



**Garden Estate Company Limited v Mohamed & 2 others (Environment & Land
Case 446 of 2008) [2025] KEELC 1229 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 446 OF 2008**

MD MWANGI, J

MARCH 7, 2025

BETWEEN

GARDEN ESTATE COMPANY LIMITED PLAINTIFF

AND

GULBANU HUSSEIN MOHAMED 1ST DEFENDANT

AMIRALI AKBARALI GULAM HUSSEIN NANJI 2ND DEFENDANT

FIROZ AKBARALI GULAM HUSSEIN NANJI 3RD DEFENDANT

JUDGMENT

Background

1. This suit was initiated by way of the plaint dated 18th September 2008. The Plaintiff's claim was that it purchased all that parcel of land known as L.R No. 209/2069/5 (hereinafter referred to as 'the suit property') measuring 0.840 acres from one Akbarali Gulam Hussein Nanji, now deceased, at a consideration of Kshs. 550,000/- in the month of January 1989. The suit property was allegedly transferred to the Plaintiff on 8th May 1989 and it immediately took possession after evicting the squatters who had been in occupation.
2. The Plaintiff avers that since the said transfer, it has partially developed the suit property by erecting two permanent buildings therein, one of which is complete and leased to a third party.
3. The Plaintiff accuses the Defendants of jointly and severally attempting to trespass upon and forcefully evict the Plaintiff from the suit property without any lawful excuse claiming ownership of the same. The Defendants have allegedly attempted to use police officers with the sole intention of dispossessing the Plaintiff of the suit property. They have gone to the extent of writing to the Director of City Planning seeking permission to demolish the structures erected on the suit property in their bid to take



it away from the Plaintiff. The Plaintiff alleges that the actions of the Defendants have interfered with its quiet and peaceful enjoyment and possession of the suit property.

4. The Plaintiff therefore prays for an order of permanent injunction against the Defendants jointly and severally restraining them from, by themselves, their agents, servants and or employees from entering, trespassing into, taking possession, offering for sale, charging, mortgaging, interfering with the Plaintiff's quiet and peaceful occupation and or dealing in any manner whatsoever with all that parcel of land known as L.R. No. 209/2069/5 situate in the City of Nairobi. The Plaintiff too prays for the costs of the suit.

Response by the Defendants.

5. The Defendants responded to the Plaintiff's suit by way of a joint statement of defence and counterclaim dated 15th October 2009 and filed in court on the same date.
6. In the statement of defence, the Defendants termed the Plaintiff's suit incompetent for failure to comply with the mandatory provisions of Order 4 Rule 3 and Order 5 rules 1(1) and (2) of the Civil Procedure Rules on the basis that the plaint was served upon them without summons to enter appearance. Further that the summons to enter appearance were served upon the Defendants contrary to the provisions of Order 4 rule 3(1) since no application for extension of validity of the summons was made prior to the issuance of the summonses.
7. Notwithstanding the above allegations, the Defendants denied that the Plaintiff purchased the suit property from Akbarali Gulam Hussein Nanji as alleged or at all. They further deny that the suit property was ever transferred to the Plaintiff as alleged. They contend that the Plaintiff unlawfully took possession of the suit property and has no title to it.
8. The Defendants in response to the Plaintiff's claim, state that;
 - I. The suit property was owned by Muriel Marguerite Jones who transferred it to Sardali Lal Ganpat Rai by a transfer dated 22nd April 1952.
 - II. The said Sardali Lal Ganpat Rai on his part transferred the suit property to Akbarali Gulamhussein Nanji and Tajdeen Gulamhussein Nanji as tenants in common in equal shares by a transfer dated 1st May 1956.
 - III. Tajdeen Gulamhussein Nanji on 6th April 1987 transferred his one half undivided share of the suit property to Akbarali Gulamhussein Nanji.
 - IV. At all material times, the suit property was owned by Akbarali Gulamhussein Nanji who died on 8th May 1990 leaving behind a will whose executors are the Defendants.
 - V. The Defendants as executors of the will of Akbarali Gulamhussein Nanji became the proprietors of the suit property by virtue of the grant of probate registered against the title on 4th August 2003 in accordance with the provisions of the Registration of Titles Act (RTA).
 - VI. The Defendants affirm that at no time was the suit property transferred to the Plaintiff.
9. The Defendants vehemently deny that the Plaintiff is entitled to the orders sought in its plaint.
10. By way of a counterclaim, the Defendants allege that in the year 1998, they made a complaint to the Criminal Investigation Department on learning that the Plaintiff through its agent and or representative was trying to take possession of the suit property. They have since made repeated



complaints on the encroachment of the suit property. Investigations have accordingly been ongoing over the last 10 years.

