



REPUBLIC OF KENYA



Sevany v Kaur Wife of Amrik Signh (Environment and Land Case Civil Suit 166 of 2019) [2023] KEELC 414 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEELC 414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 166 OF 2019**

**JO MBOYA, J
FEBRUARY 2, 2023**

BETWEEN

NAZIR SEVANY PLAINTIFF

AND

MOHINDER KAUR WIFE OF AMRIK SIGNH DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiff filed and commenced the instant suit vide Plaintiff dated the 14th May 2019 and in respect of which the Plaintiff herein sought for various reliefs which were outlined and articulated at the foot of the Plaintiff.
2. Subsequently, the Plaintiff sought for and obtained leave to file an amended Plaintiff. In this regard, the Plaintiff thereafter proceeded to and filed an amended Plaintiff dated the 6th July 2020 was duly filed.
3. Vide the amended Plaintiff dated the 6th July 2020 (details in terms of the preceding paragraph), the Plaintiff's herein has sought for the following reliefs;
 - i. A Permanent Injunction restraining the Defendant whether by themselves, their agents or servants from doing any of the following acts, or any of them, that is to say from interfering with the Plaintiff's right of possession, advertising for sale, disposing of, selling or otherwise howsoever at any other time completing by conveyance or transfer of any sale concluded by auction or private treaty, further transferring, evicting, leasing letting otherwise howsoever interfering with the ownership of title to occupation of and management of all that piece of land known as LR no.12565/36.
 - ii. An Order of Specific Performance of the said agreement between the Plaintiff and the Defendant for the Defendant to release their passport size photos needed to facilitate the



registration of the transfer and further undertake all other steps that may be needed to regularize the transfer.

- iii. An Order of Eviction against the Defendant and/or their agents from all that Parcel of Land known as LR no. 12565/36, should they encroach on the said property.
 - iv. General Damages.
 - v. Damages for Trespass.
 - vi. Costs of this suit.
 - vii. Any other order the court may deem fit.
 - viii. Interest on (iv) and (v) above at court rates
4. Upon being served with the amended Plaintiff, the Defendant herein filed a Statement of Defense dated the 26th July 2021 and in respect of which the Defendant denied and disputed the claims at the foot of the amended Plaintiff.
 5. Other than the denial of the various allegations/statement of claim contained at the foot of the amended Plaintiff, the Defendant also contended that the instant suit was statute barred pursuant to and by dint of the provisions of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
 6. Be that as it may, upon being served with the Statement of Defense, the Plaintiff herein felt obliged and thereafter filed a Reply to Statement of Defense. In this regard, it suffices to point out that the Reply to Statement of Defense is dated the 8th August 2021.
 7. For coherence, the pleadings that have been articulated and referred to in the preceding paragraphs, constitute and comprise of the requisite pleadings obtaining in respect of the subject matter.
 8. Following the close of pleadings, the subject matter was listed for case conference and thereafter same proceeded for hearing. In this regard, it is appropriate to state that the Plaintiff called two witnesses whilst the Defendant called one witness.

Evidence by the Parties

a. Plaintiff's Case

9. The Plaintiff's case revolves around the evidence of two witness, namely, Nazir Sevany and Mohamood Sevany, respectively.
10. It was the evidence of PW1, namely, Nazir Sevany, that on or about November 1989, same developed an interest and desire to purchase and acquire a property in Nairobi. In this regard, the witness added that same was thereafter informed of the availability of L.R No. 12565/36, located within the City of Nairobi.
11. It was the further testimony of the witness that upon being duly appraised of the suit property, an offer was made to purchase and acquire same, albeit through a nominee.
12. Additionally, the witness continued and stated that after due negotiations, the purchase price of Kes.850,000/= only, was paid to and in favor of the Defendant herein.
13. Furthermore, the witness testified that upon the payment of the requisite purchase price to the Defendant, same requested for the original certificate of title and original transfer documents to be



