



**Wambui & 2 others v Waweru (Environment and Land Appeal E064 & 62 of 2022
(Consolidated)) [2024] KEELC 4226 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E064 & 62 OF 2022 (CONSOLIDATED)
JG KEMEI, J
MAY 9, 2024
(CONSOLIDATED WITH ELCA NO. 62 OF 2022)**

BETWEEN

**VERONICAH NJERI WAMBUI 1ST APPELLANT
LUCY WAITHERA NJUGUNA 2ND APPELLANT
STEPHEN IRUNGU MUCHAI 3RD APPELLANT**

AND

NANCY WAITHIRA WAWERU RESPONDENT

*(Being an Appeal from the Judgment of Hon J Agonda
PM delivered on 21/6/22 in SPMCC No 9 of 2020, Ruiru)*

JUDGMENT

Introduction

1. Vide a Memorandum of Appeal dated 19/7/2022, the Appellant herein (1st Defendant in the trial Court) impugns the Judgement of the trial Court on grounds THAT;
 - a. The Learned trial Magistrate erred in fact and in law in finding that the Appellant and the 1st Respondent's husband entered into a valid contract over the subject parcel of land or at all entered into an agreement, yet the Appellant vehemently denied all her pleadings and in her oral testimony at the trial and the 1st Respondent failed to call the attesting Advocate as a witness or adduce any other evidence to disprove the Appellant's denial.
 - b. The Learned trial Magistrate erred in fact and in law in relying on the testimony of PW2 when he does not appear as a witness in the alleged sale agreement, and his testimony was not substantiated by any other party or through any other evidence.



- c. The Learned trial Magistrate erred in fact and in law by failing to find that if indeed there was a contract of sale of land between the Appellant and the 1st Respondent's husband and then the same had lapsed by virtue of effluxion of time and or operation of law and therefore any remedy for specific performance was barred by statutory limitation.
 - d. The Learned trial Magistrate erred in fact and in law in finding that the land in dispute is the same subject parcel of land and sold to the 2nd and 3rd Respondent by the Appellant.
 - e. The Learned trial magistrate erred in fact and in law in finding that the 1st Respondent had proved her case on a balance of probability when there were several lacunae in her evidence and pleadings.
 - f. The Learned trial Magistrate erred in fact and in law in finding that the Appellant breached the contract when she received the whole consideration over the subject sale agreement when the Appellant denied knowledge of the alleged sale agreement and the signatures purported to be hers, and the 1st Respondent did not call handwriting expert to assert the said allegations or even the attesting Advocate.
 - g. The Learned trial Magistrate erred in fact and in law in shifting the burden of proof of the case to the Appellant when the onus was on the 1st Respondent.
 - h. The Learned trial Magistrate erred in fact and in law when she revoked the 2nd and 3rd Respondents title to the subject parcel of land on the grounds of fraud when the same was not particularly particularized as required under Order 2 Rules 1 & 10 of the Civil Procedure Rules neither was the same proved to the required legal standard.
 - i. The Learned trial Magistrate erred in fact and in law in substantially relying on the testimony of Pw2 that the Appellant's husband was part of the transaction when the Appellant's husband was part of the transaction when the Appellant's husband does not appear as a witness in the alleged sale agreement or being mentioned anywhere in the pleadings.
 - j. The Learned trial Magistrate erred in fact and in law in making the findings in total disregard to the weight and evidence of the Appellant herein.
 - k. The Learned trial Magistrate erred in fact and in law in that he disregarded the Appellant's evidence, testimony, submissions and judicial authorities on the subject matter with the resultant miscarriage of justice to the Appellant.
2. The Appellant urged this Court to allow the Appeal and grant Orders THAT;
 - a. The whole of the Judgement of the Honorable Principal Magistrate dated 21st June 2022 be discharged and set aside by dismissing the 1st Respondent's suit.
 - b. A declaration that the Appellant held a valid title to transfer to the 2nd and 3rd Respondents.
 - c. The costs of this Appeal and the suit (sic) in the subordinate Court be borne by the 1st Respondent.
 - d. Such other orders and relief that this Honorable Court may deem fit to grant.
 3. Arising from the same Judgement is another Appeal in ELCA 62 of 2022 Thika - Lucy Waithera Njuguna & Anor. Vs Nancy Waithera Waweru & Anor. filed by the 2nd and 3rd Defendants in the trial suit. Their Memorandum of Appeal is dated 6/7/2022. They fault the trial Court's findings that; there was a valid contract for sale of land between the parties contrary to evidence adduced; adjudication



on unpleaded issues for instance Land Control Board consent, a counterclaim by Interested parties and termination/rescission of contract; lapse of contract on account of effluxion of time; failure to particularize fraud and prove it to the required standard; failure to find that the 2nd and 3rd Defendants were bona fide purchasers for value without notice and making findings not supported by evidence. They beseeched the Court to set aside the impugned Judgement and dismiss the Respondent's suit with costs.

