



Ngunyumu Housing Co. Ltd v Njambi Angela Gathecha; Gachui Kinyanjui Gathecha; & Dominic Gathecha Kinyua (Sued as Joint Administrators of the Estate of the Late Dominic Gathecha Kinyanjui) & 3 others (Environment & Land Case E395 of 2022) [2024] KEELC 6412 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6412 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E395 OF 2022**

**JO MBOYA, J
OCTOBER 3, 2024**

BETWEEN

NGUNYUMU HOUSING CO. LTD PLAINTIFF

AND

**NJAMBI ANGELA GATHECHA; GACHUI KINYANJUI GATHECHA; &
DOMINIC GATHECHA KINYUA [SUED AS JOINT ADMINISTRATORS
OF THE ESTATE OF THE LATE DOMINIC GATHECHA
KINYANJUI] 1ST DEFENDANT
REGISTRAR OF LANDS NAIROBI COUNTY 2ND DEFENDANT
NAIROBI COUNTY LAND SURVEYOR 3RD DEFENDANT
HON. ATTORNEY GENERAL 4TH DEFENDANT**

RULING

Introduction and Background

1. The Plaintiff herein has approached the court vide Plaintiff dated the 16th November 2022 and in respect of which same [Plaintiff] has sought for the following reliefs;
 - i. Declaration that the Plaintiff are the lawful and legal owners of the suit property known as LR No. 31/13 being 20 acres subdivision measuring 8.751 HA under deed plan number 228125 dated the 3rd December 1999.
 - ii. A declaratory and specific performance orders directing and compelling the registrar of lands Nairobi, county surveyor and all relevant government agencies to process, subdivide and issue title deed of the suit property known as LR No. 31/13 being 20 acres subdivision measuring



8.751 HA under deed plan number 228125 dated the 3rd December 1999 in favour of the Plaintiff and the deputy registrar to execute such transfer and processing documents if need be.

- iii. Declaratory orders that the Plaintiff's rights to hold and acquire land and obtain title thereon under Article 4[3] of the Constitution has been violated and infringed upon by the delay and denial of title thereon.
 - iv. Declaratory and specific performance orders that the director of survey or county surveyor in charge of Nairobi County to approve the subdivision of the suit property known as LR No. 31/13 being 20 acres subdivision measuring 8.751 HA.
 - v. Any other appropriate orders including supervisory structural interdicts to ensure compliance for subdivision and issuance of title to the suit property known as LR No. 31/13 being 20 acres subdivision measuring 8.751 HA under deed plan number 228125 dated the 3rd December 1999 in favour of the Plaintiff as may be deemed appropriate by this honourable court.
 - vi. Costs of the suit.
2. Upon being served with the Plaint and summons to enter appearance the 1st Defendant herein duly entered appearance and thereafter proceeded to and filed a notice of preliminary objection dated the 16th November 2023 and wherein same [1st Defendant] has highlighted a plethora of grounds.
3. For coherence, the Notice of Preliminary objection has raised the following grounds;
- i. The Plaintiff's suit as commenced is in breach of the mandatory provisions of Order 4 Rule 1[f] of the Civil Procedure Rules, 2010 for failure to disclose previous proceedings on the same subject matter namely Nairobi HCC 2587 of 1994 and Nairobi Court of Appeal Application No. 315 of 2000
 - ii. The Plaintiff's suit is void for want of instructions and offence the mandatory provisions Order 4 Rule 1[4] of the Civil Procedure Rule, 2010.
 - iii. The Plaintiff's claim is statued barred insofar as the claim is base don the agreement for sale dated 8th August 2013 as pleaded at paragraph 4 of the Plaint.
 - iv. That Njambi Angela Gathecha sued as the joint administrators of the estate of the late Dominic Gathecha Kinyanjui are nonsuited in this matter.
 - v. That the Plaintiff's suit does not raise any cause of action against Njambi Angela Gathecha sued as the joint administrators of the estate of the late Dominic Gathecha Kinyanjui.
 - vi. That the claim on actual and continuous quiet and peaceful possession of the suit property for a period of over 50 years is extinguished by the decision in Nairobi HCC No. 2587 of 1994 and Nairobi Court of Appeal Civil Application No. 315 of 2000 and further, the same cannot be sustained in this suit.
 - vii. That the Plaintiff's claim is void for want of material particulars and specificity.
 - viii. That the Plaintiff's suit is otherwise an abuse of the court process and ripe for striking out with costs.
4. The subject matter came up for directions on the 20 June 2024; whereupon learned counsel for the 1st Defendant intimated that the 1st Defendant had filed a notice of preliminary objection and thus sought directions to have preliminary objection canvassed and disposed of beforehand. Furthermore,



