



Ikua v Kilifi Plantations (2014) Limited (Environment and Land Case Civil Suit 42 of 2022) [2023] KEELC 502 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 502 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 42 OF 2022
EK MAKORI, J
FEBRUARY 1, 2023**

BETWEEN

WANJIRU IKUA PLAINTIFF

AND

KILIFI PLANTATIONS (2014) LIMITED DEFENDANT

RULING

1. The defendant's preliminary objection filed on October 22, 2022, in response to the plaintiff's plaint and motion dated July 14, 2022, raises the following issues: -
 - a) This court lacks jurisdiction to hear and determine this suit as the suit is time-barred under section 7 of the Limitation of Actions Act and therefore null and void ab initio.
 - b) This court further lacks jurisdiction to hear and determine this suit as it is time-barred under section 339 of the repealed Companies Act (cap 486) which was the prevailing statute at the time the plaintiff herein entered into an agreement with Forlornland Limited (the 2005 agreement).
 - c) The defendant herein is non-suited since it did not and has never entered into an agreement for sale with the plaintiff herein over the suit premises and therefore there is no privity of contract between the parties herein, which is the substratum of the cause of action, and therefore contrary to basic tenets of the Law.
 - d) The suit is fatally and incurably defective and the same should be dismissed with costs awarded to the defendant.
2. The preliminary objection is opposed. The court directed the parties to file written submissions. They did comply.



3. The issues for consideration arising from the PO are whether the defendant was improperly joined in this suit due to lack of privity of contract; whether the suit and the corresponding motion are time-barred and should be dismissed in limine.
4. The background of the suit is that the plaintiff commenced this suit against the defendant on July 18, 2022 through a plaint dated July 14, 2022. Her claim against the defendant is that sometime in the year 2005, she entered into a sale agreement with Forlornland Limited to purchase the piece of land referred to as plot No V323 (original No 273/10) measuring 0.3781 hectares situated within Kilifi County (the suit land).
5. The parties agreed that the purchase price for the suit land was Kshs 1,250,000. The plaintiff was required to pay a deposit of Kshs 850,000 upon execution of the sale agreement whereupon the vendor would give her vacant possession of the suit land. The parties agreed that the plaintiff would pay the balance of the purchase price in installments to be agreed between the parties.
6. The plaintiff paid the vendor the deposit of Kshs 850,000 on October 26, 2005 and took vacant possession of the suit land and erected a fence around it. She cleared the balance of the purchase price of Kshs 400,000 on December 31, 2018.
7. Some years later, the plaintiff discovered that the vendor had been wound up, and to protect the vendor's interest in the suit land pending her payment of the purchase price, the vendor registered the suit land in the name of one Sally Ann McGuinness on 8th of August 2007 and procured the registration of a declaration of trust by Sally in which she declared that she held the title to the suit land to the order of the vendor.
8. Sometime in May 2022, some strangers went to the suit land and started erecting a fence around it on top of the fence already erected by the plaintiff. Upon enquiring from them why they were trespassing on her land, they informed her that they were acting under the instructions of a Mr Chris D Wilson whom the plaintiff knew as a director/shareholder of the wound-up Forlornland Limited.
9. A few days later, the plaintiff spotted some guards stationed at the suit land and the guards restrained her access to the suit land.
10. On May 4, 2022, the Plaintiff carried out a search of the suit land at the land registry and was astonished to learn that it was now registered to the Defendants. Mr. Chris D. Wilson is a director/shareholder of the Defendant Company.
11. The plaintiff claims that the Defendant fraudulently and illegally acquired title to the suit land and consequently cannot claim bona fide interests to it. She, therefore, seeks that the title illegally issued to the Defendant be canceled and a title to the land be issued to her.
12. On the issue of whether the Defendant has been wrongly joined in this suit, the Defendant submits that it is non-suited and wrongly joined as a party as it has never entered into an agreement for sale with the Plaintiff herein over the suit premises.
13. The Plaintiff by her admission entered into a sale agreement with Forlornland Limited in 2005 (the 2005 agreement), at which time the Defendant was not in existence having been registered in 2014. The Defendant's CR12 was annexed on pages 13-14 of the Plaintiff/Applicant's supporting affidavit). The Defendant therefore could not have been privy to the said agreement and therefore had no obligations to the Plaintiff herein concerning the suit premises.



14. According to the Defendant, what constitutes privity of contract has been described by Chitty on Contracts, 2004 Edition as follows: -

“The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.”