11. The Defendants allege that in the course of the investigations, the Plaintiff produced an alleged ‘transfer of tile’ dated 30th April 1989 as the basis of its assertion of the title over the suit property. The Defendants note that the Plaintiff in an affidavit sworn by Robert Otachi in this matter had introduced yet another transfer different from the one purportedly dated 30th April 1989. The Defendants affirm that both ‘transfers’ produced by the Plaintiff’s Director are forgeries.
12. The Defendants at paragraphs 22 and 23 of the statement of defence and counterclaim pointed out the various shortcomings in the alleged “transfer”. Consequently, the Defendants challenge the alleged certificate of title terming it a forgery.
13. The Defendants pray for the dismissal of the Plaintiff’s suit and further pray for an order of mandatory injunction to compel the Plaintiff to forthwith vacate the suit property and deliver vacant possession to them.

Evidence adduced.

14. This case proceeded to full hearing. The Plaintiff called two witnesses. The Defendant too called two witnesses. The court exercising its authority under Section 22 (b) of the *Civil Procedure Act* and Section 173 of the *Evidence Act* summoned the Director Land Administration and the Chief Land Registrar to testify in this case. They both testified as witnesses in this case.

Evidence adduced on behalf of the Plaintiff.

15. PW1 was one Robert Otachi, a director of the Plaintiff company. The witness adopted his witness statement dated 4th June 2012 as his evidence in chief. He further produced as exhibits the documents listed on the Plaintiff’s list of documents dated 4th June 2012 and the supplementary list of documents dated 18th March 2022.
16. Responding to questions in cross-examination, PW1 confirmed swearing an affidavit dated 10th June 2015 whereby he attached an order issued on 13th August 1971 confirming that the Plaintiff company had been struck off the register but it was reinstated by the said order of the court in Nairobi HCCC 1634 of 1970.
17. PW1 reiterated that the Plaintiff company bought the suit property from Akbarali Gulamhussein Nanji as alleged in the plaint. He was the one who had signed the agreement on behalf of the company alongside his co-director.
18. The witness denied filing case No. ELCOS 6 of 2012 (Originating Summons). He denied instructing Ongegu & Company Advocates to file the suit on behalf of the company. He allegedly only became aware of that suit when he was served with the Defendants’ papers in this case attaching the pleadings in that case. He however admitted that he did not lodge any complaint against the Ongegu & Company Advocates for filing the case without his authority. He stated that the case was struck out and the advocates were ordered to pay the costs.
19. The witness reading from the letter from the Law Society of Kenya shown to him agreed that the lawyer who had supposedly witnessed the signatures of the Directors of the Plaintiff company, Mr. B.C. Murage had died in 1982 as confirmed in the said letter. The witness insisted that his law firm however was still running.



20. The transfer attached to the application for interim injunction was supposedly witnessed by K.S. Bhatt, a lawyer. The witness confirmed from the letter shown to him from the Law Society of Kenya that there was no advocate by the name of K.S. Bhatt.
21. PW2 was one Isaack Mogaka, who was allegedly working for the Plaintiff company in about the year 1990 as a guard/supervisor. He testified that at the time, there was a construction going on in the suit property. He worked there until 2010.
22. Responding to questions in cross-examination, PW2 stated that he was employed by one Director of the Plaintiff company though he had not been issued with any identification document. He had no pay slip either to confirm he had worked for the Plaintiff company.

Evidence adduced on behalf of the Defendants.

