of the impugned transaction, the 1st Defendant herein was a Director of the 1st Plaintiff company; albeit holding no shares, whilst the 2nd Defendant is the wife of the 1st Defendant.
18. Further and in addition, the witness averred that at the time when the impugned sale and or transaction was being undertaken, the 2nd Plaintiff, who was a Director and shareholder of the 1st Plaintiff Company was admitted to Dallas Kidney Transplant Institute, in the United State of America (USA), with a kidney failure and by reason of such admission, the 2nd Plaintiff herein could not have executed and/or signed the impugned sale agreement on behalf of the 1st Plaintiff.
19. In any event, the witness testified that the 1st and 2nd Defendants herein were privy to and aware of the fact that the 2nd Plaintiff was admitted in Hospital, but nevertheless proceeded to and caused the suit properties to be transferred to and registered in their names. In this regard, the witness added that the transfer and subsequent registration of the suit property to and in favor of the 1st and 2nd Defendants was informed by fraud.
20. Additionally, the witness testified that the 1st Defendant herein who was a Director of the 1st Plaintiff influenced and manipulated one, Mrs. Elizabeth Magundu; and thereafter procured the transfer and registration of the suit properties albeit on the basis of manipulation.
21. Other than the foregoing, the witness also averred that the 1st and 2nd Defendants also colluded with Bank Officials, the Advocates to the transaction and the Land officers with a view to procuring the discharge of charge, albeit without payment and thereafter falsely procuring the transfer and ultimate registration of the suit properties in their names.



22. Be that as it may, the witness added that upon the transfer and registration of the suit properties in their names, the 1st and 2nd Defendants purported to enter onto the suit properties and same are now threatening to commence development thereof, which activities would interfere with the 1st Plaintiff's ownership rights to and in respect of the suit properties.
23. Nevertheless, the witness reiterated that the transfer and registration of the suit properties to and in favor of the 1st and 2nd Defendants, respectively, was procured and obtained by fraud and illegality. In this regard, the witness added that the signature of the 2nd Plaintiff, which was affixed to the sale agreement dated the 12th September 2006; was therefore a forgery.
24. Other than the foregoing, the witness alluded to the Witness Statement dated the 8th October 2020; and thereafter sought to adopt and rely on same as his Evidence in chief. Consequently and in this regard, the witness statement dated the 8th October 2020; was duly admitted as the Evidence in chief of the witness.
25. Furthermore, the witness also alluded to a List and Bundle of Documents dated the 13th December 2011, containing 33 Documents; which the witness sought to adopt and rely on as part of the Plaintiff's Exhibits. For good measure, the documents at the foot of the named List of Documents were thereafter admitted as Exhibits P1 to P33, respectively.
26. Additionally, the Witness also referred to a Further List and Bundle of Documents dated the 8th October 2020; containing 3 Documents and in this regard, the Witness sought to adopt and rely on the named Documents. Instructively, the documents at the foot of the List of documents dated the 8th October 2020; were thereafter produced and admitted as Exhibits P34 to P36, respectively.
27. Other than the foregoing, the witness referred to a Further/Supplementary List of Documents dated the 17th December 2020; and same sought to produce the documents thereunder.
28. For good measure, the documents at the foot of the Further/Supplementary List of Documents were produced and admitted in Evidence as Exhibit P37 to P40, respectively.
29. On cross examination, the witness herein admitted and conceded that all the documents which same has produced and tendered before the Honourable court were within the possession and custody of the 1st Plaintiff company at all material times prior to and before the 13th December 2011.
30. In addition, the witness admitted that the documents at the foot of page 67 of the Plaintiffs trial bundle is a Letter on the Letter- head of Coda & Partners, which is a precursor of the 1st Plaintiff herein.
31. It was the further evidence of the witness that the document in question was a Letter of instructions by the Company to the Companies advocate pertaining to and concerning the sale of the properties. In any event, the witness added that the Letter in question was addressed to the firm of M/s Kamotho & Maiyo Advocates.
32. Other than the foregoing, the witness averred that the Letter in question, which was addressed to M/s Kamotho & Maiyo Advocates; also identifies the properties at the foot of the instructions. For good measure, the witness admitted that the properties at the foot of the Letter under reference are the properties which are under dispute.
33. Whilst still under cross examination, the witness admitted that there was another Letter which was generated by the First Plaintiff's advocates to the 1st Plaintiff company and which forwarded the Draft Agreement. In this respect, the witness intimated to the Honourable Court that the Letter under reference enclosed the Draft Sale Agreement for purposes of necessary action by the 1st Plaintiff.



34. Additionally, the witness testified that the Sale Agreement was subsequently signed and/or executed and in this respect, the witness confirmed that there were various signatures appearing at the execution section/segment of the Sale Agreement. In this respect, the witness pointed out that there was a signature which looked like the signature of the 2nd Plaintiff.
35. Be that as it may, the witness clarified that he was not able to confirm and/ or deny whether the impugned signature belonged to the 2nd Plaintiff or otherwise.
36. Further and in addition, the witness also pointed out that there was a transfer document, which was executed on the execution segment. In this respect, the witness also pointed out that the transfer in question also related to the properties which are the subject of dispute before the Honourable court.
37. Additionally, the witness testified that the Transfer Instrument contained a signature which looked like that of the 2nd Plaintiff, but nevertheless the witness indicated that same was unable to confirm whether the signature indeed belonged to the 2nd Plaintiff.
38. Besides, the witness also pointed out that the Transfer Instrument which has been produced in Evidence on behalf of the Plaintiff herein indicate that same was drawn by the firm of M/s Kamotho Maiyo & Mbatia Advocates.
39. Further and in addition, the witness admitted that the Bank Statement which have been produced before the Honourable court on behalf of the Plaintiff belonged to the Plaintiff company. In addition, the witness also admitted that the stated Bank Account also belongs to the Plaintiff company.
40. Furthermore, the witness herein also confirmed that on the 5th March 2007; there is an entry of Kes.6, 500, 000/= only, which was credited into the Account of the 1st Plaintiff company and consequently the Account's balance became Kes.9, 457, 758.74/= only.
41. Whilst under further cross examination, the witness also testified that the Plaintiff herein has also tendered and produced before the Honourable court a Letter which was written by M/s Kamotho Maiyo & Mbatia Advocates; and which was addressed to National Bank of Kenya Limited; and which Letter was also copied to the 1st Plaintiff company.
42. Other than the foregoing, the witness admitted that the 1st Plaintiff herein received the sum of Kes.6, 500, 000/= only, from the 1st Defendant. However, the witness denied and disputed that the sale transaction was initiated by the 1st Plaintiff or at all.
43. Notwithstanding the foregoing, the witness also admitted that the homestead of the 2nd Plaintiff, now deceased, was within the proximity of the suit properties. For good measure, the witness admitted that the home of the 2nd Plaintiff, now deceased, was barely 200 meters away.
44. Furthermore, the witness also admitted that currently there is a structure standing on the suit Property and that the suit property is fenced on one side.
45. Whilst under further cross examination, the witness testified that the 2nd Plaintiff, now deceased, was not within the Country, at the time when the Sale transaction pertaining the suit Property was carried out and or undertaken. In this respect, the witness reiterated that the 2nd Plaintiff, now deceased, was at the material point in time admitted in Hospital in the United State of America (USA), wherein same remained until his return on the 3rd March 2007.
46. The Second witness who testified on behalf of the Plaintiff was one, Gildine Karani Gatwiri. Same testified as PW2.