This means that a contract cannot confer rights or impose obligations on any person other than the contracting parties, and, therefore by dint of argument, cannot be enforced by or against a 3rd party as the Plaintiff is attempting to do against the Defendant herein. The effect of this legal principle is that only parties who are privity to a contract can sue to enforce its terms.

15. The Defendant further submits that in discussing the doctrine of privity of contracts, a three-judge bench in the Court of Appeal in *Aineah Liluyani Njirah vs. Aga Khan Health Services* [2013] eKLR stated: -

“...the doctrine of privity of contract is that, as a general rule, at common law, a contract cannot confer rights or impose obligations on persons who are not parties to it. The parties to a contract are those persons who reach an agreement...”¹

16. In trying to establish a level of obligation on the Defendant herein to enforce the said agreement for sale, the Plaintiff has presented evidence of the fact that both entities share a mutual shareholder and has to that effect presented a CR12, in a bid to convince this court that both entities, *Forlonland Limited and Kilifi Plantations* [2014] Limited, are interchangeable.

17. It is the humble submission by the Defendant that this court cannot and should not create a nexus between the two entities on the basis that they share a mutual shareholder. On this point, the Defendant has quoted the case of *Peter Muthiani Kavita & 2 others v James Muviu Mwilu & another* [2022] eKLR in underscoring the doctrine of privity of contract which relied on the case of *Dunlop Pneumatic Company Limited v Selfridge & Company Limited* [1915] AC 413 where it was held: -

“As a general rule, a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party to, even if the contract is made for his benefit and purports to give him the right to sue or make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such a near relationship to a party to the consideration does not entitle him to sue upon the contract”

18. To further buttress this point, the Defendant pointed out for consideration the principle flowing from the corporate personality that was established in the well-known case of *Salomon v Salomon* [1897] AC 78 where the House of Lords held that a company is in law a separate person from its members. In this case, both Forlonland Limited and the Defendant are separate and distinct legal persons from their shareholders and subscribers, and for that reason; any contracts entered by either party are separate and distinct even though they share [a] common director[s]/shareholder[s].

¹ (content missing)



19. The Court of Appeal in the case of *Victor Mabachi & Anor v Nurtturn Bates Ltd* NRB CA Civil Appeal No 247 of 2005 [2013] eKLR held that: -

“ [A company] as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors, and agents unless there are factors warranting a lifting of the veil.”

20. On this first issue, based on the above arguments, no suit can be sustained against the defendant, who is the current registered owner of the suit property, arising from the agreement for sale entered in 2005 between the plaintiff and Forlonland Limited. For this reason, this court need not waste its judicial time and resources on this matter as this suit and accompanying application are ripe for dismissal with costs in favor of the defendant.

21. On the other hand, the plaintiff thinks otherwise and submits that the plaintiff's case is not for breach of contract or specific performance of the sale agreement against Forlonland Limited. The plaintiff's cause of action is against the defendant who has a title to a land that was sold to the plaintiff by another party in 2005 (the 2005 agreement) and which land the plaintiff has been in possession of. Simply put, the plaintiff's cause of action against the defendant is for fraudulent and illegal acquisition of title to her land.

22. Based on the parties, pleadings, and submissions in this case, as well as the plaintiff's admission, there is no privity of contract between the Plaintiff and the Defendants. The 2005 agreement was made between the Plaintiff and a company called Forlonland Limited. The CR12 demonstrates that one of the Directors, Mr Chris D Wilson, is a common denominator in this matter. Because the Defendant was not a party to the 2005 agreement, that alone cannot impose obligations on the Defendant to discharge it through specific performance. The authorities cited by the Defendant on contract privity and the distinct personalities of the Plaintiff and the current Defendant are pertinent. Whether the PO will succeed on that point alone will depend on the cause of action as we have it after discussing the next objection.

23. On whether this suit is time-barred, the Defendant submits that the suit is time-barred noting that the undated agreement for sale annexed to Pages 2 to 4 of the Plaintiff's supporting affidavit appears to have been entered into in 2005. Furthermore, the Plaintiff has never been in possession of the said suit property. The difference in time from the date of the agreement to the date of filing of this claim amounts to, give or take, 17 years.

24. Whether on grounds of breach of contract under section 4 of the *Limitation of Actions Act* or an action to recover land under section 7 of the same, the Plaintiff's suit is incompetent, barred in law, an abuse of the court process, and by consequence ripe to be dismissed with costs. Sections 4 and 7 of the *Limitation of Actions Act* respectively provide as follows: -

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action occurred-

- (a) Actions founded on contract;
- (b) Actions including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

And



7. Actions to recover land

An action may not be brought by any person to recover the land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

25. The Defendant further submits that the fact that a suit is time-barred goes to the jurisdiction of the court to entertain the same. In the case of *Bosire Ongero v Royal Media services* [2015] eKLR, the court stated that: -

“...the question of limitation touches on the jurisdiction of the court, which means that if a matter is statute-barred, the court would lack jurisdiction to entertain it.”