learned counsel for the 1st Defendant contended that the preliminary objection was likely to dispose of the entire suit in limine.

5. Arising from the foregoing and taking into account the nature of preliminary objection, the court ordered and directed that the preliminary objection be canvassed and disposed of at the onset. In this regard, the court proceeded to and directed that the preliminary objection be canvassed by way of written submissions to be filed and exchanged by the parties.
6. Pursuant to the directions of the court, the 1st Defendant filed written submissions dated the 25th June 2024, whereas the Plaintiff herein filed written submissions dated the 22nd July 2024. Instructively, the written submissions adverted to form part of the record of the court.

Parties' submissions:

1st Defendant's Submissions:

7. The 1st Defendant filed written submissions dated the 25th June 2024 and wherein same [1st Defendant] adopted the various grounds enumerated at the foot of the notice of preliminary objection and thereafter highlighted four [4] pertinent issues for consideration by the court.
8. Firstly, learned counsel for the 1st Defendant contended that there had been previous proceedings between the Plaintiff herein and the 1st Defendant, namely, Nairobi HCC No. 2587 of 1994 and Nairobi Court of Appeal Civil Application no. 315 of 2000 and which proceedings touched on and concerned LR No. 31 Ruaraka. Furthermore, learned counsel posited that even though the previous proceedings touched on LR No. 31 Ruaraka, it is the said property which was subdivided and thus gave rise to the suit property.
9. Owing to the foregoing, learned counsel for the 1st Defendant contended that it was incumbent upon the Plaintiff herein to disclose unto the court the existence of the said suit and or proceedings between the same parties and touching on the suit property.
10. However, learned counsel for the 1st Defendant submitted that despite being aware of the existence of the previous suit, the Plaintiff herein concealed same and as a result of such concealment/non-disclosure, learned counsel for the 1st Defendant has contended that the Plaintiff has therefore breached/violated the mandatory provisions of Order 4 Rule 1 [f] of the Civil Procedure Rules, 2010.
11. In support of the foregoing submissions, learned counsel for the 1st Defendant has cited and referenced the holding in the case of *Duncan K Wachira v Muring Holding Ltd* [2013]eKLR.
12. Secondly, learned counsel for the 1st Defendant has submitted that insofar as the suit before the court has been filed by and on behalf of a limited liability company, it was incumbent upon the deponent of the verifying affidavit to procure and obtain the requisite resolution under seal, authorising same to execute the verifying affidavit.
13. In particular, learned counsel for the 1st Defendant invoked and highlighted the provisions of Order 4 Rule 1[4] of the *Civil Procedure Rules* 2010 which underpins the necessity for the verifying affidavit sworn on behalf of a company to be accompanied with the requisite resolution under seal of the company.
14. Based on the foregoing, learned counsel for the 1st Defendant has posited that the absence of the requisite resolution under seal, negates and vitiates the veracity of the verifying affidavit that has been adverted to and attached to the Plaint beforehand. In this regard, it was contended that the suit beforehand is not verified by a competent verifying affidavit.