47. It was the testimony of the witness that same is a Land Registrar currently attached to the office of the Chief Land Registrar, Ardhi House, Nairobi. Furthermore, the witness added that by virtue of her portfolio, same is charged with the custody of various records pertaining to and or concerning Landed properties within the city of Nairobi.
48. Additionally, the witness testified that same is knowledgeable of and privy to the registration status pertaining to L.R No's 7741/348 and 7741/349, respectively. In this regard, the witness added that the two Properties are currently registered in the names of the 1st and 2nd Defendants, respectively.
49. On cross examination, the witness pointed out that the suit properties were initially owned by a company known as M/s Continental Properties Ltd; thereafter same were charged to and in favor of National Bank of Kenya Ltd.
50. Additionally, the witness testified that the charge in favor of National Bank of Kenya Limited was subsequently discharged on the 29th December 2006. On the other hand, the witness also confirmed that the fourth entry in respect of the suit properties relates to the transfer and registration thereof in favor of the 1st Plaintiff herein.
51. The Third witness called by the Plaintiff was one Julius Muvea Muhinde. For clarity, same testified as PW3.
52. It was the testimony of the witness that same is a Certified Public Secretary and Certified Public Accountant, currently trading under the name and style of M/s Alms Registrars. Furthermore, the witness also added that his organization was appointed and/or retained as the Company Secretary for and on behalf of the 1st Plaintiff herein.
53. Other than the foregoing, the witness alluded to his witness statement dated the 28th December 2020; and thereafter sought to adopt and rely on the contents of the named Witness Statement.
54. On cross examination, the witness herein stated that same is a Certified Company Secretary and in any event; same held a current practicing certificate for the year 2021/2022. Nevertheless, the witness admitted that same has neither tendered nor produced a copy of the Current Certificate before the Honourable court.
55. Further and in addition, the witness also stated that M/s Alms Registrars is also registered, but nevertheless, the witness admitted that he has not tendered a copy of the Certificate of Registration of the said organization.
56. Whilst still under cross examination, the witness stated that M/s Alms Registrars was appointed and retained as the company secretary for M/s Continental Properties Ltd in 1996. Nevertheless, the witness admitted that yet again same has not produced before the Honorable court a copy of the Letter by M/s Continental Properties Ltd, which appointed his organization as the company secretary.
57. The 4th witness who testified on behalf of the Plaintiff was Jacob Gitonga Kithaka. For good measure, same testified as PW4.
58. It was the testimony of the witness that same is a registered valuer current practicing with M/s Gimco Ltd as a valuer. Furthermore, the witness averred that M/s Gimco Ltd received instructions from the 1st Plaintiff herein to undertake valuation over and in respect of the suit properties.
59. Additionally, the witness averred that upon receipt of the instructions by and on behalf of the 1st Plaintiff, the company proceeded to and undertook valuation exercise over and in respect of the suit properties; and thereafter same prepared a Valuation Report, indicating the Market values thereof.



60. Other than the foregoing, the Witness alluded to the Witness Statement dated the 8th October 2020; and thereafter sought to adopt and rely on the contents of the witness statement. Instructively, the witness statement dated the 8th October 2020; was therefore admitted and constituted as the Evidence in chief of the witness.
61. On cross examination, the witness averred that the registered proprietors/owners of the suit properties neither retained nor instructed same to undertake valuation in respect of the suit properties. In any event, the witness added that at the time when same undertook the valuation over and in respect of the suit properties, the properties were not developed. In this regard, the witness pointed out that same just entered upon and thereafter undertook the valuation.
62. The last witness who testified on behalf of the 1st Plaintiff was Elizabeth Magondu. For clarity, same testified as PW5.
63. It was the testimony of the witness that same was employed by M/s Coda International Ltd in the year 1984. Instructively, the witness stated that same was employed as a Senior Accountant, but latter on promoted to be the Administration Manager of the Company.
64. On the other hand, the witness alluded to a witness statement dated the 8th October 2020; and thereafter sought to adopt and rely on the contents of the Witness statement. For good measure, the contents of the witness statement dated the 8th October 2020; was thereafter admitted and adopted as the Evidence in chief of the witness.
65. On cross examination, the witness admitted that the documents produced by the First Plaintiff and contained at page 54 of the Plaintiff's bundle confirms that she (the witness) executed the document as the Company Secretary of the 1st Plaintiff.
66. Further and in addition, the witness also admitted that at the top of the Resolutions under reference, it is also shown that the witness herein was indeed the Company Secretary. In addition, the witness added that same also signed various minutes on behalf of the 1st Plaintiff and indicated herself as the company secretary.
67. In respect of the minutes dated the 17th August 2007, the witness admitted that same signed the said minutes as the company secretary. For good measure, the witness acknowledged that various documents which were produced on behalf of the First Plaintiff reflects that same was the company secretary.
68. Nevertheless, the witness averred that she was not the company secretary of the 1st Plaintiff. To the contrary, the witness averred that she signed the minutes as the person/secretary taking the minutes of the meeting. For good measure and whilst under further cross examination, the witness reiterated that she is not the company secretary of the 1st Plaintiff.
69. Other than the foregoing, the witness admitted that the same generated and wrote a Letter to the Company's advocates, namely, M/s Kamotho & Maiyo advocates. In this regard, the witness confirms that same signed and dispatched the Letter under reference. In any event, the witness added that the contents of the Letter which was addressed to the Company's advocates were correct.
70. Additionally, the witness also testified that same also wrote to the Company's advocate and instructed the Company's advocate to issue a Professional undertaking to and in favor of M/s National Bank of Kenya Ltd; for purposes of securing the release of the title documents relating to the suit properties, which at the material point in time, were charged to and in favor of M/s National Bank of Kenya Limited.



71. Whilst under further cross examination, the witness testified that same executed the sale agreement as well as the Transfer Instrument in respect of the suit properties. However, the witness contended that she did not see/witness the 2nd Plaintiff execute the Sale Agreement or the Transfer Instrument.
72. Further and in addition, the witness admitted and acknowledged that the seal of the Plaintiff company was thereafter affixed to both the Sale Agreement and the Transfer Instrument. In any event, the witness admitted that the seal of the company was affixed in her presence.
73. On the other hand, the witness herein also admitted and acknowledged that the Plaintiff's advocates, who have dealt with the transaction over and in respect of the suit property raised a Professional Fee Note; and thereafter the fee note was paid. For good measure, the witness admitted that she is the one who signed the cheque towards the payment of the Professional fees, which was paid to and in favor of M/s Kamotho & Maiyo Advocates.
74. Whilst under further cross examination, the witness testified that however, during the period of the execution of the sale agreement and the transfer instrument, the 2nd Plaintiff was not within the country. In addition, the witness averred that the 2nd Plaintiff was away in the United States of America seeking medical treatment.
75. Furthermore, the witness averred that the 2nd Plaintiff underwent a kidney transplant in the United States of America (USA), on or about the 21st September 2006; and same only returned to the country on the 3rd March 2007.
76. Additionally, the witness herein confirmed that the 1st Plaintiff company received the sum of Kes.6, 500, 000/= only, from the 1st Defendant herein. For good measure, the witness clarified that the cheque was made to and in favor of National Bank of Kenya Ltd.
77. Other than the foregoing, the witness averred that when the 2nd Plaintiff returned to the country, same (witness) informed him (2nd Plaintiff) of the sale of the suit properties. However, the witness pointed out that when she informed the 2nd Plaintiff of the sale of the suit properties, the 2nd Plaintiff was surprised and thereafter informed her (witness) that he did not execute the transfer instrument.
78. Be that as it may, the witness added that subsequently the company held a Board meeting on the 1st February 2008; wherein the resignation of the 1st Defendant was discussed and approved. However, the witness averred that the issues pertaining to and or concerning the sale of the two properties was neither raised nor canvassed during the said meeting.
79. With the foregoing testimony, the First Plaintiff's case was duly closed.