26. The defendant further contends that to underscore the fact that any rights of the plaintiff regarding the suit property can only be realized based on the agreement for sale, for which the proper party can only be the party with whom the plaintiff contracted. Which is Forlonland Limited. This will be necessary to keep in mind to determine when the cause of action arose.
27. The court is asked to take judicial notice of the fact that the said company, Forlonland Limited, was wound up vide a Gazette Notice dated July 31, 2009 in accordance with section 339 (3) of the old *Companies Act* (cap 486).
28. It is the contention of the defendant, that the cause of action by the plaintiff (if any) could only have arisen at the point when the agreement for the sale of the suit property was terminated, this occurred when Forlonland Limited was struck out by virtue of the referenced gazette notice.
29. It is the contention of the defendant that no reason has been advanced by the plaintiff as to why she did not institute a claim for any perceived rights against the said company while it was still in existence. She simply attempts to allege ignorance as to the winding up of the company, which argument cannot stand noting that the import of the gazetting of companies for winding up is meant to notify any third parties with any dealings with the company being struck off to surrender objections (if any) within 3 months before the winding up notice.
30. It is further submitted by the defendant that the plaintiff was not without an opportunity to resurrect the company to sustain a claim for any perceived breach of the agreement for sale. The same Act provided a remedy for parties in the position of the plaintiff but this remedy needed to be put into effect within ten (10) years from the date of the gazetting of the gazette notice striking off the company. Section 339 (6) of the old *Companies Act* which states: -

“If a company or any member or creditor, therefore, feels aggrieved by the company having been struck off the register the court on an application made by the company or member or creditor before the expiration of ten years from the publication of the gazette if the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon a certified copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been struck off



31. The law does not provide a remedy for a claimant who has not objected regarding the deregistration of a company under this section or any other section of the old Act. The company was dissolved through a gazette notice dated 31st July 2009, which means that the ten-year period provided under the said section for lodging objections lapsed on July 31, 2019. This was before the property was registered in the Defendant's name in May of 2021.
32. The Defendant concludes that on the issue of whether the claim is time-barred, the court is invited to find that, whatever cause of action that may have existed against the proper party lapsed by virtue of the provisions of the [Limitation of Actions Act](#) and the [Companies Act](#), cap 481 as highlighted above.
33. On whether the claim is Statute barred, the Plaintiff submits that it is not. The limitation of action for a case of fraudulent or illegal acquisition of title to land starts running from when the fraud or illegality is discovered. See section 26 of the [Limitations of Action Act](#) which provides as follows: -
- “Extension of the limitation period in case of fraud or mistake.
- Where, in the case of an action for which a period of limitation is prescribed, either—
- (a) The action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
- (b) The right of action is concealed by the fraud of any such person as aforesaid; or
- (c) The action is for relief from the consequences of a mistake
- The period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
34. The plaintiff discovered the defendant's fraudulent and illegal acts on May 4, 2022 when she carried out a search of the suit land at the land registry and learnt that it was registered to the defendant. Her cause of action against the defendant, therefore, started running on May 4, 2022.
35. In the submission by the Plaintiff, this is the second disagreement on points of fact. It is inescapable that if the court were to resolve the issue of limitation at this point, it will have to ask itself when the plaintiff's cause of action against the defendant started to run. The defendant contends that it started running in 2005. The plaintiff's position is that it started running on May 4, 2022. The court has to reconcile these two positions and it can only do so by taking evidence from the parties.
36. With a similar token, the Defendant's reliance on Section 339 (6) of the repealed [Companies Act](#) is misplaced. In his submissions, the defendant's advocate has asked the court to take judicial notice of a gazette notice dated July 31, 2009 that wound up Forlonland Limited. The gazette notice is evidentiary material that has no room for a preliminary objection.
37. Further, section 339 (6) of the repealed [Companies Act](#) would only be applicable if the plaintiff's suit is against Forlonland Limited. That is not the case here.
38. Lastly, in an action for fraudulent and illegal acquisition of title to land, privity of contract does not apply because in suing the offending party, the plaintiff is not seeking to enforce a contract between the contracting parties but is rather seeking to cancel a title which was fraudulently and illegally acquired by a 3rd party, in this case, the defendant.
39. The question to determine is whether then the PO has achieved the threshold as laid in the leading authority in this realm - *Mukisa Biscuits Manufacturing Co Limited v West End Distributors Limited* [1969] E A 696. The case has been cited in several others with approval for instance in the case of [Gladys](#)