4. By consent of the parties both Appeals were consolidated on the 10/5/23 with the instant file being the lead file and the Appellants being Veronica Njeri Wambui, Lucy Waithira Njuguna and Stephen Irungu Muchai while the Respondent remained Nancy Waithira Waweru.

The case in the trial Court

5. To place the Appeal in context, a brief summary of the trial Court case is relevant. Vide an amended plaint dated 19/11/2021, the Respondent claimed that her late husband Bernard Maina Waweru (Bernard, deceased) was the proprietor of land parcel known as Title No. RUIRU/MUGUTHA BLOCK 1/2390 (hereinafter the suit land) vide original certificate No. 6297 and ballot No. 2390 issued by Nyakinyua Investment Limited (the Company). That by an agreement dated 13/1/2005 between Bernard and the 1st Appellant, it was agreed inter alia that the 1st Appellant would sell to Bernard the suit land at Kshs. 250,000/= with a deposit of Kshs. 100,000/- payable on or before signing the agreement and the balance to be paid before 21/1/2015. That thereafter the Respondent and 1st Appellant executed an acknowledgement of receipt of the balance of the purchase price on 12/3/2015. At that time the 1st Appellant claimed that she had lost the original certificate No. 6297 and ballot No. 2390 and that she had procured a police abstract on 21/3/2015 which the 1st Appellant is said to have shared with Bernard.
6. That notwithstanding and in flagrant breach of the said agreement and subsequent verbal variations, the 1st Appellant failed to furnish the suit land title documents to Bernard. That Bernard died on 7/1/2020. That upon his death the 1st Appellant took advantage of his absence and fraudulently sold off the same suit land to the 2nd and 3rd Appellants on 10/2/2020.
7. The Respondent outlined particulars of breach against the Appellants at para 9 of the plaint as ; failing to procure title documents of the suit land; breach of contract dated 13/1/2005; fraudulent sale of the suit land; failure to refund the monies paid pursuant to the agreement; failing to carry out due diligence on the suit land. The result of which the 2nd and 3rd Appellants became registered as owners of the suit land. She sought orders THAT;
 - a. Revocation of title no. RUIRU/MUGUTHA BLOCK 1/2390 issued in favor of the 2nd and 3rd Defendants and the Court vest it on the Plaintiff.
 - b. Specific performance of the sale agreement dated 13th January 2005.
 - c. A prohibitory injunction stopping prejudicial dispositions on the suit property.
 - d. Costs of the suit.
8. In addition, the Respondent sought alternative prayers and urged the Court to order refund of the purchase price at current market price, costs, general damages, punitive damages, special damages and interests.
9. The 1st Appellant filed her amended statement of defence dated 18/11/2021 whereas the 2nd and 3rd Appellants' defence is dated 8/12/2021. The 1st Appellant denied the Respondent's suit and in particular selling the suit land to Bernard. That her share certificate was lost way back in 2017 over



- two years before the demise of Bernard. That she could not be accused of trespassing on her own land which she lawfully sold to the 2nd and 3rd Appellants. She denied the Respondent's claim and sought to put her to strict proof.
10. On their part, the 2nd and 3rd Appellants vide their amended joint statement of defence dated 8/12/2021 maintained that they were strangers to the sale agreement between Bernard and the 1st Appellant. They denied any fraudulent allegations against them in obtaining the suit land title which they insisted they acquired lawfully under the doctrine of bona fide purchasers for value without notice.
 11. Upon hearing the parties and the rival evidence tendered before it, the Hon trial Court delivered its Judgement dated 21/6/2022 in favour of the Respondent in the following terms;
 - a. A declaration be and is hereby issued that the Plaintiff is the lawful proprietor of all that parcel of land known as L.R RUIRU/MUGUTHA BLOCK 12/2390 (sic)
 - b. A permanent injunction restraining the Defendants by themselves, their servants, agents or otherwise howsoever from trespassing, disposing, selling, constructing or in any other manner whatsoever interfering with the Plaintiff's quiet possession of all that parcel of land known as L.R No. Ruiru/Mugutha Block 12/2390.
 - c. An order for the land registrar to reconstruct and/or restore the original register for L.R No. Ruiru/Mugutha Block 12/2390 and the Plaintiff as the 2^{dn} registered owner after the Government of Kenya.
 - d. The costs of this suit is awarded to the Plaintiff to be paid by the 1st Defendant.
 12. It is the above findings that have provoked the instant Appeal. The Appellants also filed a supplementary Record of Appeal dated 17/3/2023 to include copies of the trial Court Ruling dated 6/7/2021 for temporary injunction and official search of the suit land dated 26/8/2021.