b.1st And 2nd Defendants' Case:

80. The 1st and 2nd Defendants' case revolves and or gravitates around the Evidence of Three witnesses, namely, Boniface Ndege Kirigia, Dr. Speranza Muthoni Ndege and Mr. Kenneth Kamotho Waiganjo, who testified as DW1, DW2 and DW3, respectively.
81. It was the testimony of DW1, that same is a Consultant with Royal Associates and furthermore; that same is conversant with and knowledgeable of the facts pertaining to and concerning the dispute before the Honourable court.
82. It was the further testimony of the witness that the 2nd Defendant herein is his wife and that both himself and the 2nd Defendant are currently registered as the proprietors of the suit properties, namely, L.R No's 7741/348 and 7741/349, respectively.



83. Additionally, the witness testified that the suit properties were hitherto registered in the name of the 1st Plaintiff company who entered into and executed a lawful Sale Agreement dated the 12th September 2006. Furthermore, the witness added that the suit properties were ultimately transferred to and registered in the names of the 2nd Defendant and himself on the 29th December 2006.
84. Other than the foregoing, the witness averred that the sale transaction over and in respect of the suit properties was facilitated by and on behalf of the 1st Plaintiff and that various instructions to and in favor of the transaction advocates, were issued and disseminated by M/s Elizabeth Magondu, who was the 1st Plaintiff's company secretary.
85. Additionally, the witness alluded to the witness statement dated the 29th January 2021; and thereafter sought to adopt and rely on the witness statement. In this regard, the witness statement was thereafter admitted and constituted as the Evidence- in chief of the witness.
86. On the other hand, the witness alluded to a List and Bundle of Documents dated the 6th July 2021; and thereafter sought to tender and produce same as Exhibits before the Honourable Court. For good measure, the documents at the foot of the List dated the 6th July 2021, were admitted and constituted and Defense Exhibits D1 to D45, respectively.
87. On cross examination, the witness testified that the 2nd Defendant and himself duly executed both the Sale agreement, dated the 12TH day of September 2006; as well as the transfer instrument relating to the suit properties.
88. In addition, the witness also testified that the sale agreement and the transfer instrument were also executed by and on behalf of the First Plaintiff. Furthermore, the witness added that the sale agreement was executed by both the 2nd Plaintiff, now deceased, and Elizabeth Magondu, respectively.
89. Other than the foregoing, the witness averred that the signatures of the 2nd Plaintiff and that of Elizabeth Magondu, were duly attested by an advocate.
90. Whilst under further cross examination, the witness testified that same was conversant with the terms of the Memorandum of Association and the Article of Association of the 1st Plaintiff company. However, the witness added that same is not aware of whether the company generated/made a resolution to sell the suit properties.
91. Additionally, the witness stated that though he was a Director of the 1st Plaintiff company, same however did not sign the sale agreement or the transfer instrument on behalf of the 1st Plaintiff company. To the contrary, the witness pointed out that the sale agreement and the transfer instrument were signed by the other Directors of the 1st Plaintiff company.
92. Other than the foregoing, the witness testified that the 1st Plaintiff company, through the Company Secretary was the one who instructed the firm of M/s Kamotho Kimaiyo & Mbatia Advocates; to proceed with the sale of the suit properties. In this regard, the witness alluded to the Letter dated the 2ND August of 2006.
93. In answer to a question concerning the status of Elizabeth Magondu, the witness herein indicated that same was the company secretary of the 1st Plaintiff company.
94. Additionally, the witness herein testified that the balance/final payment towards and in respect of the suit properties was made to and in favor of Coda International Ltd. In any event, the witness clarified that the payment at the foot of the balance of the purchase price was made on the 9th March 2007.
95. The second defense witness was Dr. Speranza Muthoni Ndege. Same testified as DW2.



96. It was the testimony of the witness that same is the 2nd Defendant in respect of the subject matter and that she is also conversant with the facts pertaining to and concerning the dispute before the Honourable court. In addition, the witness added that same is the wife of the 1st Defendant.
97. Other than the foregoing, the witness testified that the 1st Defendant and herself entered into a sale agreement with the 1st Plaintiff herein pertaining to and concerning the sale of L.R No's 7741/348 and 7741/349, respectively.
98. Furthermore, the witness averred that thereafter the sale agreement was reduced into writing and same was executed by the sellers as well as the purchasers, respectively. For good measure, the witness alluded to the sale agreement dated the 12th September 2006.
99. It was the further testimony of the witness that thereafter, the suit properties were transferred to and registered in favor of the 1st and 2nd Defendants respectively. In this respect, the witness alluded to the transfer and registration which took effect on the 29th December 2006.
100. Other than the foregoing, the witness alluded to the witness statement dated the 29th January 2021; and which statement, the witness sought to adopt and rely on as her Evidence in chief. In this regard, the witness statement was duly admitted and constituted as the Evidence in chief on behalf of the witness.
101. Additionally, the witness alluded to the List and Bundle of documents dated the 6th July 2021; and sought to adopt and rely on the named documents. Instructively, the documents alluded to by the witness are the same as the ones which had hitherto been produced and admitted as D1 to D45, at the instance of DW1.
102. On cross examination by Learned counsel for the Plaintiff, the witness testified that same became aware and knowledgeable of the fact that the suit properties were on sale through her husband, namely, the 1st Defendant herein.
103. Additionally, the witness testified that thereafter a sale agreement was crafted by and on behalf of the sellers and themselves through the law firm of M/s Kamotho, Maiyo & Mbatia Advocates.
104. Whilst under further cross examination, the witness averred that the sale agreement and the transfer instrument were signed by and on behalf of the 2nd Plaintiff and that same believed that it was the 2nd Plaintiff who signed the transaction documents.
105. Nevertheless, the witness averred that same was not aware whether the 2nd Plaintiff was out of the country at the time when the transaction documents, namely, the Sale Agreement and the Transfer Instrument, were signed.
106. The last witness who testified on behalf of the defense was Kenneth Kamotho Waiganjo. For clarity, same testified as DW3.
107. It was the Evidence of the witness that same is an advocate of the High Court of Kenya, with 38 years of experience. In addition, the witness also pointed out that same is familiar and conversant with the facts of the instant matter.
108. It was the further testimony of the witness that same was also conversant and knowledgeable of the Plaintiffs' in respect of the instant matter. In particular, the witness averred that same hitherto acted for the 1st and 2nd Plaintiffs in various transactions. For good measure, the witness averred that the 1st and 2nd Plaintiffs were his long-standing clients.