Pereruan v Betty Chepkorir [2020] eKLR, Hon Justice Githinji, quoting several other authorities held as follows: -

“The purpose of a preliminary objection was broadly discussed in *Charles Onchari Ogoti v Safaricom Ltd & Anor* [2020] eKLR as follows:

“[9] This Court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest Court for purposes of this jurisdiction and the others in East Africa in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, where Law JA and Newbold P (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the Court, or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

[10] The Supreme Court of Kenya, now the highest Court in the land has broadly confirmed and extended, the nature and scope of preliminary objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of article 163 (7) of the *Constitution of Kenya 2010*.

(11) In the case cited by the 1st Respondent, *David Nyekorach Matsanga & Another v Philip Waki & 3 Others* [2017] eKLR, the three-judge bench of the High Court (Lenaola, J (as he then was), Odunga and Onguto, JJ) after considering various holdings of the Supreme Court of Kenya on the question of Preliminary Objection held as follows:

“We quickly turn to the question of whether we have before us a Preliminary Objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In *Hassan Ali Joho & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:



“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

The preliminary objection if allowed may dispose off the entire suit without allowing parties to be heard. This has to be done with caution that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process.

The court is guided by order 2 rule 15 of the Civil Procedure Rules on when a suit can be struck out as provided below:

- (1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:
 - a) it discloses no reasonable cause of action or defence in law; or
 - b) it is scandalous, frivolous, or vexatious; or
 - c) it may prejudice, embarrass or delay the fair trial of the action; or
 - d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

40. Repeatedly, the superior courts and this court have held that once a party has filed a suit, it should be sustained at all costs to its natural finality. A litigant who has filed a cause should not be removed from the seat of justice. This sits well with art. 50(1) of the [Constitution](#) on Right to Fair Hearing and the doctrine of audi alteram partem for instance in the case of [Bosire Ongeru v Royal Media services](#) [2015] eKLR, Justice Aburili opined as follows: -

“The right to be accorded a hearing and a fair one at that is embedded in the Constitution, article 50(1) which right cannot be limited, by virtue of article 25. In the end, the plaintiff will have been guaranteed the right to access justice as enshrined and guaranteed in article 48 of the Constitution.

Madan JA (as he then was) in the *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR held, as to the matter with striking out of suits:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.”

41. Considering the pleadings, submissions on the PO on limitation of actions. The defendant takes a strong view that even if the claim by the plaintiff is either based on breach of contract or recovery of land, the suit stands time-barred even if we were to calculate time to either start running from 2005



– when the sale agreement was entered or from 2009 when Forlornland Limited was deregistered as a company with the plaintiff taking no steps to ventilate her claim on any of the fronts aforesaid.

42. The plaintiff is also categorical that her claim is based on the impeachment of a title obtained illegally through fraud, and that the fraud was discovered on May 4, 2022 when a search was conducted at the land office, which revealed that the land had been registered in the name of the defendant, the CR12 revealed that Mr Chris D Wilson one of the defendant's director, was affiliated with the wound-up Forlornland Limited.
43. On the front of privity of contract – the court has found that none exists between the plaintiff and the defendant. On limitation of actions, based on breach of contract or recovery of land, the 2005 agreement runs afoul of the statute of *Limitations Act*. The claim was extinguished against Forlornland Limited in 2019 after 10 years of the deregistration of the company which happened in 2009 via gazette notice dated July 31, 2009. The publication of that notice was not idle – it guaranteed a 3rd party a window to ventilate his/her grievances and enforce his/her rights and obligations owed by the company to be deregistered. as in this case, the plaintiff had a right to have Forlornland Limited retained in the companies register for purpose of enforcing her rights emanating from the 2005 agreement. The company was wound up and the plaintiff came to know of it but did nothing until May 4, 2022. This Plaintiff was not even vigilant enough to pay the outstanding balance owed from 2005 to 2018. Forlornland Limited was dissolved in 2009, so it is unclear to whom she paid the outstanding balance in 2018. This is not one of those reasonable Kenyans in a Matatu standpoint who ought to “stay on the radar” or “kaa rada” – as the situation could demand - in the purchase of land transactions in this country. What was it that the Plaintiff was waiting for from 2005 to 2022 to conclude a sale of land transaction?
44. This court will then purely proceed on the basis that the claim is directed at the 3rd party herein - the Defendant based on a fraudulent acquisition of title which was reckoned on May 4, 2022. And time will start running for purposes of the *Limitation of Actions Act*. This can be traced from the plaint in paragraph 10 as follows: -

“On May 4, 2022, the plaintiff carried out a search of the suit property at the land registry and was astonished to learn that it was now registered to the defendant. Mr. Chris D Wilson is the director/shareholder of this company.”