23. DW1 was one Firoz Akbarali Gulam Hussein Nanji, the 3rd Defendant in this case. He adopted his witness statement dated 7th November 2014 as his evidence in chief. He further produced as exhibits the documents listed on the Defendants' list and bundle of documents dated 13th November 2013 and the supplementary bundle dated 14th January 2017.
24. The witness explained that the 1st Defendant who was his late mother had passed on way back in 1998, before the filing of this case, whereas the 2nd Defendant who was his brother died on 13th May 2017.
25. DW1 reiterated that his late father never sold the suit property to the Plaintiff as alleged or at all.
26. Responding to questions in cross-examination, DW1 confirmed that the 1st and 2nd Defendants are deceased. The grant of probate of the will of their late father had been issued on 26th January 1995. The witness came to know that the suit property was occupied by 3rd parties in 1998. That was when they first made a report to the police.
27. The Defendants subsequently placed a caveat on the title to the suit property. They did not immediately file a suit, they were instead pursuing the issue with the lands office. Though the suit property was not specifically indicated in the will of their late father, it constituted the 'remainder of his estate' which was catered for in the will by a residuary clause in the will.
28. The witness admitted that their counterclaim was not accompanied by a verifying affidavit.
29. DW1 confirmed that he was still holding the original title of the suit property.
30. DW2 was one Zahid Nanji, a nephew of the 3rd Defendant and a grandson of the late Akbarali Gulamhussein Nanji. He adopted his witness statement dated 27th October 2024.
31. DW2 confirmed that he was a beneficiary of his grandfather's estate. He had lodged a caveat on the title to the suit property in that capacity.
32. Responding to questions in cross-examination, DW2 stated that his father was the 2nd Defendant in this case and had passed on in the year 2017.

Evidence adduced by the Director Land Administration and the Chief Land Registrar.

33. As I stated earlier on, the court summoned the Chief Land Registrar and the Director Land Administration to appraise the court on the history and status of the title to the suit property.
34. The Director in charge of Land Administration Mr. Gordon Odeka Ochieng testified before the court led by the senior State Counsel, Mr. Allan Kamau. He adopted the witness statement dated 12th June 2024 as his evidence in chief. He told the court that he had prepared the witness statement pursuant



to the summons issued by the court on 6th June 2024. Alongside the witness statement, the Director further produced the documents listed as No. 14 to 35 in the list of documents filed as exhibits in this matter.

35. Responding to questions put in cross examination by Mr. Oyugi advocate of the Plaintiff, the Director affirmed that he is the custodian of the correspondence files. He is based at the Ministry of Lands and not at the National Land Commission. He does not report to the National Land Commission. He had therefore not consulted the commission since he had in his custody all the documents he required. The commission does not hold any documents in relation to the suit property. The suit property is a private property held on a free hold tenure, not a leasehold.
36. Responding to questions by the advocate for the Defendants, Mr. Mwihuri, the Director stated that the correspondence file only contains correspondences and not titles.
37. In re-examination by Mr. Allan Kamau, the Director affirmed that the suit property is private property and the National Land Commission had nothing to do with it.
38. Responding to questions from the court, the Director confirmed that the title to the suit property is indeed free hold. The memorandum of transfer confirms that position too.
39. The Chief Land Registrar, Mr. Nyandoro David Nyambaso too testified in this case. He had prepared a witness statement dated 12th June 2024 which he adopted as his evidence in chief. The statement was made pursuant to summons issued by the court on 6th June 2024. He produced the documents listed as No. 1 to 13 in the list of documents of the Chief Land Registrar and the Director Land Administration dated 14th June 2024.
40. Responding to questions from the Plaintiff's advocate, the Chief Land Registrar stated that part of his duties was registration of documents. He had produced before the court a certified copy of the title to the suit property confirming the status of the title to the suit property.
41. Responding to the advocate for the Defendants, the Chief Land Registrar stated that the current registered owner of the suit property is the Estate of Akbarali Gulam Hussein. The entries on the title are all supported by the documentation he had produced.
42. There were entries cancelled by the Registrar of Titles being a court order and a transfer to the Plaintiff company.