- released to his advocates, namely, the firm of M/s Rayani, Rach & Sevany Advocates, for purposes of effecting the transfer.
14. In addition, the witness testified that indeed the original certificate of title and the signed transfer Instrument were duly released and handed over to his advocate, for purposes of further action.
 15. Be that as it may, the witness has continued to and averred that even though the certificate of title and original transfer documents were duly handed over to his advocates, same were neither presented for registration nor were same registered. For clarity, the witness added that at the point in time when the named documents were presented to his Advocates, the partners in the firm of Reyani, Rach & Sevany Advocates were (sic) entangled in restructuring their partnership.
 16. Furthermore, the witness has testified that thereafter his advocates misplaced and mislaid the certificate of title and the original transfer documents and thus the misplacement contributed to the delay in presenting the named documents for registration.
 17. Notwithstanding the foregoing, the witness added that even though the transfer instrument had not been presented or lodged for purposes of registration, same however entered upon and took possession of the suit property.
 18. In any event, the witness further testified that upon taking possession of the suit property, same erected a wire fence round the suit property and thereafter commenced to pay the requisite land rates.
 19. Be that as it may, the witness further testified that on or about December 2011, same realized that the Defendant had commenced the process of procuring and obtaining a Provisional certificate of title over and in respect of the suit property.
 20. To this end, the witness averred that same was constrained to and indeed instructed his advocates to write to and inform the Defendant of the fact that same (Plaintiff) was in possession of and had the custody of the original certificate of title.
 21. It was the further evidence of the witness that thereafter same instructed his Advocates to write to the Defendant through the Lawfirm, which had hitherto acted for the Defendant during the transaction over the suit Property. In this regard, the witness added that his advocates indeed complied and wrote a letter to the firm of M/s M.A Khan Advocates, who were the Advocates who had acted for the Defendant in the named transaction.
 22. Other than the foregoing, the witness has further testified that to avert the fraudulent intention by the Defendant to acquire a Provisional certificate of title, same similarly instructed his advocates to liaise with the Defendant and to obtain copies of passport sized photographs and other necessary documents, to facilitate effective transfer and registration of the suit property in the name of the witness.
 23. It was the witness further testimony that upon the instruction to his advocate to procure and obtain the named additional documents, in accordance with the amended land laws, the Defendant failed, neglected or otherwise refused, to provide the named documents.
 24. To the contrary, the witness has testified that the Defendant proceeded to and caused a gazette to be published vide Kenya Gazette and in respect of which (Defendant) contended that the original certificate of title over and in respect of the suit Property, had been misplaced/lost.
 25. Be that as it may, the witness added that the publication of the gazette notice at the instance of the Defendant, was carried out and undertaken even though the Defendant knew and was knowledgeable of the fact that the witness was in possession of the original certificate of title.



26. Other than the foregoing, the witness added that the actions by and at the instance of the Defendant are calculated to defeat and frustrate the effective transfer and registration of the suit property in favor of the Plaintiff.
27. Consequently, the witness averred that it was therefore imperative that the court be pleased to order and direct the Defendant herein to perform her part of the bargain and to facilitate the transfer and registration of the suit property in his (Witness') favor.
28. In addition, the witness referred to his witness statement dated the 19th January 2022 and sought to adopt and rely on the contents of the named witness statement. In this regard and at the instance of the witness, the witness statement dated the 19th January 2022 was duly admitted and constituted as evidence in chief.
29. On the other hand, the witness also referred to the List and Bundle of documents dated the 14th May 2019, containing 9 documents. For clarity, the witness sought leave of the court to rely on and to produce the named documents as exhibits.
30. For completeness, the named documents were thereafter admitted and produced as Exhibits P1 to P9, respectively.
31. Other than the foregoing, the witness also pointed out that same had also filed a Further list and bundle of documents dated the 19th January 2022, containing 10 documents. For clarity, the witness also sought to adopt and produce the named documents.
32. Similarly, the named documents were thereafter produced and admitted as exhibits P10 to 19 respectively.
33. Having adopted the named witness statement as well as the various documents, which were admitted as exhibits, the witness thereafter informed the court that same was also adopting and relying on the amended Plaint dated the 6th July 2020.
34. On cross examination, the witness stated that same became aware and got the information pertaining to the availability of the suit property from his brother, namely, Muhamood Sevany, who is also an Advocate of the High Court of Kenya.
35. On the other hand, the witness added that same received the information pertaining to the suit property in the year 1989. However, the witness stated that same could not recall the registration details pertaining to and concerning the suit property.
36. Whilst still under cross examination, the witness stated that same was informed that the owner of the suit property was known as Mohinder Kaur.
37. Furthermore, the witness testified that even though the suit property belonged to and was registered in the name of Mohinder Kaur, the transaction in respect of the sale of the suit property was being carried out by one, namely, Amrik Sighn.
38. Nevertheless, it was the further testimony of the witness that he neither met nor transacted with the owner of the suit property, namely, Mohinder Kaur.
39. Additionally, the witness further stated that he also did not sign or execute any sale agreement with Mohinder Kaur. For clarity, the witness added that same has not signed any such agreement with Mohinder Kaur over the suit property, or at all.