109. Further and in addition, the witness herein testified that other than the various transactions in respect of which same had acted for the 1st and 2nd Plaintiffs, the 2nd Plaintiff was also a long-time friend of the witness. For coherence, the witness averred that same had a deep relationship/friendship with the 2nd Plaintiff herein. Instructively, the witness testified that he used to visit the 2nd Plaintiff variously.
110. In respect of the subject matter before the Honourable court, the witness testified that his law firm, namely, M/s Kamotho, Maiyo & Mbatia Advocates; were retained by the 1st Plaintiff herein to act as the transaction advocate pertaining to and in respect of the sale of the suit properties herein. Furthermore, the witness averred that pursuant to the instructions under reference, same proceeded to and crafted the requisite sale agreement, which same forwarded to the 1st Plaintiff for necessary comments and execution.
111. Additionally, it was the evidence of the witness that the sale agreement was duly executed by and on behalf of the respective Parties, namely, the vendors and the purchasers; and thereafter same was returned to him for further action.
112. Other than the foregoing averments, the witness alluded to the witness statement the 10th February 2020; and thereafter sought to adopt and rely on the contents of the witness statement under reference. In this respect, the witness statement together with the various Documents alluded to in the witness statement were thereafter admitted and constituted as the Evidence in chief of the witness herein.
113. For good measure, the documents alluded to in the witness statement of the witness were formally admitted and marked as Exhibits D49 to D63, respectively.
114. Other than the foregoing, the witness averred that at the conclusion of the transaction, namely, the sale and transfer of the suit properties; his law firm was duly paid the requisite professional fees by the First Plaintiff herein.
115. On cross examination, the witness pointed out that in respect of the sale transaction, same acted for both the sellers and the purchasers. In any event, the witness added that prior to acting for both the sellers and the purchasers in respect of the sale transaction, same duly advised the respective Parties as pertains to their legal rights accordingly.
116. Additionally, it was the testimony of the witness that same knew the Directors of the 1st Plaintiff. Nevertheless, the witness admitted that prior to undertaking the transaction relating to the sale of the suit properties, same did not undertake a search at the Companies registry, to ascertain and/or authenticate the Directors of the 1st Plaintiff.
117. Further and in addition, the witness averred that same is aware of the sale agreement dated the 12th September 2006; which the witness confirmed was crafted and drawn by his firm.
118. In answer to a question as to whether same procured and obtained resolutions of the company prior to commencing the sale transaction, the witness stated that he could not remember. However, the witness added that he believed that there was such a resolution authorizing the sale of the suit properties.
119. Whilst under further cross examination, the witness testified that same did not attest the execution of the sale agreement by and on behalf of the Parties. In this regard, the witness clarified that the sale agreement was crafted and thereafter forwarded to the company secretary of the 1st Plaintiff company to facilitate execution and sealing of the sale agreement on behalf of the 1st Plaintiff/vendor.
120. In addition, the witness also averred that thereafter the sale agreement was returned to him duly executed and sealed and thereafter affixed his signature in attestation. Nevertheless, the witness averred



that prior to the execution of the sale agreement and transfer instrument, same spoke to the 2nd Plaintiff, now deceased, who confirmed the sale of the two properties.

121. Furthermore, the witness added that the 2nd Plaintiff had to sign and execute the sale agreement twice because the first copy had a mistake. For good measure, the witness clarified that the mistake related to the signing of the agreement.
122. Finally, the witness stated that at the time when his law firm was retained to undertake the transaction relating to the suit properties, the properties in question were charged to and in favor of National Bank of Kenya. In this regard, the witness added that he was obliged to and indeed issued a Professional undertaking, on behalf of the First Plaintiff, to facilitate the discharge of the titles of the suit properties, for purposes of the conveyance.
123. With the foregoing testimony, the 1st and 2nd Defendants' case was duly closed.

Submissions By The Parties:

a. Plaintiff's Submissions

124. The Plaintiff's herein filed two sets of written submissions, namely, the maiden written submissions dated the 30th May 2023; and the Rejoinder submissions dated the 3rd July 2023; wherein the Plaintiff has raised, highlighted and amplified four (4) pertinent issues for consideration by the Honourable court.
125. Firstly, Learned counsel for the Plaintiff has submitted that the 1st and 2nd Defendant did not legally and or lawfully acquire and or obtain valid title to and in respect of the suit properties. In this respect, Learned counsel for the Plaintiff has invoked the provisions of Section 3(3) of the [Law of Contract Act](#), Cap 23 Laws of Kenya, wherein same contends that a valid sale agreement requires the signatures of the Parties thereto to be attested by a witness who is present when the contract was being signed and not otherwise.
126. Additionally, Learned counsel for the Plaintiff has submitted that as pertains to the sale agreement dated the 12th September 2006 and the transfer instrument dated the 30th November 2006, respectively, the signature of the 2nd Plaintiff was never attested by the attestator, namely, Mr. Kenneth Kamotho Waiganjo, in accordance with the law.
127. Instructively, Learned counsel for the Plaintiff submitted that the attesting witness, namely, Mr. Kenneth Kamotho Waiganjo admitted and acknowledged that the sale agreement and transfer instrument were never executed in his presence, but that the same documents were executed elsewhere before same were returned to him (attesting advocate).
128. Furthermore, Learned counsel for the Plaintiff has submitted that insofar as the attesting advocate did not witness the execution of the sale agreement and the transfer instrument, the purported attestation thereof was therefore in breach and violation of the provisions of Section 3(3) (b) of the [Law of Contract Act](#).
129. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on, inter-alia, the case of Jane Catherine K Karani versus Daniel Mureithi Wachira (2014)eKLR, Nyeri Teachers Investment Company Ltd versus Solio Ranch Ltd & Another (2015)eKLR, Hasham Lalji Properties Ltd versus Hassan K Koskey alias Jasan K Koskey (2021)eKLR and Eliud Moya Kariuki & 2 Others versus Mary Wanjiru Njenga & 4 Others (2019)eKLR, respectively.