Issues for determination

43. The parties in this case had agreed and filed the agreed issues for determination dated 22nd May 2017. The agreed issues are;
 - a. Is the suit competent for failure to comply with the provisions of Order 4 rule 3 and order 5 rule 1 (1) and (2) of the Civil Procedure Rules.
 - b. Did the Plaintiff purchase L.R. 209/2069/5 (the suit property) from Akbarali Gulamhussein Nanji in January 1989 for a consideration of Kshs. 550,000/-?
 - c. Whether the facts set out in paragraph four of the defence have been proved?
 - d. Did the Defendants lodge a complaint with the Directorate of Criminal Investigations on or about 1983? If so, what was the outcome of the investigations by the police?
 - e. Did the Plaintiff produce a transfer dated 30th April 1989 to police as proof of its claim in the suit premises?



- f. Whether the Defendants' actions on diverse dates between February 2004 and 31st August 2008 jointly or severally amounted to direct interference with the Plaintiff's quiet and peaceful possession of the suit property?
- g. Has the Plaintiff produced any forged transfers in support of its claim?
- h. Are the sale agreements and certificate of Title exhibited as "RO1" and "R03" respectively in the affidavit of Robert Otachi sworn on 18th September 2008 forgeries?
- i. Is there a caveat registered against the suit property?
- j. Whether the Defendants interests as the beneficiaries of the estate of Akbarali Gulamhussein Nanji were time barred as at the year 2003 pursuant to the provisions of the Limitation of Actions Act?
- k. Did either of the parties make demand before instituting suit?
- l. Is the counter-claim bad in law for violating the clear provisions of the Civil Procedure Rules?
- m. Is either of the parties entitled to the reliefs sought?
- n. Who should pay the costs of the suit?

Plaintiff's submissions.

44. The Plaintiff's submissions are dated 29th May 2023. In its submissions, the Plaintiff admits that the suit against the 1st Defendant was non-starter ab initio since it was inadvertently filed against a deceased person. It blames the 2nd and 3rd Defendants for not disclosing the fact of the death of the 1st Defendant upon being served with summons.
45. Further, the Plaintiff points out that the 3rd Defendant only disclosed about the demise of the 2nd Defendant during his testimony. That was when he stated that the 2nd Defendant died in the year 2017. There was no substitution of the 2nd Defendant by a personal representative. The legal consequences of that omission is that the suit against the deceased 2nd Defendant abated within one year because no application for substitution was made under Order 24 rule 4 (3) of the Civil Procedure Rules.
46. The Plaintiff further contends that the counterclaim by the Defendants violates the clear provisions of the Civil Procedure Rules and is therefore bad in law. The 2nd and 3rd Defendants had an opportunity to move the court to rectify the omission but they chose not to. The Plaintiff relies on the case of *Galerius Investments Limited –vs- County Government of Mombasa & another* (2020) eKLR, where the Defendant had filed a statement of defence and a counterclaim without a verifying affidavit. The court noted that the provisions of Order 4 rule (1), (2) and Order 7 rule 5 (a) were coached in mandatory terms. Therefore the Defendant's counterclaim was improperly before the court for failure to have an accompanying verifying affidavit. The court went ahead to strike out the counterclaim.
47. *Oguttu Mboya Judge in Habiba Ali Mursal & 4 others –vs- Mariam Noor Abdi* (2022) eKLR, made a similar finding in respect of a plaint that was not accompanied by a verifying affidavit.
48. The Plaintiff further cites the decision of the court of appeal in the case of *Bishop Joshua Gawo & others –vs- Nairobi City Council*, where the Court of Appeal too held that Order VII rule 1 (2) of the Civil Procedure Rules is clear that a plaint must be accompanied by a verifying affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.



49. The Plaintiff submits that the requirements that a plaint and a counterclaim be accompanied by a verifying affidavit are mandatory and any default renders the plaint or counterclaim incompetent. The same should therefore be struck out. The Plaintiff urges the court to strike out the Defendants' counterclaim in this case.
50. On the written will of the late Akbarali Gulam Hussein Nanji executed on 16th April 1983 and the grant of probate of written will issued on 26th January 1995, the Plaintiff submits that the will is silent on the suit property. Further that there is nowhere in the will where the testator directed for disposal of future acquired properties.
51. According to the Plaintiff, the suit property ought to have been treated as intestate. The 3rd Defendant therefore ought to have approached the High Court with an intestacy application for the grant of letters of administration in respect to the suit property.
52. The Plaintiff further submits that the 3rd Defendant's counterclaim is time barred under the provisions of the *Limitation of Actions Act*. It is his position that the 3rd Defendant ought to have brought his claim within twelve (12) years of the demise of his father. That is when the cause of action accrued according to the Plaintiff. Quoting Section 7 of the *Limitation of Actions Act*, the Plaintiff submits that no action can be filed in court after the end of 12 years from the date on which the right of action accrued to the person entitled to the preceding estate or interest.