The written submissions

13. On 9/5/2023 directions were taken and parties elected to canvass the Appeal by way of written submissions.
14. The 1st Appellant through the firm of Bunei Jackline & Associates filed submissions dated 5/3/2024. Five issues were drawn for determination to wit; whether there was a valid contract of sale of the suit land between the 1st Appellant and Bernard; whether the suit land was allegedly sold to Bernard and later to the 2nd and 3rd Appellants; whether the Respondent proved fraud against the Appellants; whether the Respondent proved her case to the required standard and whether the trial Court failed to consider the 1st Appellant's defence.
15. The 1st Appellant submitted that she denied executing the sale agreement dated 13//1/2005 and the acknowledgement receipt dated 12/3/2015 which were said to have been attested by Mr. Muturi Njoroge, Advocate. That no expert witness was called to authenticate the impugned signature nor was the disclosed Advocate called to testify contrary to the provisions of Section 107 *Evidence Act*. That according to the sale agreement the parcel of land was RUIRU/RUIRU EAST BLOCK 2/2390 while the one sold to the 2nd and 3rd Respondents was RUIRU/MUGUTHA BLOCK 1/2390 and therefore the trial Court failed to adjudicate on this fundamental issue thereby reaching a wrong conclusion in its Judgement.
16. Additionally, it was contended that the Respondent failed to particularize fraud on the part of the Appellants contrary to the provisions of Order 2 Rule 4 Civil Procedure Rules. The 1st Appellant fell



- short of the standard of proving fraud as enunciated in the case of *Yalwala & 3 Others Vs. Kadenge & 3 Others* [2022] KEELC 2510 (KLR). Lastly the trial Court was faulted for failing to find that the suit was time barred.
17. The law firm of Solomon Mugo & Co. Advocates filed submissions dated 15/2/2024 on behalf of the 2nd and 3rd Appellants. Similarly, five issues were condensed from their Memorandum of Appeal for determination namely; whether the trial Court erred in finding that the Plaintiff proved existence of a valid sale agreement; whether the Court erred in failing to adjudicate on the Respondent's failure to particularize fraud allegations and whether the suit was time barred; whether the Court erred in determining unpleaded issues such as land control board consent, alleged counterclaim by undisclosed Interested Party; failure to find that the 2nd and 3rd Appellants were bona fide purchasers for value without notice and whether he impugned Judgement is legally sound.
 18. On the first issue and like the 1st Appellant, it was submitted that the Respondent failed to discharge the burden of proving her case on a balance of probability. Secondly that the trial Court failed to determine the issue of whether the suit was bad in law for want of particulars of fraud. That the suit was time barred having been filed on 1/12/2020, 15 years after the alleged contract. That according to Section 3 (sic) of *Limitation of Actions Act* (LAA) a claim found on contract ought to be filed within six years of the alleged contract and the Court was faulted for failing to consider this plea of limitation which would have rendered the suit a nullity.
 19. It was further contended that the Court erred in determining extraneous and unpleaded issues like the Land Control Board consent, counter claim by undisclosed Interested Party at page 6 of the Judgment, termination of sale agreement. That Land Control Board consent was first raised by the Respondent's counsel in their written submissions necessitating a rebuttal by the Appellants in their submissions. That it is trite that parties are bound by their pleadings and unpleaded matters cannot be adjudicated by a Court of law. The Court was urged to be guided by the decision in the case of *Philmark Systems Co. Ltd Vs. Andermore Enterprises* [2018] eKLR which was cited.
 20. On the issue of bona fide purchaser for value, the 2nd and 3rd Appellants submitted that they held a certificate of title, purchased the land in good faith as per agreement dated 11/10/2019, had no knowledge of the alleged agreement between the 1st Appellant and Bernard, duly paid valuable consideration for the land which was acknowledged by the 1st Appellant; the 1st Appellant had valid documents of title issued by Nyakinyua Investment Ltd. Moreover a clearance letter dated 11/11/2017 was produced in evidence in support of her interest in the suit land. The 2nd and 3rd Appellants were not aware nor party to any fraud as alleged. It was also pointed out by the 2nd and 3rd Appellants that the ultimate verdict given by the trial Court was in respect of L.R No. RUIRU/MUGUTHA BLOCK 12/2390 yet the suit land was RUIRU/MUGUTHA BLOCK 1/2390. For the above reasons they urged the Court to set aside the impugned Judgment with costs.
 21. The Respondent through the firm of Macharia Gikonyo & Company Advocates filed submissions dated 6/4/2024. She rehashed the factual background of the case and drew nine issues for determination; whether there was a valid contract of sale; whether the parcel of sold to the 2nd and 3rd Appellants was the same as the one sold to the Respondent; particulars of fraud for the 1st Respondent (sic); particulars of fraud of the 2nd and 3rd Appellants and whether they were bona fide purchasers for value; constructive notice of the 2nd and 3rd Defendants; whether the trial Court erred in adjudicating upon extraneous and unpleaded matters; why did the transaction take too long and variation of the agreement.
 22. The first issue was answered in the affirmative urging that a valid and executed sale agreement dated 13/1/2005 conforming with Section 3(3) of the Law of Contract was presented in Court. That PW2