130. Secondly, Learned counsel for the Plaintiff has submitted that the transfer and registration of the suit properties to and in favor of the 1st and 2nd Defendants, was procured and obtained by fraud and forgery.
131. In particular, Learned counsel for the Plaintiff has submitted that neither the sale agreement nor the transfer instrument was signed/executed by the 2nd Plaintiff, who was the Director and shareholder of the 1st Plaintiff company, either in the manner alleged or at all.
132. Further and in addition, the Counsel submitted that at the point in time when the sale agreement and the transfer instrument relating to the suit properties, were executed, the 2nd Plaintiff herein was outside the country. For good measure, Learned counsel pointed out that the 2nd Plaintiff was in the United States of America undergoing kidney transplantation and that same only returned to the country on the 3rd March 2007.
133. In the absence of the execution of the sale agreement and the transfer instrument by the 2nd Plaintiff, Learned counsel for the Plaintiff has contended that the impugned transaction was therefore fraudulent and thus the 1st and 2nd Defendants did not procure any lawful interests over the suit properties.
134. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on inter-alia the case of Fredrick Ongeru versus Jackline Kwamboka Nyang'wechi & 2 Others (2021)eKLR and Giriama Central Properties Associates & Property Management Ltd versus Ayub Shero Baluchi & 2 Others (2022)eKLR, respectively, to underscore the position that insofar as the 2nd Plaintiff was outside the country, there is no way that same could have executed the impugned sale agreement and the transfer instrument, whatsoever.
135. In any event, Learned counsel for the Plaintiff has submitted that the evidence that the 2nd Plaintiff was outside the country at the point when the sale agreement and the transfer instrument were executed, has neither been disputed nor controverted by the Defendants, whatsoever.
136. Thirdly, Learned counsel for the Plaintiff has submitted that the execution of the sale agreement and the transfer instrument by and on behalf of Elizabeth Magondu, was also a nullity and of no legal consequence. In this regard, Learned counsel has contended that the said Elizabeth Magondu, was not the Company secretary of the 1st Plaintiff company and therefore same was not seized of the requisite capacity to execute any Legal instrument on behalf of the 1st Plaintiff.
137. It was the further submissions of the Learned Counsel that in any event, Elizabeth Magondu was merely a secretary and same was manipulated and/or coerced by the 1st Defendant to sign the sale agreement and the transfer instrument, leading to the transfer of the suit properties in favor of the 1st and 2nd Defendants.
138. Fourthly, Learned counsel for the Plaintiff has submitted that the impugned sale transaction, which culminated into the transfer and ultimate registration of the suit properties in favor of the 1st and 2nd Defendants, was carried out and/or undertaken without the requisite resolution by the 1st Plaintiff company.
139. To the extent that the 1st Plaintiff company neither generated nor made any resolution allowing the transfer and registration of the suit property in favor of the 1st and 2nd Defendants, Learned counsel for the Plaintiff has therefore submitted that the impugned transfer was therefore undertaken without the sanction and authority of the 1st Plaintiff company.



140. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on the holding in the case of Pan African Insurance Holding Ltd & Another versus Dickson Ngatia Gachuche (2021)eKLR.
141. Lastly, Learned counsel for the Plaintiff has submitted that the 1st and 2nd Defendants herein have neither disproved nor controverted the evidence placed on record by and on behalf of the Plaintiff herein. In particular, Learned counsel has contended that the Defendants have neither controverted the evidence that no resolution was generated by the Plaintiff to sanction the sale of the suit properties.
142. Additionally, Learned counsel for the Plaintiff has similarly contended that the 1st and 2nd Defendants have also not controverted the evidence that the 2nd Plaintiff did not execute the sale agreement and the transfer instrument, insofar as same was outside the country, at the time of the purported transaction.
143. Finally, Learned counsel for the Plaintiff has also contended that the Defendants herein have also not disputed the evidence tendered to the effect that Elizabeth Magondu, had not capacity to sanction the sale of the suit properties; let alone executing the impugned sale agreement and transfer instrument.
144. Based on the foregoing submissions, Learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Plaintiff has established and proved her case to the requisite standards and thus the court ought to grant prayers (b), (c), (d) and (f) enumerated at the foot of the Plaintiff dated the 13th December 2011.

b.1st And 2nd Defendants' Submissions:

145. The 1st and 2nd Defendants filed written submissions dated the 19th June 2023; and in respect of which same has raised, canvassed and highlighted four salient issues for consideration and ultimate determination by the Honourable court.
146. First and foremost, Learned counsel for the 1st and 2nd Defendants has submitted that the sale and subsequent transfer of the suit properties to and in favor of the 1st and 2nd Defendants, followed the lawful and legal process, commencing with the preparation of a sale agreement at the instance and request of the 1st Plaintiff company.
147. Furthermore, Learned counsel for the 1st and 2nd Defendants has submitted that it was the 1st Plaintiff's company secretary, Mrs. Elizabeth Magondu, who generated the letter dated 6th August 2006 and in respect of which same instructed the firm of M/s Kamotho, Mbaiyo & Mbatia Advocates to undertake the sale of the suit properties and in particular the preparation of the sale agreement on behalf of the parties, namely, the 1st Plaintiff as the vendor and the 1st and 2nd Defendants as the Purchasers, respectively.
148. Furthermore, Learned counsel for the 1st and 2nd Defendant has further submitted that upon the crafting of the sale agreement, same was duly executed by both the 2nd Plaintiff, now deceased, and the company secretary, namely, Elizabeth Magondu, the latter who thereafter proceeded to and affixed the seal of the company to the sale agreement and the instrument of transfer.
149. It was the further submissions of Learned counsel that the affixation of the seal of the 1st Plaintiff company on both the sale agreement and the instrument of transfer, confirmed that the transaction in question was sanctioned and authorized by the company and not otherwise.
150. Secondly, Learned counsel for the 1st and 2nd Defendants has submitted that following the execution and signing of both the sale agreement and the transfer instrument; same were duly and lawfully attested by DW3, namely, Mr. Kenneth Kamotho Waiganjo. In any event, Learned counsel has



- submitted that DW3 tendered evidence that prior to attesting the sale agreement and the transfer instrument; same spoke to the 2nd Plaintiff who confirmed and authorized the attestation.
151. Premised on the foregoing, Learned counsel for the 1st and 2nd Defendants has therefore submitted that the attestation of both the sale agreement and the instrument of transfer were done in accordance with the law and same were therefore binding on the company.
 152. Thirdly, Learned counsel for the 1st and 2nd Defendants has also submitted that the question of whether or not there was the resolution of the company authorizing the sale and ultimate transfer of the suit properties to and in favor of the 1st and 2nd Defendants; cannot now be invoked and/or used to defeat a lawful transaction that was instigated by and at the instance of the 1st Plaintiff company.
 153. In any event, Learned counsel has contended that having duly executed and sealed the Sale Agreement and the resultant transfer instrument, the 1st Plaintiff herein is estopped by the Doctrine of Estoppel from renegeing on the representations hitherto made to and acted upon by the 1st and 2nd Defendants herein.
 154. In support of the Doctrine of Estoppel, Learned counsel for the 1st and 2nd Defendants has invoked and cited the decision in the case of Central London Property Trust Ltd versus Hightrees House Ltd (1947) KB 130, Comb versus Comb (1951) 2KB 215 and First Assurance Company Ltd versus Seascapes Ltd (2008)eKLR, respectively.
 155. Lastly, Learned counsel for the 1st and 2nd Defendants has also submitted that the Plaintiffs herein have failed to established and/or proved the claim founded on fraud, either to the requisite standard or at all. In this regard, Learned counsel for the 1st and 2nd Defendants has submitted that it was incumbent upon the Plaintiff to place before the Honourable court cogent, credible and believable evidence to vindicate the claim of fraud.
 156. As concerns proof of the claim founded on fraud and the requisite standard thereto, learned counsel for the 1st and 2nd Defendants has cited and relied on, inter-alia, the case of Vijay Morjaria versus Nangsigh Madusigh Dabar & Another (2000)eKLR, Kinyanjui Kamau versus George Kamau (2015)eKLR and Ndolo versus Ndolo (2008) 1KLR, respectively.
 157. In view of the foregoing, Learned counsel for the 1st and 2nd Defendants has therefore implored the Honourable court to find and hold that the Plaintiff herein has failed to discharge the burden of proof cast upon same and having failed to do so, Learned counsel contends that the Plaintiff's suit therefore merits dismissal.