Defendants' submissions.

53. The Defendants' submissions are dated 10th July 2023. The Defendants begin by addressing the issue of lack of verifying affidavit in support of the counter-claim. They submit that the counter-claim was filed in the year 2009 before the onset of the current Civil Procedure Rules in the year 2010. Under Order VIII of the Old Rules, there was no requirement for a counter-claim to be accompanied by a verifying affidavit.
54. The Defendants identify four undisputed issues in this case as follows;
 - a. The late Akbarali Gulamhussein Nanji was the proprietor of the suit property.
 - b. He passed away on 8th May, 1990.
 - c. It is not disputed that the deceased left behind a will and named the Defendants as his executor.
 - d. A grant of probate of will was issued to the Defendants as co-executors on 26th January 1995.
55. On the effect of the death of the 1st and 2nd Defendants, the 3rd Defendant submits that there is no hindrance to the suit going on against him or him prosecuting the counterclaim. He cites Section 81 of the *Law of Succession Act*, which provides that upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them.
56. The 3rd Defendant in regard to the will of the Late Akbarali Gulamhussein, submits that the residuary clause therein takes care of the suit property which is not expressly dealt with by the other provisions of the will. He submits that there is no factual or legal basis for the Plaintiff's assertion that simply because the deceased had not specifically mentioned the suit property in his will, then it means he sold it to the Plaintiff as alleged in the Plaintiff's submissions.
57. On the allegation that the counterclaim is barred under the Limitations of Actions Act, the 3rd Defendant submits that the suit property had remained vacant until 1998 when the Defendants



discovered that the Plaintiff had trespassed into it. That was what made them register caveats against the title of the suit property on 16th April 1998. The counterclaim having been filed in the year 2009 cannot therefore be time-barred. The 12 years' time limit had not lapsed.

58. Addressing the claim of the Plaintiff having purchased the suit property, the 3rd Defendant submits that in the alleged agreement for sale allegedly entered into between the Plaintiff and the deceased, the agreement is allegedly entered into in January 1989 while the transfer is dated 30th April 1989. In the said transfer, the Vendor allegedly acknowledged the sum of Kshs. 550,000/- from advocate B.C. Murage on behalf of the Plaintiff. The 3rd Defendant points out the said B.C. Murage died in May 1982 as confirmed by the letter from the Law Society of Kenya.
59. The 3rd Defendant points out that the Plaintiff alleges that he signed the documents in the presence of Mr. B.C Murage. The 3rd Defendant submits that the assertion by Mr. Otachi cannot simply be true. He urges the court to reject the narrative of the purchase of the suit property by Mr. Otachi. He further invites the court to find that the alleged sale agreement and transfer documents were forged.
60. The 3rd Defendant goes to a great extent to demonstrate that the transfer form is a forgery including submitting on the two other versions of the alleged transfer form produced in the other cases filed by the Plaintiff. The 3rd Defendant affirms that the documents produced by the Plaintiff and the testimony of its key witness, Mr. Otachi are contradictory, distorted and false.
61. On the prayer in the counter-claim for an order that the Plaintiff vacates the suit premises and delivers vacant possession to the Defendants, the 3rd Defendant submits that it is not in dispute that the Plaintiff is in actual physical possession of the suit property. The Plaintiff is however, a trespasser having failed to prove that it purchased the suit property. It should therefore vacate the suit property. They pray for an order of mandatory injunction as the most appropriate remedy.
62. The 3rd Defendant filed further submissions dated 22nd November 2024. He affirms his earlier submissions and concludes that since the grant of letters of administration was registered against the title on 4th August 2023, the executors of the estate of Akbarali Gulamhussein Nanji are authorized to deal with the property in accordance with the wishes of the deceased.