testified that he witnessed the execution of the agreement and acknowledgment receipt of payment of the balance of Kshs. 150,000/=. Similarly, the second issue was answered in the affirmative and reliance was placed on the copy of green card to show that the land in question is Ruiru/Ruiru East Block 2/2390. For issues No 3 and 4 the Respondent went ahead to enumerate particulars of fraud on the 1st Respondent and 2nd and 3rd Appellants respectively. The Respondent ventured to impugn the alleged payments totaling Kshs. 5,550,000/= and contended it is doubtful that the 1st Defendant received the payments.

23. Additionally, the Respondent denied the 2nd and 3rd Appellants claim of bona fide purchasers. She accused them of failing to obtain Land Control Board consent and failure to pay valuable consideration for the suit land. That they did not make adequate inquiries on the utility of the suit land. On why the transaction took so long (2005 -2015), the Respondent attributed this to the 1st Appellant's alleged loss of documents and the fact that Bernard was operating on trust and in any event, he was busy with his duties at the University where he worked. It was further submitted that variation of the agreement was a possibility as can be inferred from the parties' conduct to wit 1st Appellant's of late payment of the balance of the purchase price. That in the end, and in view of the evidence she adduced, the balance of convenience tilted in her favor.

Analysis & determination

24. As a first Appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own conclusions. The Court has however to bear in mind that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the Civil Procedure Act which espouses the role of a first appellate Court which is to:

“... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.”

25. Furthermore, in the case of *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, in which the Court stated:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

26. In the case of *Bwire Vs. Wayo & Sailoki* [2022] KEHC 7 (KLR) in discussing the role of an Appellate Court stated that the appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage.
27. Kneller JA in the Court of Appeal case of *Ephantus Mwangi & Another Vs. Duncan Wambugu* [1984] eKLR had this to say on the duty of an Appellate Court; a member of an Appellate Court, is not bound to accept the learned Judge's findings of fact, if it appears either that, (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or, (b) if the impression based on the demeanour of a witness, is inconsistent with the evidence in the case generally.



28. In the case of Chief Justice and President of the Supreme Court of Kenya & Another Vs. Khaemba [2021] KECA 322 (KLR), the Court of Appeal held that it is possible for an appellate Court to depart from the findings of the trial Court if it is apparent that such findings are not supported by evidence on record, or where the trial Court is shown to have acted on wrong principles of law, as held in Jabane Vs. Olenja [1986] KLR 661.
29. Having considered the record of Appeal, the submissions and all the material placed before this Court, I find that the issues for determination are; Whether the Appeal has merit; Who bears costs?
30. In answering the first issue, the Court will consider whether the 1st Appellant entered into a sale agreement with Bernard; whether the cause of action arising from the sale agreement was time barred; the description of the land allegedly forming the transaction? was there breach of contract? was the claim on fraud proven?
31. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. The Court shall be guided by the provisions of Section 107 – 109 of the Evidence Act which provide as follows;

“ 107. Burden of proof

- (1) Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

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.”