Issues For Determination

158. Having reviewed the Plaint filed by and on behalf of the Plaintiffs' herein and the Statement of Defense on behalf of the 1st and 2nd Defendants; and upon taking into account the evidence tendered by the Parties (oral and documentary); and finally upon consideration of the elaborate written submissions filed by the respective Parties; the following issues do arise and are thus worthy for determination;
 - i. Whether the suit by and on behalf of the Plaintiff herein touching on and/or anchored on the basis of the transfer which took place on the 29th December 2006; is statute barred or otherwise.
 - ii. Whether the Plaintiff herein has placed before the Honorable court credible and cogent evidence in proof of the plea of Fraud or otherwise.
 - iii. What reliefs, if any; ought to be granted.



ANALYSIS AND DETERMINATION

ISSUE NUMBER 1. Whether the suit by and on behalf of the Plaintiff herein touching on and/or anchored on the basis of the transfer which took place on the 29th December 2006; is statute barred or otherwise.

159. It is common ground that the Plaintiff herein is contesting the validity, legality and propriety of the sale agreement which was entered into and executed on the 12th September 2006; and the resultant transfer which was undertaken on the 29th December 2006, respectively.
160. For good measure, it is the Plaintiff's case that the sale agreement dated the 12th September 2006, which anchors the transfer and registration of the suit properties, to and in favor of the 1st and 2nd Defendants, was not signed and/or executed by the 2nd Plaintiff, now deceased, who was the director/shareholder in the Plaintiff company.
161. Further and in addition, PW1 averred that the 2nd Plaintiff, now deceased, went to the United States of America in 28th March 2006 and that same did not return to the country up to and including the 3rd March 2007. In this regard, it was contended that there was no way that the 2nd Plaintiff, now deceased, could have executed and/or signed the impugned sale agreement, either as alleged or at all.
162. Similarly, it was contended that insofar as the 2nd Plaintiff, now deceased, was outside the country between 28th March 2006 up to the 3rd March 2007, same would not have executed the impugned transfer instrument on the 30th November 2006 or at all.
163. Instructively, it was contended that having not executed the transfer instrument, the resultant transfer and registration of the suit property in favor of the 1st and 2nd Defendants which took place on the 29th December 2006; was therefore fraudulent and illegal.
164. Notably, the plea of fraud and illegality, which underpin the claim before the court touches on the sale agreement and the consequential transfer and registration of the suit properties in favor of the 1st and 2nd Defendants respectively. For coherence, it is important to recall and highlight the dates of the two instruments.
165. Having highlighted the dates of the two instruments, it becomes evident and apparent that the fraud, if any, that is alluded to indeed transpired and accrued at the very latest on the 29th December 2006, when the instrument of transfer was registered and thereby culminating into the transfer of the suit properties in favor of the 1st and 2nd Defendants.
166. In view of the foregoing, if the impugned transaction was undertaken without the knowledge and/or sanction of the 1st Plaintiff company; then it behooved the Plaintiffs herein to commence and originate the suit premised on fraud, illegality and forgery, (which constitutes the tort of fraud), within three years from the date of accrual of the cause of action.
167. In my humble view, the three years within which the Plaintiffs herein ought to have filed and or commenced the suit anchored on fraud are computed and/or reckoned from the 29th December 2006 and same would run to the 28th December 2009. In this regard, it is therefore imperative to underscore that the suit premised on fraud ought to have been filed at the very latest on or about on the 28th December 2009 and not otherwise.
168. For good measure, it is instructive to take cognizance of the provisions of Section 4(2) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.



169. For ease of reference, same is reproduced as hereunder;
- (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
- Provided that an action for libel or slander may not be brought after the end of twelve months from such date.
170. Further and in any event, it is not lost on the Honourable court that from the body of the Plaint, which has been filed by the Plaintiff, there is no averment and/or allegations that the fraud, if any, leading to the transfer and registration of the suit properties in favor of the 1st and 2nd Defendants, was concealed or otherwise discovered subsequent to the date of (sic) the transfer and registration of the suit properties.
171. Notably, if there were any such averments which is not the case, then the Plaintiffs herein would be entitled to invoke and apply the provisions of Section 26 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. However, I have clarified that there is no averment whatsoever in the body of the Plaint to show and or demonstrate that there was concealment of the acts and/or omissions, leading to the transfer and registration of the suit property in favor of the 1st and 2nd Defendants.
172. Consequently and for the avoidance of doubt, it was incumbent upon the Plaintiffs herein, if same, were suitably advised, to commence and lodge the suit premised on fraud in accordance with the stipulations of the law; and in particular, within the three-year period provided by dint of Section 4(2) of the *Limitation of Actions Act*.
173. Arising from the foregoing, it is my finding and holding that by the time the instant suit was filed on the 13th December 2011, the timeline for filing the suit based and premised of fraud had long lapsed and hence the suit was/is statutorily time barred. In this regard, the entire suit, is a nullity and incapable of revival and resuscitation.
174. As pertains to the legal implications of the limitation of actions, it is appropriate to take cognizance of the dictum of the Court of Appeal in the case of *Gathoni versus Kenya Co-operative Creameries Ltd*[1982] eKLR, where the court stated and observed as hereunder;
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done
175. Additionally, the Legal implications and consequences of Limitation of actions, was also canvassed, highlighted and elaborated upon by the Court of Appeal in the case of *Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) versus Rosaline Njeri Macharia & another* [2016] eKLR, where the court stated thus;
- “(33) 33] With regard to the third issue, namely whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose



security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the “suit” having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit. That answers the third issue.”

176. In this respect, I therefore come to the conclusion that the suit by and on behalf of the Plaintiffs and in particular the 1st Plaintiff, who is now the only Plaintiff, was statute barred by dint of Section 4(2) of The *Limitation of Actions Act*, Chapter 22 Laws of Kenya, by the time same was lodged and/or filed before the court.
177. Nevertheless, even assuming for the sake of arguments only, that the 2nd Plaintiff, now deceased, who was the director/shareholder of the 1st Plaintiff company, was not aware of (sic) the execution of the sale agreement and the instrument of transfer, pertaining to the sale and eventual transfer of the suit properties, same no doubt, was briefed and thus became aware of the transfer of the suit properties upon his return on the 3rd March 2007, if at all.
178. At this juncture, it is important to recall the evidence tendered by Elizabeth Magondu, PW5 whilst under cross examination by Learned Counsel for the 1st and 2nd Defendants. Instructively, same testified as hereunder;

“I did inform the 2nd Plaintiff of the sale of the suit properties. When I informed him of the sale, he was surprised and he informed me that he did not execute the transfer instrument. I don’t know whether the 2nd Plaintiff reported the matter to any police station.....the 1st Defendant ceased to be a director of the Plaintiff company. The issue of the sale of the two properties was not raised during the meeting of the company held on the 1st February 2008 (see minutes at page 54 of the Plaintiff’s bundle)”.
179. From the testimony of PW5, it is evident that the 2nd Plaintiff, now deceased (if same was no aware of the sale), became aware and/or was duly informed of the sale of the suit properties upon his return. In any event, the 2nd Plaintiff, now deceased was seized of the facts as at 1st February 2008, when the 1st Plaintiff held a Board meeting.
180. Even taking the second perspective, it would still transpire that the company, including the company’s directors/shareholder, was privy to the sale and transfer of the suit properties to the 1st and 2nd Defendants by the 1st February 2008.
181. Taking the latter date as the benchmark for computation of time, it would again transpire that the three-year duration for mounting a suit for fraud would lapse and/or stand extinguished by the 31st January 2010 or thereabouts.
182. Similarly, there is no gainsaying that whichever yardstick one applies for determining the duration within which the suit ought to have been filed; the conclusion becomes crystal clear and unmistakable. Instructively, the suit beforehand was time barred irrespective of the perspective applied and/or adopted, in determining the requisite Statutory duration.
183. Before departing from this particular issue, it is important to mention that despite the elaborate submissions filed by and on behalf of the Parties; none of the advocates addressed this pertinent issue, which certainly goes to the Jurisdiction of the Honourable Court.