Analysis and determination.

63. I noted earlier in this judgment that the parties in this case had agreed on and filed the agreed issues for determination. As the court held in the case of Galaxy Paints Company Limited –vs- Falcon Guards Limited (2000) 2 EA 385, the general rule is that courts should determine a case on the issues that flow from the pleadings and therefore a court may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination and therefore it is a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of case.
64. In this case, the parties did not amend their pleadings after filing the agreed issues. The court will therefore confine its determination to the agreed issues without necessarily following the sequence of the issues as listed.

a. Competence of the suit and the counterclaim.

65. The Plaintiff challenged the competence of the Defendants' counterclaim alleging that it did not comply with the provisions of Order 4 rule (1) (2) and Order 7 rule 5(a) of the Civil Procedure Rules, 2010. On their part, the Defendants challenged the competence of the Plaintiff's suit for non-compliance with Order 4 rule 3 and Order 5 rule 1 (1) & (2) of the Civil Procedure Rules.



66. Order 4 rule 3 of the Civil Procedure Rules requires that where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it. On the other hand, Order 5 rule 1 (1) and (2) relates to the issuance and service of summons.
67. Courts are enjoined under Article 159 of *the Constitution* to, amongst other issues administer justice without undue regard to procedural technicalities. The issues raised by the Defendants in the court's opinion have since been overtaken by events. In any event, non-compliance with Order 4 rule 3 is curable by an amendment of the plaint if raised at the early stages of the suit. I do not think there is any doubt, in either of the parties' mind as to the description of the suit property, the subject matter of this suit.
68. On the issue of service of summons, this court agrees with the view expressed in *Amina Hergi Moghe & 2 others –vs- Diamond Trust Bank Kenya Limited & another* (2021) eKLR, to the effect that a Defendant who enters appearance and actively participates in defending its position without protesting that he has not been served with summons will be taken to have waived his right to challenge the validity of the suit for non-compliance with Order 5 rule 1, unless he can demonstrate prejudice that cannot be compensated by way of costs. The Defendants in spite of the 'defect' in the summons entered appearance and filed their statement of defence and counterclaim. No prejudice has been demonstrated.
69. On the competence of the counterclaim, the Defendants response to the Plaintiff's allegation was precise and to the point. The counterclaim was filed before the enactment of the 2010 rules which brought in the requirement that a counterclaim, like a plaint needed to be accompanied by a verifying affidavit. I will say no more.

b. Whether the Plaintiff has established its claim of the suit property.

70. The Plaintiff's claim on the suit property is grounded on the agreement of sale of January 1989 and the transfer of April 1989 both produced as exhibits in support of the Plaintiff's claim. Aspersions were cast as to the validity of the two documents by the Defendants. In respect to the agreement of January 1989, the Defendants pointed out that the same was stated to be subject to the Law Society Conditions of Sale (1989 edition). The agreement was further purportedly attested by K.B. Bhatt advocate for the vendor and B.C. Murage for the purchaser.
71. It has been submitted by the Defendants that the Law Society Conditions of Sale 1989 Edition had not come into force in January 1989. Secondly, evidence has been adduced from the Law Society of Kenya to the effect that there was no advocate by the name of K.B. Bhatt, and that Advocate B.C. Murage passed on way back in 1982. How then could an advocate who died in 1982 have witnessed an agreement in January 1989 and a transfer on 30th April 1989?
72. As if that was not enough, the transfer provided that Akbarali Gulamhussein transferred to the Plaintiff an "undivided one-half share" in the suit property. By 1989 however, Akbarali Gulamhussein owned the whole of the suit property having purchased the other half share from Tajdeen Gulamhussein Nanji, the co-tenant.
73. Pausing at this point, my finding is that the purported sale agreement and the transfer upon which the Plaintiff bases its claim of ownership of the suit property are questionable documents. The purported signatures and stamps of K.B. Bhatt, an advocate who never was, and B.C. Murage, who passed on in 1982 can only be construed to be forgeries. The Plaintiff's claim is therefore based on fraud.
74. Fraud as defined in the Black's Law Dictionary, 9th Edition includes a knowing misrepresentation of the truth or concealment of a material fact. The Plaintiff misrepresented and represented itself as the



bona fide owner of the suit property using the purported sale agreement and the transfer. That was deception that constitutes fraud.