15. Thirdly, learned counsel for the 1st Defendant has submitted that the Plaintiff's suit, which touches on and concerns the sale agreement entered into on the 8th August 2013, is statute barred. In particular, learned counsel contended that to the extent that the suit herein is founded on contract, it behooved the Plaintiff to file the suit within the statutory timelines espoused by the provision of Section 4[1] of the Limitation of Actions Act Chapter 22 Laws of Kenya.
16. It was the further contention of learned counsel for the 1st Defendant that by the time the instant suit was being filed, the statutory duration prescribed under the law had long lapsed and hence the Plaintiff's claim was rendered redundant and thus stood extinguished.
17. To this end, learned counsel for the 1st Defendant has cited and referenced the decision in the case of Kober & 2 Others v Korkoren [Chairman & Another] 2023 KELC 18168, Meta v Shab [1965]EA 321 and Gathoni v Kenya Cooperative Creamaries Ltd [1982]eKLR, respectively.
18. Fourthly, learned counsel for the 1st Defendant has submitted that even though the 1st Defendants have been sued and impleaded as the administrators of the estate of Domnic Gathecha Kinyanjui [now deceased], same are not the duly appointed legal administrators of the said estate. In this regard, it has been posited that the suit against the 1st Defendant is therefore premature and misconceived.
19. Furthermore, it has been contended that insofar as the 1st Defendant is not the duly appointed administrators of the estate of the deceased, same cannot be sued on a matter pertaining to and concerning the estate of the deceased. In this regard, it has been contended that the Plaintiff's suit as against the 1st Defendant does not raise and/or disclose any reasonable cause of action.
20. Lastly, learned counsel for the 1st Defendant has submitted that the limb of the Plaintiff's claim that touched on and/or concerned [sic] the purported occupation of the suit property for more than 50 years, is erroneous and misleading insofar as the purported sale agreement was entered into on the 8th August 2013. At any rate, it has been posited that the sale agreement being relied upon by the Plaintiff contains a clause that the property was being sold in vacant possession.
21. Arising from the foregoing, learned counsel for the 1st Defendant has therefore implored the court to find and hold that the Plaintiff's suit, which is premised and anchored on the sale agreement dated the 8th August 2013 is not only misconceived, but same is statute barred. In this regard, the court has been invited to proceed and strike out the suit for being an abuse of the due process of the court.

Plaintiff's Submissions:

22. Learned counsel for the Plaintiff herein filed written submissions dated the 22nd July 2024, and in respect of which same has highlighted and canvassed three pertinent issues for consideration by the court.
23. First and foremost, learned counsel for the Plaintiff has submitted that the various issues which have been highlighted at the foot of the notice of preliminary objection by the 1st Defendant, do not raise and/or espouse pure points of law that can be canvassed and disposed of in limine. In particular, learned counsel for the Plaintiff has posited that what the 1st Defendant has adverted to are issues of mixed facts and law, which cannot be canvassed and disposed of summarily.
24. Secondly, learned counsel for the Plaintiff has submitted that the question of limitation which has been raised and highlighted by the 1st Defendant herein cannot be addressed via a preliminary objection. In any event, it has been posited that matters of limitation would require production of evidence and thereafter due evaluation by the court with a view to ascertaining whether the cause of action is statute barred or otherwise.



25. To this end, learned counsel for the Plaintiff has cited and referenced the decision in *Devecon Ltd v Sbrinmkhana Samani* Civil Appeal No. 142 of 1997 and *Oruta v Samuel Mose Nyamato* [1984]eKLR, respectively.
26. Thirdly, learned counsel for the Plaintiff has submitted that the contention by the 1st Defendant that the suit beforehand is barred by the doctrine of *res-judicata* is premature and misconceived. Similarly, it has been contended that the question of *res-judicata* is a matter that would require evaluation of the pleadings and proceedings in previous suit, before the court can determine whether the plea of *res-judicata* suffices or otherwise.
27. Finally, learned counsel for the Plaintiff has submitted that the Plaintiff's suit discloses a reasonable cause of action which merits to be heard and disposed of in the usual manner of proceedings. In this regard, learned counsel has posited that the preliminary objection herein is an endeavour by the 1st Defendant to drive away the Plaintiff from the seat of justice.
28. Flowing from the foregoing, learned counsel for the Plaintiff has therefore invited the court to find and hold that the preliminary objection raised and canvassed by the 1st Defendant is misconceived and devoid of merits.

Issues For Determination:

29. Having reviewed the notice of preliminary objection dated the 16th November 2023 and upon consideration on the written submissions filed by and on behalf of the parties, the following issues emerge [emerge] and are thus worthy of determination;
 - i. Whether the 1st Defendant are the legal administrators of the estate of Domnic Gathecha Kinyanjui and if not whether the suit as against the 1st Defendant is premature and misconceived.
 - ii. Whether the suit by and on behalf of the Plaintiff is duly verified by the requisite verifying affidavit in accordance with the provisions of Order 4 Rule 1[4] of the *Civil Procedure Rules* or otherwise.
 - iii. Whether the suit by and on behalf of the Plaintiff is statute barred or otherwise.