32. The Court of Appeal in the case of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14 which states as :

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the Court to take action. Thus, a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation



of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

33. The Respondent’s case as set out in the amended plaint dated 19/11/2021 is that her late husband Bernard was the proprietor of all that property known as RUIRU/MUGUTHA BLOCK 1/2390 vide Certificate No. 6296 and ballot No. 2390 – Nyakinyua Investment Limited pursuant to a sale agreement dated 13/1/2005 between the late Bernard (purchaser) and the 1st Appellant as vendor. The consideration price was Kshs. 250,000/= and upon full payment of the purchase price, the purchaser would take possession of the land. That Kshs. 100,000/= was paid upon execution of the agreement and balance paid on 12/3/2015 at which time the 1st Appellant claimed loss of original certificate No 6297 and ballot No. 2390. That later and upon the demise of Bernard on 7/1/2020, the 1st Appellant fraudulently sold the suit land to the 2nd and 3rd Defendants. Additionally, the Respondent levelled particulars of breach against the 1st Appellant and negligence on the part of the 2nd and 3rd Appellants. The Respondent further accused the Appellants for illegal trespass on the suit land and prayed inter alia for specific performance of the sale agreement; injunction against the Appellants; and revocation of the 2nd and 3rd Respondents’ title over the suit land.
34. Supporting her case, the Respondent testified as PW1 that she was the wife of the late Bernard as shown by copies of her marriage certificate and chief’s letter dated 13/2/2020. That they bought the suit land in 2005 and left it to a neighbor to farm on it. That the 1st Appellant’s claim that the certificate was lost was a scheme to defraud the 2nd and 3rd Appellants because the suit land had already been sold to Bernard. PW1 produced Pexh 1 -4 namely Bernard’s death certificate, acknowledgement of receipts note, police abstract and green card from Ruiru Lands Registry.
35. In cross, the Respondent stated that she did not know the parcel of land. That the lady who sold the land to Bernard was introduced by Mrefu/Mutahi. She also admitted to not witnessing the execution of the sale agreement as she was not a party to it. Regarding the payment of the balance of the purchase price, PW1 confirmed that it was not paid according to the terms of the agreement.
36. The Respondent’s suit was opposed by the Appellants. The 1st Appellant denied the Respondent’s claims in toto vide her amended defence dated 8/12/2021 and particularly denied ever selling the suit land to the late Bernard as alleged. That she could not be accused of trespassing on her own parcel of land. That her share certificate from Nyakinyua Investment Ltd was replaced on 10/11/2017 over two years before the demise of Bernard. She urged the Court to dismiss the Respondent’s suit with costs.
37. In a similar fashion, the 2nd and 3rd Appellants through their amended defence dated 8/12/2021 denied the late Bernard’s proprietorship over the suit land and maintained that they were strangers to the alleged sale between Bernard and the 1st Appellant. They stated that they lawfully purchased the suit land from the 1st Appellant upon conducting due diligence and confirmation from Nyakinyua Investment Ltd as to the original owners of the suit land. They averred that they are bona fide purchasers for value and not trespassers as claimed. They also urged the Court to dismiss the Respondent’s suit with costs.
38. Did the Respondent discharge the burden of proof in support of her case? For starters the Respondent in her exam in chief produced the documents comprised in the List of Documents dated 25/11/2021. However, the said list does not contain the agreement of sale dated 13/1/2005.
39. Be that as it may, the Court notes that there is a further Affidavit sworn on 14/2/2021 by the Respondent and filed in Court on the 22/2/2021 in which the said agreement for sale dated 13/1/2005 is annexed as “NWW1”. The sale agreement is between the Njeri Wambui (1st Appellant) as vendor and Bernard M. Waweru (purchaser) in respect to parcel of land known as RUIRU/RUIRU EAST



BLOCK 2/2390 measuring ¼ an acre sold vide share certificate No. 6297 and ballot No. 2390 with the Nyakinyua Investment Ltd. The purchase price is agreed at Kshs. 250,000/=, with Kshs. 100,000/= acknowledged at the time of execution by the parties. The agreement was drawn and witnessed by a Mr Muturi Njoroge, Advocate.