75. The transfer allegedly witnessed on 30th April 1989 further does not support the Plaintiff's claim for the whole of the suit property.
76. The Defendants brought to light other versions of the alleged transfer produced by Mr. Otachi, the director and key witness of the Plaintiff in the other cases touching on the suit property highlighted in the course of the hearing. The Plaintiff had produced a transfer marked as 'RO2' annexed to the affidavit sworn by Robert Otachi on 18th September 2008 as the basis of assertion of its title to the suit property which is different from the transfer dated 30th April 1989 produced as an exhibit in support of its case. The Defendants demonstrated the differences in the two transfers pointing out amongst other issues that;
- i. The transfer marked as 'RO2' had 12 embossed stamps on it while the one dated 30th April 1989 has 4 stamps;
 - ii. The transfer marked as 'RO2' is undated while the other is dated 30th April 1989;
 - iii. The transfer marked as 'RO2' is shown to have been executed by Akbarali Gulamhussein Nanji only in the presence of K.S Bhatt Advocate while the one dated 30th April 1989 is shown to have been executed by Akbarali Gulamhussein Nanji in the presence of B.C Murage Advocate and sealed with the common seal of the Plaintiff in the presence of B.C Murage Advocate.
 - iv. The transfer marked as 'RO2' is stated to have transferred all the suit property to the Plaintiff while the one dated 30th April 1989 is said to have transferred Akbarali Gulamhussein's undivided one half share in the suit property to the Plaintiff.
77. Considering the totality of the evidence presented before the court, the court finds and holds that the Plaintiff has not established a valid claim of ownership of the suit property. He has not established the allegation that he purchased it from the late Akbarali Gulamhussein. Indeed, the Plaintiff has not presented evidence of the payment of the alleged consideration of Kshs.550,000/- to the late Akbarali Gulamhussein. The allegation that it paid through B.C Murage Advocate falls flat on its face. B.C Murage was long dead, buried and turned into clay.
78. I therefore dismiss the Plaintiff's suit.
79. This now takes me to the Defendants counterclaim.

c. Whether the Defendants' counterclaim was time barred

80. The Plaintiff in its submissions submitted that the Defendants counterclaim was time barred. In its defence to the counterclaim, the Plaintiff had pleaded at paragraph 12 that, 'the said caveat was registered unlawfully and illegally as the Defendant's interest as beneficiaries of the estate of Akbarali Gulamhussein Nanji was time barred as at the year 2003 pursuant to the provisions of Limitations of Actions Act.' That is what informed the framing of the issue number 11 to the effect that. 'whether the Defendants interests as beneficiaries of the estate of Akbarali Gulamhussein Nanji was time barred as at the year 2003 pursuant to the provisions of Limitations of Actions Act.'
81. In its submissions, the Plaintiff reframed the issue submitting that the Defendants counterclaim was time barred.
82. In *First Community Bank Limited v Cecil G. Miller t/a Miller & Company Advocates* [2021] KEHC 284 (KLR), it was held that the rule that a party must plead limitation and indeed any defence that



would defeat a claim is salutary and good practice and underpins a fair trial that a party must have notice of the case against it to avoid being taken by surprise. The reason why the law requires the defence of limitation to be pleaded is that the opposing party may have a response that would defeat the claim of limitation. It must not also be lost to the Defendant, that the Defence of limitation can be waived (see *Stephen Onyango Achola & another v Edward Hongo Sule & another (Supra)*). The party facing a defence of limitation must therefore be given an opportunity to set out the facts upon which the court may conclude that the defence is not well founded.

83. In the case of *Stephen Onyango Achola and Another v Edward Hongo Sule and Another* KSM CA Civil Appeal No. 209 of 2004 [2004]eKLR, the Court of Appeal stated as follows:

“The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such a defence and thus let the suit proceed to trial on its merit.”