Analysis And Determination

Issue Number 1 Whether the 1st Defendant are the legal administrators of the estate of Domnic Gathecha Kinyanjui and if not whether the suit as against the 1st Defendant is premature and misconceived.

30. The Plaintiff's suit and or claim before the court is premised on the basis/contention that the Plaintiff herein entered into and executed a sale agreement with one Domnic Gathecha Kinyanjui, now deceased on the 8th August 2013. For good measure, the sale agreement under reference touched on and/or concerned the sale of the property, known as LR No. 31/13, Deed plan number 228125 and which was said to be measuring approximately 8.751 HA.
31. However, it appears that the vendor, namely, Domnic Gathecha Kinyanjui passed on prior to and before the sale transaction could materialize. In this respect, the Plaintiff thereafter proceeded to and filed the instant suit as against the 1st Defendant, who is contended to be the legal administrators of the estate of Domnic Gathecha Kinyanjui, deceased.



32. Nevertheless, even though the Plaintiff has sued and impleaded the 1st Defendant as the legal administrators of the estate of Dominic Gathecha Kinyanjui, the Plaintiff has however failed to place before the court any evidence namely Grant of Letters of Administration of Grant of Probate to demonstrate that the 1st Defendant has been duly constituted as the administrator of Dominic Gathecha Kinyanjui, now deceased.
33. Suffice it to underscore, that one can only be sued for and on behalf of the estate of a deceased person upon issuance of Grant of Letters of Administration. For coherence, it is the grant of letters of administration or grant of probate that bestows upon the holder thereof the requisite legal capacity to speak and/or act on behalf of the estate of the deceased.
34. To this end, it suffices to cite and reference the provisions of Section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya.
35. Same provides as hereunder;
 82. Powers of personal representatives' Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
 - (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
 - (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—
 - (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
 - (ii) no immovable property shall be sold before confirmation of the grant;
 - (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
 - (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any will—
 - i. no appropriation shall be made so as to affect adversely any specific legacy;
 - ii. no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his



parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

36. Pertinently, the importance of grant of letters of administration was considered and elaborated upon by the court of appeal in the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR, where the court held and observed as hereunder;

That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo (supra)* this Court differently constituted rendered itself thus:

“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

37. In view of the holding in the decision [*supra*], there is no gainsaying that a suit by or against the estate of the deceased can only be commenced against the duly constituted legal administrator of the estate and not otherwise. In this regard, the Plaintiff herein, could only implead the 1st Defendant provided that the Plaintiff was able to demonstrate that the 1st Defendant has since been issued with the requisite grant of letters of administration.
38. However, in respect of the instant matter, the Plaintiff who is chargeable with the obligation to demonstrate that the 1st Defendant is possessed with the requisite locus standi, has failed to place before the court any scintilla of evidence/documents to underpin the contention that the 1st Defendant is the legal administrator of the estate of the deceased.
39. At any rate, it is not lost on this court that whenever a party is sued as the legal representative of the deceased, then it behooves the claimant/plaintiff, to not only mention the capacity upon which the administrator is being sued but same [Claimant] is obligated to venture forward and disclose the basis of such contention.
40. Simply put, it is the obligation of the Plaintiff/Claimant to place before the court the requisite particulars of [sic] the succession cause number or copy of grant of letters of administration underpinning the contention that the person sued has been duly constituted as the administrator of the estate in question.
41. Without belabouring the point, it suffices to reference and cite the provisions of Order 4 Rule 4 of the *Civil Procedure Rules*, 2010 which provides as hereunder;
- [Order 4, rule 4.] Capacity of parties.
4. Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.
42. Simply put, in respect of the instant matter, the Plaintiff herein has not endeavoured to demonstrate how the capacity by the 1st Defendant has arisen and/or accrued. Instructively, it is not enough to baptize and/or reference the 1st Defendant as the administrators of the estate of Dominic Gathecha Kinyanjui, now deceased without providing any basis and/or foundation.
43. Before departing from this issue, it is also apposite to state and underscore that the capacity of parties is a pertinent and cardinal issue. Indeed, the locus standi question relates to whether or not the person suing or being sued has the requisite capacity in the first place.