40. Notwithstanding the fact that the agreement was not produced in evidence by the Respondent, the same was relied extensively in the trial by the parties for and against it. For example the Respondent led evidence that Bernard purchased the land in January 2005 and referred to the agreement. PW2 stated that he took the agreement dated the 13/1/2005 to Bernard to execute. In cross the said agreement was put to the 1st Appellant who stated that she did not know about it nor that the signature was hers. The Court finds that the agreement though not produced by Respondent was central to the suit in the trial Court.
41. The ingredients of a contract for sale of land are contained in Section 3(3) of the [Law of Contract Act](#) which states;

- “(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

42. The above provision is mirrored under Section 38 [Land Act](#) as follows;

“38.

- (1) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”

43. Having set out the law as above, the Court will now examine whether or not the 1st Appellant entered into a sale agreement with Bernard. The evidence of the Respondent centred on hearsay. I say so



because she led evidence that she was neither present when the agreement she relied on was signed nor witnessed the same. She stated in evidence;

“I was not a witness in the execution of the land sale agreement. I cannot confirm the detail of the agreement acknowledgement receipt I was not a party to it.”

44. It emerges from the evidence that PW2 -Henry Muiruri Gichuki was the one who orchestrated the transaction. I say so because he admits being the broker (go between) who allegedly introduced Benard to the 1st Appellant. How did he know that the 1st Appellant was selling land? It has been admitted that PW2 is actually the nephew of the 1st Appellant. From the evidence led in the trial Court he is the central actor so much so that he led evidence that he took the money from Bernard and went and paid the 1st Appellant. He made the startling revelation as follows;

“... Waweru went to the bank and withdrew Kshs. 100,000/= to purchase the said plot. I met Njeri and her husband and I had Kshs. 100,000/=. On 13th January 2005 we went to the Advocates office – me, Njeri, Husband and Advocates. The sale agreement was prepared and we all signed and Waweru did not sign on the same day. I took the agreement further list of documents dated 13th January 2005. I gave the Advocate money and Mary Njeri took the money Kshs. 100,000/=”

45. From the above it is clear that Bernard did not hand over the money to the 1st Appellant. PW2 failed to show any evidence of receipt or acknowledgement of the deposit of Kshs 100,000/- in Court. More worrying is the disclosure that Bernard did not sign the agreement in the lawyer’s offices as alleged by Respondent. It is anybody’s guess if indeed he ever signed the same as dead men tell no tales. Further a perusal of the said agreement shows two signatures while PW2 insisted that the agreement was signed by 1st Appellant, her husband and PW2. This further shows that the evidence of PW2 is not only unreliable but made up.
46. In the face of the 1st Appellant denying that she signed the agreement of sale, the onus was on the Respondent to prove otherwise. That is by tendering expert evidence pinning the 1st Appellant to the execution of the said agreement of sale. The agreement is alleged to have been witnessed by a Mr Muturi Advocate, however he was not called to confirm whether he drew the agreement and whether Benard and the 1st Appellant executed the said agreement in his presence. This is despite the Respondent stating in para 3 of her submissions that Advocate Muturi Njoroge was called to testify contrary to the record before me. It was incumbent upon the Respondent as the one alleging the existence of an agreement over the suit land to avail evidence by way of an expert witness to corroborate the assailed signature. The Respondent failed to discharge the burden of proof on this important issue which in the view of the Court. The rights of the parties will either rise or fall.
47. The next area of contradiction falls on the description of the land allegedly purchased by Benard. In the amended plaint the land is described RUIRU/MUGUTHA BLOCK 1/2390 while in the impugned agreement of sale it is stated as RUIRU/RUIRU EAST BLOCK 2/2390. Notably the description of the parcel of land in the sale agreement is different from the parcel of land contained in the amended plaint. The totality of these descriptions creates considerable doubt as to which property was actually transacted by the late Bernard. The Respondent’s case was not made any better by the trial Court who in its disposal orders, stated the suit land as Ruiru/Mugutha Block 12/2390. I have anxiously evaluated the record, the pleadings of the parties and the evidence adduced and fail to find such land.



48. On the question of proof, the trial Court held that;

“There is no doubt that the Plaintiff’s husband entered into sale agreement with the 1st Defendant and his (sic) husband over the sale and purchase of suit property. It is evident that there is sale agreement dated January 2005 in relation to this transaction for KShs. 100,000/ =.....

The Plaintiff’s husband and 1st Defendant had a written land agreement which is considered as a contract. The same is in writing and is signed by the Plaintiff nad husband 1st Defendant, a fact that was disputed by the 1st Defendant but PW2 who introduced the Plaintiff’s husband confirmed that the two sale agreements were signed by 1st Defendant ...”