40. As pertains to the payment of the purchase price, the witness stated that same was paid out by his brother, who was also his advocates. For clarity, the witness pointed out that the purchase price was paid by Muhamood Sevany, namely, PW2.
41. Other than the foregoing, the witness contended that the purchase of the suit property was done through a nominee known as Batuk Vithani.
42. Whilst still further cross examination, the witness added that he did not appoint the nominee. However, same contended the nominee was appointed by his brother, that is, PW2.
43. Besides, it was the further testimony of the witness that though the purchase price was duly paid out, same however, did not know where the money (read, the Purchase price), had come from.
44. Furthermore, the witness testified that the transfer instrument which same had procured and adduced before the court did not show that the suit had been transferred to him. In any event, the witness added that same had requested for blank transfer instrument.
45. Other than the foregoing, the witness stated that the transfer instrument is dated the 24th November 1989, but the title that was being purchased is dated the 7th May 1981.
46. Additionally, the witness stated that the original transfer shows that the transfer took place on the 20th November 1989.
47. It was the further testimony of the witness that the suit property was sold to him by the nominee. Nevertheless, the witness added that the Defendant did not sell the suit property unto him.
48. The 2nd witness who testified on behalf of the Plaintiff was Muhamood Murtaza Sevany. For clarity, same testified as PW2.
49. It was the testimony of the said witness that he is an advocate of the High court of Kenya and that at the material point in time, same was a Partner in the law firm of M/s Reyani, Rach and Sevany Advocates.
50. Furthermore, the witness added that on or about the year 1989, one ,namely, Batuk Vitlhani, approached him with instructions to undertake some conveyance pertaining to and concerning L.R No. 12565/36, Nairobi.
51. It was the further testimony of the witness the said Batuk Vitlhani informed same (witness) that he had agreed with the vendor, namely, the Defendant, that the purchase price was Kes.850, 000/= only.
52. In addition, the witness testified that whilst in the course of undertaking the conveyance/legal work on behalf of the named purchaser, he enquired from the named purchaser the purpose why same was purchasing the suit property.
53. On the other hand, the witness testified that the purchaser informed same that he was purchasing the suit property for commercial purposes and that soon same (purchaser) would be keen to resale the property.
54. Furthermore, the witness testified that after some point in time, Mr. Batuk Vitlhani, on whose behalf he was undertaking the conveyance informed same (witness) that he (purchaser) was now keen and desirous to dispose of the suit property.
55. In this regard, the witness testified that same alerted his (witness) brother about the availability of the suit property and thereafter his brother, namely PW1, signaled his interests in acquiring and purchasing the suit property.



56. Further, the witness testified that Mr. Batuk Vitlani, who was the original purchaser had requested him (witness) to prepare a blank transfer instrument in respect of the suit property, because he (Batuk Vitlani) was keen to resell the suit property to the Plaintiff herein.
57. Be that as it may, the witness testified that he proceeded to and complied with the instruction of Mr. Batuk Vitlani by preparing a blank transfer instrument.
58. Other than the foregoing, the witness averred that Mr. Batuk Vitlani thereafter handed over the purchase price to the law firm of M/s Reyani, rach & Sevany Advocates, for onward transmission to the vendor's advocates.
59. For coherence, the witness added that upon receipt of the purchase price/ consideration, same was processed and ultimately paid out to the vendors advocates, namely, M/s M.A Khan Advocates vide cheque number 190734.
60. Furthermore, the witness added that upon the remittance of the purchase price to the vendor's advocates, the vendor's advocate caused the original transfer instrument to be executed by the vendor and thereafter the advocate returned to the witness the original certificate of title and the duly executed transfer instrument, over and in respect of the named property.
61. In addition, the witness also averred that other than the original certificate of title and the duly executed transfer instrument, the vendor also caused to be forwarded to the witness the original rates clearance certificate in respect of the suit property. For clarity, the witness pointed out that the rates clearance certificate was forwarded by the vendor's husband, namely, Mr. Amrik Sighn.
62. Be that as it may, the witness testified that despite receiving the original certificate of title and the duly executed transfer instruments and the rates clearance certificate, in respect of the suit property, same did not present/lodge the documents with the land registry, for purposes of registration.
63. On the other hand, the witness averred that the named documents were placed in a file within the offices of M/s Reyani, Rach & Sevany Advocates, awaiting further action. However, the witness contended that owing to time lapse, the documents were mislaid and misplaced.
64. In addition, the witness testified that later on, same migrated to Australia with his family, before eventually returning to Kenya in the year 2008.
65. Nevertheless, it was the further testimony of the witness that on or about the year 2011, same was informed by the Plaintiff that a sign board had been erected on the suit property indicating that the suit property was not for sale.
66. To this end, the witness averred that he was constrained to and indeed called the vendor's advocates to ascertain the circumstances pertaining to and concerning the purported signage.
67. Besides, the witness also added that same also alerted and informed the vendor's advocates that the suit property had been duly sold and that the vendors advocates had forwarded the original certificate of title and the duly executed instrument of transfer.
68. Notwithstanding the foregoing, the witness added that he was also constrained to and indeed wrote to the firm of M/s M.A Khan Advocate a letter dated the 16th December 2011, wherein same pointed out the details pertaining to the sale of the suit property to Mr. Batuk Vitlani.
69. Other than the foregoing, the witness added that later on the firm of M/s M.A Khan Advocate wrote back to him and indicated that no purchase price had been paid or remitted on account of the intended sale Of the suit property to Mr. Batuk Vitlani.