44. Put differently, locus standi to sue and or be sued is a jurisdictional question and same goes to the root of the proceedings. Consequently, where a party has been sued but same is not seized of the requisite capacity to be sued, the entire suit is vitiated and thus become untenable.

45. In the case of Alfred Njau & 5 others v City Council of Nairobi [1983] eKLR, where the court discussed the place of locus standi and stated as hereunder;

“Lack of *locus standi* and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ...”

The court proceeded to state:

“To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

46. Additionally, the centrality of locus standi was elaborated in the case of Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR, where the court held as hereunder;

Further the issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. *Locus standi* relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

47. Arising from the foregoing discussion, my answer to issue number one[1] is threefold. Firstly, the Plaintiff herein was obligated not only to reference the 1st Defendant as the administrator of the estate of Dominic Gathecha Kinyanjui, now deceased but same was obligated to disclose how the representative capacity arose. [see Order 4 Rule 4 of the Civil Procedure Rules].

48. Secondly, the 1st Defendant herein cannot be sued for and on behalf of the estate of Dominc Gathecha Kinyanjui prior to and before the issuance of grant of letters of administration in accordance with the provision of Section 82 of the Law of Succession Act, Chapter 160 Laws of Kenya.

49. Thirdly, in the absence of grant of letters of administration, the 1st Defendant is not possessed of the requisite locus standi to be sued and/or impleaded on behalf of the estate of the deceased. In this regard, the suit against the 1st Defendant is not only premature and misconceived, but same is legally untenable.

Issue Number 2 Whether the suit by and on behalf of the Plaintiff is duly verified by the requisite verifying affidavit in accordance with the provisions of Order 4 Rule 1[4] of the Civil Procedure Rules or otherwise.

50. Furthermore, the suit before the court has been filed by and on behalf of a limited liability company. Suffice it to point out that a limited liability company is incapable of executing pleadings by and on her own behalf. In this regard, the limited liability company acts through her authorized officers and/or recognized agents.



51. Owing to the manner in which limited liability companies operate; the law requires that actions and/or activities by and on behalf of limited liability companies be undertaken by persons who are duly authorized by the company under seal. In this regard, whenever an action is undertaken on behalf of a company, it behooves the person undertaking the action in question to exhibit and/or demonstrate that the company has sanctioned the act in question.
52. To this end, it suffices to reiterate the holding of the Supreme Court of Kenya [the Apex Court] in the case of *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* (Petition 32 ... Petition 20 of 2020; [2022] KESC 31 (KLR), where the court stated and held thus;

It is elementary principle of company law that a company as a distinct legal entity from its promoters, directors or employees can only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.

53. Likewise, the necessity to exhibit the resolution of a company under seal was also highlighted in the case of *Affordable Homes Africa Ltd v Henderson & 2 others* [2004] eKLR, where the court stated as hereunder;

As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty. As to which of these two organs should give the necessary sanction depends, in the case of registered companies, entirely on the construction of the company's articles of association. In *Automatic Self-cleansing Filter Syndicate v Cuninghame* [1906] ch.34, C.A., it was held that where a company's powers of management are, by the articles, vested in the board of directors, the general meeting cannot interfere in the exercise of those powers. It is therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company.

54. Duly guided by the holding in the decisions referenced in the preceding paragraphs, it is now appropriate to revert back to the instant matter and to consider whether the verifying affidavit which has been annexed to the Plaint has been sworn by a person who is duly authorized under the seal of the company, namely, the Plaintiff to do so.
55. To start with, there is no gainsaying that the provision of Order 4 Rule 1[4] of the *Civil Procedure Rules*, underscores that where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company. In this regard, it was therefore incumbent upon Mr. Mwaura Githiora, who swore the verifying affidavit to annex and/or attach the resolution under seal.
56. However, there is no gainsaying that no such resolution and/or authority under seal has been annexed and/or exhibited. In this regard, it is apparent that the verifying affidavit that has accompanied the Plaint does not meet and/or satisfied the statutory threshold in terms of Order 4 Rule 1[4] of the *Civil Procedure Rules*, 2010.
57. To my mind, the provisions of Order 4 Rule 1[4] of the *Civil Procedure Rules*, 2010; are intended to eliminate situations where suits are brought by and on behalf of the company, albeit without the



sanction of the company. For good measure, the import and tenor of Order 4 Rule 1[4] [*supra*] is to avert the mischief of misusing and/or abusing the name of a corporation.