49. The totality of the Respondent’s evidence as presented in Court, in my view fell short of the required standard to prove that her husband entered into a valid sale agreement with the 1st Appellant and the trial Court erred in reaching the conclusion it did.

50. In light of Section 107 of the *Evidence Act* above, it is trite that he who alleges must proof. In this case this burden rested on the shoulders of the Respondent. It is also trite that parties are bound by their pleadings. A Court of law cannot rewrite pleadings or correct anomalies in pleadings to tally with evidence produced before it. The Respondent’s amended plaint vis-a-vis the copy of sale agreement in the Court record (which was not formally produced in evidence) do not correspond. On this ground alone, the Respondent’s suit ought to have failed for want of proof.

51. In the foregoing I find that grounds Nos. 1,2,5,7 and 9 in the Memorandum of Appeal are merited thus succeed.

52. Ground no 3 in the Memorandum of Appeal impugned the trial Court finding that if indeed there was a valid sale agreement, the same had lapsed by effluxion of time and the remedy for specific performance was barred by statutory limitation. If the cause of action is taken to be in congruence with the sale agreement entered into on 13/1/2005 then one would be right to imply that the cause of action arose in 2005. Applying Section 4(a) of the *Limitation of Actions Act* an action founded on contract cannot be brought after 6 years whereas a claim for ownership of land cannot be brought after 12 years since the right of action has accrued to a party as provided under Section 7 of the *Limitation of Actions Act*. However, if the cause of action is taken to be 2015 when the balance of the purchase price was made then 6 years would lapse in 2021 and 12 years in 2027. In either way it is my view that given the holding of the Court in the preceding paras successfully impugning the agreement of sale, the issue of limitation is neither here or there.

53. The question on breach of the sale agreement that the trial Court addressed itself on, is now moot for determination by this Court having found that there was no evidence of parties entering into a sale agreement for the suit land.

54. The next issue is whether fraud was proven. In its Judgment the trial Court held as follows;

“... the 1st Defendant did not rescind the agreement between her and the Plaintiff’s husband but colluded with the 2nd and 3rd Defendant who were not parties in this suit to fraudulently dispossess the Plaintiff of the suit property. Further there was no termination notice served upon the Plaintiff regarding termination of the agreement, I find that the 1st Defendant was not honest with the Plaintiff and the 2nd and 3rd Defendants and she wanted to enrich herself from both the Plaintiff and 2nd and 3rd Defendants’ funds”



55. Order 2 Rule 4 (1) Civil Procedure Rules states;

- “ 4. Matters which must be specifically pleaded [Order 2, rule 4.]
- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading.”

56. In addition to that Order 2 Rule 10 (1) (a) of the Civil Procedure Rules is to the effect that;

- “ 10. Particulars of pleading [Order 2, rule 10.]
- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

57. Flowing from the above provisions, it is imperative that fraud must not only be pleaded but particularized to enable a party to sufficiently answer to the accusations levelled against them. It puts them on notice of the case to answer to where particulars are necessary to enable the parties and Court to frame the correct issues for determination.

58. The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities. See *Kinyanjui Kamau Vs. George Kamau Njoroge* (2015) eKLR; *Bruce Joseph Bockle Vs. Coquero Ltd* (2014) eKLR. The Court of Appeal in the case of *John Mbogua Getao Vs. Simon Parkoyiet Mokare & 4 Others* [2017] KECA 156 (KLR) affirmed that allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person’s right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. The appellate Court cited with approval its earlier holding in *Emfil Ltd Vs. Registrar of Titles Mombasa & 2 Others* (2014) eKLR on the issue of fraud that;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the Court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the Respondents to totally ignore the rules of evidence.”