184. Nevertheless, even though none of the Parties addressed and/or canvassed the question of Limitation of Actions, it is not lost on the court that insofar as same is a question of Jurisdiction, the Honorable court is at liberty to address same and to make a determination thereof. For good measure, a court of law cannot gloss over a pertinent issue and let it go, merely because the advocates and the Parties thereto skirted the issue.
185. For umpteenth time, I must reiterate that a court of law owes a duty to the Rule of law and the General administration of Justice and must therefore at all times rise to the occasion and to discharge its/ her mandate; in accordance with the law and *the constitution*. Instructively, ignorance of (sic) the law must not allow a court to circumvent a critical question which goes to the Jurisdiction of the court.
186. Further and in any event, the obtaining Jurisprudence pertaining to issues of law which have not been canvassed by the Parties is explicit and well beaten. In this respect, I beg to adopt and reiterate the dictum of the Court of Appeal in the case of Kenya Ports Authority versus Modern Holding (EA) Ltd (2017)eKLR, where the court stated and held thus;

“This Court in *Adero & Another V Ulinzi Sacco Society Limited* [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;

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2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.
6.
7.” (Our emphasis).

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself

- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

(See *All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others*, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these



authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing).

187. In a nutshell, it is immaterial that the question of Limitation was neither ventilated nor canvassed by either of the Parties. Suffice it to point out that same arises by implication from the pleadings placed before the Honourable court and thus warranted examination, appraisal and due adjudication.

Issue Number 2. Whether the Plaintiff herein has placed before the Honorable court credible and cogent evidence in proof of the plea of Fraud or otherwise.

188. Apart from the question of Limitation of Actions, which has been canvassed and addressed in terms of the preceding paragraphs, it is imperative to recall that the gravamen of the Plaintiff's case is that the sale and transfer of the suit properties to and in favor of the 1st and 2nd Defendants, respectively, was informed by fraud and illegality.

189. Furthermore, having alluded to fraud and illegality, the Plaintiff has thereafter supplied various particulars of what is deemed to be fraud and misrepresentation on the part of the 1st and 2nd Defendants.

190. Additionally, the Plaintiff's herein has gone ahead and made some sweeping allegations wherein it is stated inter-alia as hereunder;

“The two Defendants colluded with Bank officials, the advocates to the transaction, and the lands office to purport to discharge the charge without payment, to witness the false sealing of the agreement for sale and to register the discharge of charge and ultimately the forged transfer of the subject properties”

191. Invariably, I beg to state and underscore that the Plaintiff has indeed supplied various particulars of the fraud, collusion, forgery and misrepresentation, which are being relied upon to impeach and invalidate the transaction leading to the transfer of the suit properties.

192. However, it is imperative to underscore that it is not enough to implead fraud and thereafter supply the requisite particulars of fraud against the adverse party. For good measure, the plea of fraud and the enumeration of particulars of fraud, is just the first steps towards and in the process of proving fraud.

193. Notably, having pleaded and supplied particulars of fraud, the Plaintiff herein was called upon to tender and/or placed before the Honorable court cogent and credible evidence to demonstrate and establish the plea/charge of fraud.

194. Instructively, the position of the law as pertains to the plea of fraud, the necessity of particular and the requirement to tender cogent and credible evidence; was elaborated upon by the Court of Appeal in the case of *Kuria Kiarie & 2 others versus Sammy Magera* [2018] eKLR, where the court succinctly stated and observed as hereunder;

25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be



distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows;-

...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

195. Having laid the foregoing background, it is now appropriate to interrogate the facts and circumstances relating to the subject matter, with a view to discerning whether fraud was established/proved or otherwise.
196. To begin with, Elizabeth Magondu was constituted as the company secretary and same variously signed and executed a plethora of documents on behalf of the 1st Plaintiff herein in her capacity as the company secretary.
197. For good measure, the said Elizabeth Magondu signed and executed a charge in favor of National Bank of Kenya Ltd wherein M/s Continental Properties Ltd, which is the precursor of the 1st Plaintiff company was obtaining a Banking facility. In this respect, it is appropriate to take cognizance of Exhibit D41, contained at pages 103 to 123 of the Defendant’s bundle.
198. Secondly, the same Elizabeth Magondu also signed the Letter of instructions addressed to M/s Kamotho, Maiyo & Mbatia Advocates dated the 2nd August 2006; 3rd August 2006 and 14th August 2006, wherein same was giving instructions to the advocate for the 1st Plaintiff to undertake the transaction relating to the sale of the suit properties to the 1st and 2nd Defendants. Instructively, the said Elizabeth Magondu, espoused and confirmed that she was the Company secretary.
199. Thirdly, the said Elizabeth Magondu, is reflected at the foot of minutes of the 1st Plaintiff company held on the 1st February 2008; and which minutes were acknowledged by PW5 to be correct; as the company secretary.
200. Furthermore, when Elizabeth Magondu was being cross examined by Learned Counsel for the 1st and 2nd Defendants pertaining to the contents of the Letters of instructions which were directed to the firm of M/s Kamoth, Maiyo & Mbatia Advocates; same stated as hereunder;

“I wrote the letter at page 67 of the Plaintiff’s bundle. The letter was addressed to the Companies advocates. The contents of the letter are correct. The letter informs the advocate to offer a professional undertaking to the bank. I also signed the letter at page 66 of the Plaintiff’s bundle. The copy of the letter was sent to the companies advocate. The letter at page 65 was the letter from the advocate and the same was enclosing the draft sale agreement.



At page 64 of the Plaintiff's bundle is my letter whereby I returned the sale agreement with the proposed amendment.....I am the one who executed the documents and it showed that I signed as the company secretary of the Plaintiff company”.

201. From the excerpt which has been reproduced, it is evident that Elizabeth Magondu was indeed the company secretary of the 1st Plaintiff herein.
202. Further and in addition, Elizabeth Magondu; as the company secretary is the one who originated the instructions to M/s Kamotho, Maiyo & Mbatia Advocates (who are referred to as the company advocates) to commence the process pertaining to the sale of the suit properties to the 1st and 2nd Defendants.
203. For good measure, it is not lost on this court that Elizabeth Magondu, PW5 was discharging her mandates as the company secretary and in this respect, same cannot for convenience, now purport that she was not the company secretary.
204. In my humble view, the evidence that was tendered by Elizabeth Magondu and in particular the denial that same was not the company secretary of the Plaintiff Company; constitutes outright falsehoods and deliberate manipulation, to suite a pre-meditated scheme.
205. Sadly, it should not be allowed for Parties and witnesses to advert to intentional and deliberate falsehood, solely with the intention of misleading the court and by extension defrauding the cause of Justice.
206. Simply put, a substantial segment of the evidence tendered by PW5 is replete of and fraught with perjury.
207. In this respect, I am reminded of the dictum of Supreme Court of Kenya in the case of Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (5 September 2022) (Judgment), where the court succinctly stated and observed as hereunder;

Paragraph 24(d) and (e)

This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed. We must remind counsel who appear before this court, or indeed before any other court, or tribunal of the provisions of Sections 113 and 114 of the Penal Code, that swearing to falsehoods is a criminal offence, and too that it is an offence to present misleading or fabricated evidence in any judicial proceedings.