58. On the other hand, there is no gainsaying that the provisions of Order 4 Rule 1[4] of the *Civil Procedure Rules*, 2010 are couched in mandatory terms. In this regard, same cannot be disregarded and/or ignored with abandon.
59. At any rate, is worth pointing out that even though the question of lack of resolution under seal was highlighted in the body of the preliminary objection, learned counsel for the Plaintiff did not deem it appropriate to procure and obtain the resolution/authority under seal and thereafter seek leave of the court to file same. In this regard, the court has been left with no explanation as to why the resolution was not availed.
60. Be that as it may, it is my humble view that the rules of procedure and particularly those that are intertwined with substance of the matter cannot be disregarded with licentious abandon. In any event, compliance with the rules of procedure, is critical in ensuring a level playing field for litigants.
61. To underscore, the importance of the rules of procedure and the need to comply therewith, it suffices to cite and reference the holding of the court of appeal in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, where the court stated as hereunder;

A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

62. Flowing from the foregoing analysis, it is my finding and holding that the Plaint on behalf of the Plaintiff herein has not been suitably verified by the requisite affidavit signed/sworn by a person duly authorized under seal. In short, the Plaint that underpins the suit before the court violates the provisions of Order 4 Rule 1[4] of the *Civil Procedure Rules*, 2010.

Issue Number 3 Whether the suit by and on behalf of the Plaintiff is statute barred or otherwise.

63. The Plaintiff's suit is premised and predicated on the basis of a sale agreement dated the 8th August 2013 and wherein the Plaintiff sought to purchase the property known as LR No. 31/13 from one Dominic Gathecha Kinyanjui, now deceased.
64. To understand the crux of the Plaintiff's claim before the court, it suffices to reproduce the contents of paragraphs 4 and 5 of the Plaint. Same provides as hereunder;
 4. On or about the 8th August 2013, the Plaintiff entered and executed a sale agreement with the late Dominic Gathecha Kinyanjui over the subject suit property known as LR No. 31/13 being 20 acres subdivision measuring 8.751 HA under deed plan number 228125 dated the 3rd December 1999.
 5. The consideration thereon was for the sum of Kes.5, 000, 000/= by way of bankers cheques issued to the seller. The property was sold under vacant possession. Based on the above sale



agreement an instrument of transfer was executed together therein by the parties. The Plaintiff referred to the said instrument and cheques for their purport and effect.

65. Other than the foregoing paragraphs which have been extracted from the body of the Plaintiff, it is also worthy to take cognizance of the reliefs sought at the foot of the Plaintiff. Instructively, one of the reliefs that is being sought by the Plaintiff is an order of specific performance underpinned by the sale agreement entered into and executed on the 8th August 2013.
66. To my mind, the Plaintiff's suit before the court seeks to enforce the terms of the sale agreement/ contract entered into between the Plaintiff and one Dominic Gathecha Kinyanjui dated the 8th August 2013. In this regard, there is no gainsaying that the Plaintiff's claim is founded on contract.
67. Insofar as the Plaintiff's claim is founded on the sale agreement dated the 8th August 2013, it behooved the Plaintiff to commence the suit, if any, within six [6] years from the date of accrual of the cause of action.
68. In this respect, there is no gainsaying that the Plaintiff's suit ought to have been commenced within the timelines circumscribed by the provisions of Section 4[1] of the Limitation of Action Act, Chapter 22 Laws of Kenya.
69. For ease of reference, the provisions of Section 4[1] [*supra*] stipulates as hereunder;
 4. Actions of contract and tort and certain other actions
 - (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - a. actions founded on contract;
 - b. actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
 - (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.
 - (3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.
 - (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.