84. The submission that the counterclaim is time barred does not arise out of the pleadings. What the court must decide therefor is only what the parties framed as an issue for determination that is whether the Defendants interests as beneficiaries of the estate of Akbarali Gulamhussein Nanji was time barred as at the year 2003 pursuant to the provisions of Limitations of Actions Act.
85. In the 3rd Defendants evidence, he testified that the suit property remained vacant until 1998 when the Defendants discovered that the Plaintiff had trespassed into the property. The 2nd and 3rd Defendants then registered caveats against the property on 16th April 1998. No contrary evidence was presented to contradict that of the 3rd Defendant. The testimony of PW2 who alleged that he had been employed as a caretaker by the Plaintiff company was not supported by any material evidence. It was unverifiable and unbelievable.
86. Consequently and in accordance with section 26 of the *Limitation of Actions Act*, time would only begin to run from 1998, when the Defendants discovered that the Plaintiff was laying a claim over the suit property. Therefore, the Defendants interests as beneficiaries of the estate of Akbarali Gulamhussein Nanji was not time barred as at the year 2003 pursuant to the provisions of Limitations of Actions Act. The counterclaim too is not time barred.

d. Whether the Defendants have proved their counterclaim.

87. The Defendants filed the counter-claim as the executors and administrators of the estate of the Late Akbarali Gulamhussein. It came from the evidence that the 1st Defendant died way back in 2003 whereas the 2nd Defendant died in 2017. The Plaintiff was right to state that its claim against the 1st Defendant was non-starter ab initio.
88. Under Section 81 of the *Law of Succession Act*, upon the death of one or more of the several executors or administrators, all the powers and duties of the executors or administrators become vested in the surviving executors/administrators. In spite of the death of his co-administrators/executors, the 3rd Defendant therefore has the legal capacity to continue with the administration of the estate of the late Akbarali Gulamhussein.



89. The Plaintiff claimed that the suit property was not expressly provided for in the will of the Akbarali. The 3rd Defendant in response pointed out that the will had a ‘residuary estate’ clause.
90. Having perused the will, I agree that the will indeed had a residuary clause; clause 10 thereof. Through the said clause, the deceased brought on board any property that he had not specifically mentioned in the will. That is the effect of a residuary clause in a will. The grant of probate granted in favour of the Defendant therefore suffices and grants thereon legal authority over the suit property.
91. Having found that there is no evidence that the late Akbarali sold the suit property to the Plaintiff as alleged or at all, the inevitable conclusion is that the suit property remains part of the estate of the late Akbarali Gulamhussein.
92. The evidence of the Director Land Administration and the Chief Land Registrar confirmed that the grant in favour of the Defendant, was duly registered against the title to the suit property. The subsequent registration of the Plaintiff as proprietor was cancelled upon the setting aside of the consent order that had been the basis of the registration. The position therefore remains that the title is in the name of the administrators of the estate of the late Akbarali Gulamhussein. The confirmed grant vested the suit property in the administrators of the estate.
93. Consequently, the Defendants having proved their counterclaim, I allow the counterclaim and issue a mandatory injunction in favour of the Defendants to compel the Plaintiff to forthwith vacate the suit property and deliver vacant possession thereof to the 3rd Defendant in his capacity as the administrator of the estate of the late Akbarali Gulamhussein Nanji, in the next 60 days from the date of this judgment.
94. The 3rd Defendant too shall have the costs of the counterclaim and the suit against the Plaintiff.

Final Disposition

95. The final disposition is that:
- A. The Plaintiff’s suit is dismissed.
 - B. The Defendants’ counterclaim is allowed and an order of mandatory injunction in favour of the Defendants is hereby issued compelling the Plaintiff to forthwith vacate the suit property, L.R No. 209/2069/5, and deliver vacant possession thereof to the 3rd Defendant in his capacity as the administrator of the estate of the late Akbarali Gulamhussein Nanji, in the next 60 days from the date of this judgment.
 - C. The costs of the suit and the counterclaim are awarded to the 3rd Defendant against the Plaintiff.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 7TH DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Manyara h/b for the Plaintiff

N/A by the Defendants



Court Assistant: Mpoye

M.D. MWANGI

JUDGE