70. In response, the witness testified that same was obliged to and wrote back to the firm of M/s M.A Khan Advocate vide letter dated the 27th January 2012 and in respect of which he (witness) indicated and similarly reiterated that the purchase price had been duly paid and remitted.
71. Nevertheless, the witness averred that despite the various correspondence, the Defendant proceeded to and caused a gazette notice to be published vide Kenya gazette, signaling her desire to procure and obtain a provisional certificate in respect of the suit property.
72. Further, the witness herein alluded to the witness statement dated the 9th May 2022 and same invited the court to adopt and admit the named witness statement. In this regard, the named witness statement was duly admitted and constituted as further evidence of the witness.
73. Other than the foregoing, the witness also identified the various documents contained in the List and Bundle of documents, which had hitherto been produced by PW1.
74. On cross examination, the witness stated that same was retained and instructed to act for the purchaser known as Batuk Vitlani, whereas the vendor was a lady known as Mohinder Kaur.
75. Furthermore, the witness stated that even though he acted for the purchaser, same was not in possession of any Sale agreement entered into and executed between the purchaser and Mohinder Kaur.
76. In any event, the witness herein contended that same was unable to recall whether a sale agreement was ever prepared or drawn in respect of the suit property.
77. Nevertheless, the witness stated that the purchase price was agreed in the sum of Kes.850, 000/= only and that indeed same was paid. In this regard, the witness alluded to the acknowledgement contained in the body of transfer instrument.
78. Additionally, the witness stated that the purchase price was paid through the firm of M/s Reyani, Rach & Sevany Advocates vide cheque addressed to the vendor's advocates.
79. Nevertheless, the witness conceded that he did not have a copy of the cheque or any other acknowledgment to confirm that the purchase price was indeed paid.
80. In respect of registration of transfer instrument, the witness stated that same did not receive any instruction to proceed and present the instrument for registration. For clarity, the witness added that he only acted according to the instructions that same was given.
81. Furthermore, the witness stated that he did not prepare a Deed of assignment because he never received any such of instruction and in any event, the Witness added that it was unnecessary.
82. As to whether there was any sale agreement between the Plaintiff and the Defendant, the witness contended that same was not aware and could not recall the existence of any sale agreement.
83. Other than the foregoing, the witness reiterated that he sent/forwarded the cheque in settlement of the purchase price to M/s M.A Khan Advocate, who was acting for the vendor.
84. In addition, the witness pointed out that even though same corresponded with the firm of M/s M. A Khan Advocates as pertains to the payment of the purchase price, the said firm of advocate have not expressly admitted receipt of the purchase price.
85. With the foregoing testimony, the Plaintiff's case was closed.