- (5) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued.
- (6) This section does not apply to a cause of action within the Admiralty jurisdiction of the court which is enforceable in rem, except that subsection (1) of this section applies to an action to recover seamen's wages.

70. Other than the provisions [*supra*], the importance of limitation has also been considered and addressed in a plethora of decisions. In this case of [Gathoni v Kenya Co-operative Creameries Ltd](#) [1982] eKLR, where the court held thus;

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.

71. Likewise, the importance of the law of limitation on causes of actions was also discussed by the court in the case of [Bosire Ogero v Royal Media Services](#) [2015] eKLR, where the court stated and observed as hereunder;

In *Dhanesvar v Mehta v Manilal M. Shah* (1965) EA 321, the court was categorical that the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case, but it is not meant to extinguish claims.

The [Limitation of Actions Act](#) Chapter 22 Laws of Kenya is the primary substantive legislative enactment which statute expects the intending plaintiffs to exercise reasonable diligence and to take reasonable steps in their own interest, as not all causes of action once barred by statutory limitations are capable of being revived.

72. Arising from the foregoing, there is no gainsaying that where a suit is filed outside the prescribed limitation period, such a suit is incompetent and legally untenable. Furthermore, where the suit is filed outside the prescribed limitation, the court is divested of the requisite jurisdiction to take cognizant of such a suit.

73. Put differently, where the suit is barred by the limitation of actions, the proponent/claimant is non-suited and thus same cannot purport to approach the seat of justice with a view to propagating a still claim. In short, such a claim is rendered redundant and otiose and must thus be confined to the graveyard.

74. Before departing from the issue herein, it suffices to also cite and reference, the decision of the Court of Appeal in the case of [Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited](#) [2017] eKLR, where the court held thus;

30. With respect, there was no factual or legal basis for those findings. In the first place, the Deposit Protection Fund case relied on was not followed in the Court of Appeal decision in *Deposit*



Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & Another [2016] eKLR. This Court stated:

“As to 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.”

75. In view of the foregoing analysis and coupled with the various decisions referenced herein before, it is my finding and holding that the suit beforehand which is underpinned by the sale agreement entered into and executed on the 8th August 2013, is statute barred.
76. Quite clearly, same was filed well outside the prescribed timeline and thus the suit beforehand does not disclose a reasonable cause of action.
77. Notwithstanding the foregoing, it is also worthy to underscore that the suit against the 2nd, 3rd and 4th Defendants, which are public authorities would also be barred by the provisions of Section 3 of the Public Authorities Limitation Act Chapter 39 Laws of Kenya. For good measure, a suit founded on contract against public authorities must be filed within 3 years from the accrual of the cause of action.

Final Disposition:

78. Flowing from the analysis, [details highlighted in the body of the ruling] there is no gainsaying that the Plaintiff's suit which is predicated upon the sale agreement dated the 8th August 2013, was certainly filed outside the prescribed limitation. In this regard, the Plaintiff is clearly non-suited.
79. Other than the foregoing, it is also worthy to posit that the Plaintiff herein proceeded to and impleaded the 1st Defendant purportedly as the legal administrators of the estate of Domnic Gathecha Kinyanjui, albeit without lawful cause or basis. In any event, the Plaintiff paid scant respect to the provision of Order 4 Rule 4 of the Civil Procedure Rules, 2010.
80. In the premises, the final orders of the court are as hereunder;
 - i. The Preliminary Objection by and on behalf of the 1st Defendant is meritorious.
 - ii. The Plaintiff's suit is premature, misconceived and legally untenable.
 - iii. Consequently, the Plaintiff's suit vide Plaint dated the 16th November 2022 be and is hereby struck out.
 - iv. Costs of the suit and the preliminary objection be and are hereby awarded to the 1st Defendant. Same to be agreed upon and default to be taxed by the deputy registrar.
81. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024

OGUTTU MBOYA.



JUDGE.

In the presence of:

Benson – court Assistant

Mr. Ny'ende for the Plaintiff

Mr. Kariuki for the 1st Defendant

Mr. Allan Kamau h/b for Ms. Kerubo for the 3rd and 4th Defendants