Paragraph 11 of the plaint: -

“The plaintiff will aver that the defendant fraudulently and illegally acquired title to the suit property”

Paragraph 12: -

“The plaintiff will also aver that the defendant cannot claim bona fide interests to the suit property because it did not make proper inquiries to satisfy itself that it could acquire clean title to the suit property”

Paragraph 13: -

“The plaintiff's case against the defendant is for cancellation of title illegally issued to it and issuance of a title to her”

45. The plaintiff's claim is based on fraud and illegalities, as stated in the four paragraphs of the plaint, which I have reproduced above in their entirety. When fraud is leveled against a party in any proceeding,



it imputes a criminal mind, which necessitates sanctions. For one to answer to fraud, the specifics of the fraud must be pleaded and specifically proved at the hearing. In the Court of Appeal in the case of Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR it was held: -

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

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

46. Order 2 Rule 10 of the Civil Procedure Rules also provides those particulars of fraud have to be specifically pleaded in the plaint: -

“(1) Subject to sub-rule (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
- b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”

47. In Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another [2020] eKLR, Mutungi J held as follows on fraud: -

“The foregoing notwithstanding the provisions of section 26 of the Limitations of Actions Act vide which the plaintiff seeks refuge cannot have any application in the circumstances of this matter. No fraud was pleaded and/or any concealment of any material facts relevant to the action. Besides, the 2nd defendant and the 3rd defendants were bonafide purchasers of the suit property for value without any notice of any defect in the title they purchased. They could not have known about and were not a party to any fraud affecting the suit property. The 2nd and 3rd defendants under provision (i) and (ii) of section 26 of the Limitation of Actions Act would be absolved of any wrongdoing, they having not been a party to any fraudulent dealing affecting the property.”

48. The law requires that if one wishes to plead fraud, one must do so specifically and prove it at the hearing. In this case, the Plaintiff has pleaded fraud and illegalities against the Defendant without going into detail. It is unclear how the Plaintiff was defrauded by the Defendant in the acquisition of the title to the disputed land. If the case goes to trial, such allegations without specifics will be challenged. The Defence will be ambushed with details about which it is unaware. As previously stated, the only common denominator is the Director of the Defendant, Mr Chris D Wilson, who is not a Defendant in this matter. That in itself does not infer fraud on the part of the Defendant.



49. The Plaintiff's claim of fraud can only be resolved at a full hearing. It is not something I can simply wish away.

50. Order 2 Rule 10(2) of the *Civil Procedure Rules*, states: -

“The court may order a party to serve on any other party particulars of any claim, defence, or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.”

A suit filed by a Plaintiff pleading fraud cannot succeed unless the Plaintiff specifically pleads the facts on which the Plaintiff relies on the alleged fraud or illegalities as stated in the pleadings. This will also avoid an ambush on the Defendant and, of course, have an orderly business of the court proceedings and determination of the real issues at hand. It will also maintain equality of arms.

51. As a result, rather than dismissing the Plaintiff's suit summarily, I will grant the Preliminary Objection partially and then place the following orders: -

- a) The Preliminary Objection succeeds to the extent that there is no privity of contract between the Plaintiff and the Defendant.
- b) The issues and allegations of fraud with the specificity to proceed to full trial.
- c) Within 14 days hereof and under Order 2 Rule 10 (2), the Plaintiff is hereby directed by this court to amend her Plea and set out the specific particulars of fraud and illegalities against the Defendant to be relied on at the hearing hereof.
- d) The Defendant within 14 days thereafter to amend Defence to reckon the particulars of fraud and illegalities if any.
- e) Upon fulfillment of the above, the matter be set down for pre-trials.
- f) Failure to comply with orders (C) above and in line with Active Case Management, the PO to stand upheld in its entirety for lack of particulars of fraud and or illegalities.
- g) Costs to the Defendant.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 1ST DAY OF FEBRUARY 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

Mr. Mugambi H/B for Kitoo for the Plaintiff

Mr. Mwai for the Defendant