- (e) Section 114 of the Penal Code states that: “Any person who swears falsely or makes a false affirmation or declaration before any person authorised to administer an oath or a declaration upon a matter of public concern, and at such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour.” One of the most serious losses an advocate may ever suffer is the loss of trust of Judges for a long time. Such conduct amounts to interference with the proper administration of justice.



208. Secondly, both the sale agreement dated the 12th September 2006; and the instrument of transfer dated the 30th November 2006, were duly attested by Mr. Kenneth Kamotho Waiganjo. For clarity, same testified as DW3.
209. In the course of his cross examination, DW3 stated as hereunder;
- “I wish to add that before the execution of the sale agreement and transfer, I had discussed the issue of the sale with the 2nd Plaintiff. Further, I do add that therefore the execution of the sale agreement and the transfer were known to me beforehand. I wish to also state that the 2nd Plaintiff signed the document twice because he(2nd Plaintiff) made a mistake in signing. I don't meeting the 2nd Plaintiff but I do confirm that I spoke to him (2nd Plaintiff) several times during the sale transaction”.
210. The evidence by DW3, himself and advocate of the High court of Kenya of 38 years standing, was explicit. Indeed, it is not lost on the court that the witness had also pointed out that same was known to the 2nd Plaintiff and in any event same had undertaken various transactions for and on behalf of the Plaintiffs herein.
211. To my mind, the evidence by DW3 when read together with the various letters which came from the PW5 (read the company secretary); exhibits a clear dimension that the sale of the suit properties was indeed known and within the knowledge of the Plaintiffs, more particularly, the First Plaintiff, who was hitherto the registered owner of the Suit Properties.
212. Thirdly, there is the aspect of the evidence which was tendered by PW5 and wherein she stated as hereunder;
- “I did inform the 2nd Plaintiff of the sale of the suit properties. When I informed him of the sale he was surprised and he informed me that he did not execute the transfer instrument. I don't know whether the 2nd Plaintiff reported the matter to any police station”.
213. Other than the foregoing, it is important to point out that the 2nd Plaintiff herein only passed away on the 15th August 2016; in terms of the certificate of death contained at the foot of the List of documents dated the 8th October 2020.
214. However, despite the fact that same was aware of the sale agreement and the transfer instrument, there is no evidence of lodgment of any criminal complaint pertaining to (sic) the forgery of his signature, if at all; or the fraudulent transfer of the suit properties in favor of the 1st and 2nd Defendants, respectively.
215. Surely, a person of the status of the 2nd Plaintiff who was a holder of PHD and was variously referred to as Dr. Mwaniki Ndiguri Nick; would not fathom fraud and forgery and fail to report same for a duration of approximately 9 years; during his lifetime.
216. In my humble view, the conduct of the 2nd Plaintiff during his lifetime, militates against a finding of fraud and forgery; either in the manner contended or at all.
217. The other critical issue that also merits mention and a short discussion relates to the fact that the sum of Kes.6, 500, 000/= only which was the purchase price paid at the foot of the sale and transfer of the suit properties by 1st and 2nd Defendants was indeed remitted to and received by the 1st Plaintiff.
218. For good measure, it is instructive to recall and reiterate the evidence of PW1 whilst under cross examination by counsel for the Plaintiff.



219. In this respect same stated as hereunder;

“I do confirm that the 1st Plaintiff received the sum of Kes.6, 500, 000/= only from the 1st Defendant”.

220. First forward, PW5 was succinct and spot on as pertains to the receipt of the purchase price. In this respect, I beg to reproduce her testimony whilst under cross examination by Learned counsel for the 1st and 2nd Defendants as hereunder;

“Referred to page 132 of the Plaintiff’s bundle, the witness confirms that same show that Plaintiff received the sum of Kes.6, 500, 000/= only. The cheque was made to and in favor of National Bank of Kenya..... I don’t recall whether the money was refunded”

221. From the evidence of PW1 and PW5, respectively; it is common ground that the 1st Plaintiff herein received the purchase price at the foot of the sale of the two properties to and in favor of the 1st and 2nd Defendants.

222. Quite clearly, the 1st Plaintiff herein could not have received and continued to retain the purchase price relating to the sale of the suit properties, if same believed that the impugned transaction was fraudulent and invalid. Invariably, the 1st Plaintiff seems to be approbating and reprobating at the same time; which constitutes abuse of Due process of the court.

223. Arising from the foregoing, I come to the conclusion that the Plaintiff herein has not been able to establish and demonstrate fraud, forgery or misrepresentation, to the requisite standard or at all.

224. Suffice it to point out that the burden of proof laid on the shoulders of the Plaintiff and it was therefore incumbent upon the Plaintiff to place before the Honourable court cogent and believable evidence. Further and in any event, it is trite and hackneyed the Plaintiff can only succeed on the strength of her case and not of the weakness of the defense.

225. Furthermore, the burden of proof is on the Plaintiff and same must discharge it to the requisite standards (balance of probabilities) before the Evidential burden can shift to the Defendants. However in this case, the Evidential burden did not shift because the Plaintiff was unable to discharge the first incidence of proof.

226. Simply put, the law as pertains to the burden of proof was summarized and illuminated by the Supreme Court in the case of Samson Gwer & 5 others versus Kenya Medical Research Institute & 3 others [2020] eKLR, where the court held thus;

(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares 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.”



[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

227. To surmise, the Plaintiff herein has similarly failed to prove her claim to the requisite standard. Consequently, the Plaintiff's suit also collapses on this hurdle.

Issue Number 3. What Reliefs, if any; ought to be granted.

228. The Plaintiff herein had sought for various reliefs at the foot of the Plaint dated the 13th December 2011. However, when counsel for the Plaintiff filed submission dated the 30th May 2023, same made the following remarks;

Paragraph 93

Based on the evidence tendered before this Honourable court and this submissions, it is our plea to this honorable court to allow the 1st Plaintiff's case in terms of prayer (b), (c), (d) and (f) of its Plaint dated the 13th December 2011 with costs to the 1st Plaintiff.

229. From the foregoing, it means that the Plaintiff has abandoned prayers (a) and (d), whose details were enumerated elsewhere at the onset of this Judgment.

230. Nevertheless, whilst discussing issues numbers 1 and 2, this Honourable court has arrived at some firm findings, whose import and tenor negate the award/ grant of the reliefs sought by the Plaintiff herein.

231. From the foregoing and in the premises, there is no gainsaying that the Plaintiff's suit, is not only misconceived, but is otherwise Legally untenable.

Final Disposition

232. Having carefully evaluated and analyzed the thematic issues, which were enumerated elsewhere hereinbefore, I come to the conclusion that the Plaintiff's suit, was not only premature and misconceived, but same is legally untenable.

233. Consequently and in the premises, the suit by the Plaintiff herein, courts dismissal. In this respect, same be and is hereby Dismissed with costs to the 1st and 2nd Defendants.

234. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF AUGUST 2023.

OGUTTU MBOYA



JUDGE