59. The Respondent accused the 1st Appellant of fraudulently selling the suit land to the 2nd and 3rd Appellants after the demise of Bernard. She produced a copy of an occurrence book (OB) No. 4/21/3/2015 report dated 21/3/2015 that allegedly was made by the 1st Appellant for loss of her documents which the 1st Appellant disputed. A close scrutiny of this document reveals that the date therein has been erased. No evidence was led by the Respondent as to how and why it was erased or who erased it. It was also not disclosed how the Respondent obtained the OB. It was upon the Respondent to call evidence from the Ruiru Police Station to confirm if indeed the report culminating into the said OB was made by the 1st Appellant. She failed to do so.
60. Conversely the 1st Appellant testified that her documents got lost around 2016 before the demise of Bernard and she reported the loss to Nyakinyua Investment Ltd and the police in 2017. In evidence she produced an OB No 34/32/08/17 dated the 31/8/2017, Affidavit sworn by the 1st Appellant deponing on the loss of the documents, letter dated the 10/11/2017 by Nyakinyua Investments Limited addressed to the Land Registrar Thika confirming the 1st Appellant as the owner of the land and the replacement certificate No 00829. These actions and documents of the 1st Appellant when weighed against the OB presented by the Respondent are in my view more probable. The Court finds that steps taken by the 1st Appellant after loss of her documents is devoid of fraud as alleged.
61. Sections 24 (a), 25 (1) and 26(1) of the [Land Registration Act](#) provide;
- “24. Interest conferred by registration
Subject to this Act—
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - b. ...
25. Rights of a proprietor
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie



evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

62. Accordingly, the Court finds that the Respondent having failed to prove fraud against the 1st Appellant, there was no evidence to warrant the impeachment/cancellation of the 2nd and 3rd Appellants’ title obtained from the 1st Appellant which is protected under Sections 24, 25 and 26 *Land Registration Act*.
63. Last but not least the Appellants urged that the trial Court erred in determining unpleaded issues in its Judgment to wit; Land Control Board consent, counter claim by interested parties and termination/rescission of contract. In considering the question of pleadings I find concurrence with the decision of the Court of Appeal in the case *Galaxy Paints Company Limited vs. Falcon Guards Limited* CA Case No. 219 of 1998 (2000) eKLR, stated that:

“Issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial Court by dint of the aforesaid rules may only pronounce Judgment on the issues arising from the pleadings or such issues as the parties have framed for the Court’s determination.”

64. It is trite that parties are bound by their pleadings. In the Court of Appeal case of *Okoth Vs. Nyaberi & Anor.* [2024] KECA 427 (KLR) the Court affirmed the trial Court Judgment that dismissed the Appellant’s suit for want of proof and cited the holding in the Malawi Supreme Court decision in *Malawi Railways Ltd Vs. Nyasulu* [1998] MWSC 3, where the Court quoted with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in 1960, *Current Legal Problems*, at p.174 where the author had stated:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

....



In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

65. Earlier on the Court of Appeal in Antony Francis Wareham T/A AF Wareham & 2 Others Vs. Kenya Post Office Savings Bank [2004] eKLR in allowing an Appeal that inter alia challenged trial Court findings on unpleaded issues held as follows:-

“ ... Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a Court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings ...”

66. Going by the above binding decisions, this Court agrees with the 2nd and 3rd Appellants that the trial Court erred in pronouncing itself on issues which were not raised by the parties in their rival pleadings.

67. In light of my analysis and conclusions above, I find that the trial Court Judgment is ripe for setting aside. This is because the Hon Magistrate misdirected and misapprehended the facts of the case and evidence adduced leading to a wrong decision.

68. The last issue for determination is who bears costs? Section 26 of the *Civil Procedure Act* provides that costs generally follows the event. The Supreme Court in the case of Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others [2014] eKLR affirmed that costs must always follow the event unless the Court has a good reason to order otherwise. One may ask what is this event that the drafters of the law had in mind? The answer is found in the Supreme Court Ruling on the issue of costs in Baridi Felix Mbevo Vs. Musee Mati & 2 Others [2021] eKLR that;

“ 21. Applying the principle in the Jasbir Singh Rai Case that costs normally follow the event, the question to ask is whether an event to which costs would follow has materialized. The answer is in the negative. The Appellant’s Appeal did not fail but was frustrated. Strictly speaking, there were no winners or losers following the withdrawal. It is the occurrence of the event which crystalizes costs for the successful party ...”

69. In this case, the Appeal has succeeded and there is no reason why the Appellants should be denied costs.

70. Final Orders for disposal;

- a. The whole of the Judgement of the Honorable Principal Magistrate dated 21st June 2022 be and is hereby set aside by dismissing the Respondent’s suit.
- b. A declaration that the 1st Appellant held valid documents to title to transfer to the 2nd and 3rd Appellants.



c. The costs of this Appeal and the suit shall be in favour of the Appellants.

71. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF MAY, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mbogo HB Ms. Bunei for 1st Appellant

Mbogo for 2nd and 3rd Appellants

Gikonyo for the Respondent

Court Assistant – Phyllis