b. Defendant's Case

86. The Defendant's case revolves and or gravitates around the testimony of Mr. Jaswinder Sighn Rihal, who testified as DW1.
87. It was the testimony of the witness that the Defendant herein is his mother. However, the witness added that the Defendant was old, immobile and suffering from old age senility.
88. Owing to the foregoing, the witness added that he was therefore authorized and competent to testify on behalf of the defendant.
89. Furthermore, the witness contended that the suit property belonged to and is registered in the name of the Defendant. However, the witness added that neither the Defendant nor her late husband Amrik Sign, ever sold the suit property to the Plaintiff herein or his agents or nominees.
90. In addition, the witness stated that the Defendant has also never received any purchase price over and in respect of the suit property.
91. In any event, the witness added that the Defendant remains the lawful and legal proprietor of the suit property and that same is also in possession of the suit property. For clarity, the witness stated that the Defendant has been in possession of the suit property for more than 40 years.
92. Other than the foregoing, the witness testified that the Defendant did not release the original certificate of title and any signed transfer instrument to the Plaintiff or his advocate.
93. In this regard, the witness pointed out that the original certificate of title that is being held by the Plaintiff's advocate is being illegally held and same should be returned to the Defendant.
94. Furthermore, the witness also testified that on various occasions, the Defendant herein has requested the Plaintiff to provide evidence of payment of the purchase price. However, the witness averred that despite such request, the Plaintiff has failed and neglected to supply or provide such evidence.
95. At any rate, the witness added that the suit property lawfully belongs to the Defendant and consequently, the Plaintiff ought to be compelled to surrender the original certificate of title, which is being held by same.
96. Other than the foregoing, the witness identified the witness statement dated the 30th November 2021 and same sought to rely on the named statement.
97. Pursuant to and at the instance of the witness, the named witness statement was admitted as evidence in chief.
98. Furthermore, the witness also alluded to the List and Bundle of documents dated the 30th November 2021 and sought to adopt and rely on the named documents. In this regard, the documents at the foot of the list and bundle dated the 30th November 2021 were thereafter admitted in evidence as exhibits D1 to D12, respectively.
99. On cross examination, the witness herein admitted and acknowledged that he is not the Defendant in the matter. However, the witness added that the Defendant is his mother and that same is very old.
100. Other than the foregoing, the witness added that same has a general power of attorney to act on behalf of the Defendant. Nevertheless, the witness admitted that no such power of attorney had been lodged or produced before the court.



101. Furthermore, the witness stated that same did not have any written authority to testify or act on behalf of the Defendant.
102. Other than the foregoing, the witness admitted that his Father, namely, Amrik Sighn, was a director in a company known as Luckton Company Ltd, which was engaged in export and importation of assorted items.
103. In any event, the witness stated that the document contained at page 34 of the Plaintiffs Bundle of documents was a letter from Luckton Company Ltd and that the letter in question was signed by himself (witness).
104. Furthermore, the witness added that the letter in question was forwarding a rates clearance certificate to the firm of M/s Reyani, Rach & Sevany Advocates. For clarity, the witness added that the said rates clearance certificate was in respect of the suit property.
105. Whilst under further cross examination, the witness stated that he forwarded the rates clearance certificate to the firm of M/s Reyani, Rach & Sevany Advocates because same had been instructed to do so.
106. Other than the foregoing, the witness testified that the Defendant herein was hitherto a British Citizen and held a British passport.
107. Additionally, the witness averred that the Defendant also lived and resided in London. In respect of whether the witness knew the firm of M/s M A Khan Advocate, same averred that the said firm was the family advocate for many years. In this regard, the witness added that the firm of M/s M A Khan Advocates would act for their family on various family issues.
108. Nevertheless, the witness stated that same did not follow up the issue of the payment cheque and the cheque number with the firm of M/s M. A Khan Advocate or at all. For clarity, the witness pointed out that what he knows is the firm of M/s M A Khan Advocate wrote a letter that the purchase price was never paid.
109. Finally, the witness stated that the release of the original certificate of title and the signed transfer instrument to the firm of M/s Reyani, Rach & Sevany Advocates was not in error.
110. With the foregoing testimony, the Defendant's case was duly closed.

Submissions by the Parties

a. Plaintiff's Submissions

111. The Plaintiff filed written submission dated the 30th November 2022 and in respect of which same has identified, highlighted and canvassed three pertinent issues for consideration and determination.
112. First and foremost, learned counsel for the Plaintiff has submitted that there existed a valid and binding contract between the Plaintiff and the Defendant, pertaining to and in respect of L.R No. 12565/36.
113. Furthermore, learned counsel has submitted that in respect of the suit property, there was indeed an offer, which was duly accepted and the requisite consideration was thereafter paid to the Defendant.
114. To this extent, learned counsel has submitted that for there to be a valid contract; four critical elements must exist. For clarity, counsel has pointed out the named elements as comprising of an offer, acceptance, consideration and ultimately and intention to create legal relations.



115. In addition, counsel has contended that in respect of the subject matter, there was indeed a valid contract culminating into the payment of the purchase price to and in favor of the vendor, through her named advocates.
116. On the other hand, counsel has also contended that upon the remittance of the purchase price, the vendor through her named advocates released and forwarded the original certificate of title and the original and duly executed instrument of transfer to the Purchaser's advocate for purposes of transfer and registration of the suit property.
117. Premised on the release of the original certificate of title and the duly executed transfer instrument, counsel has submitted that a valid contract was thereafter sealed. For clarity, it has been added that the release of the named documents constitutes acceptance.
118. In view of the foregoing, learned counsel for the Plaintiff has therefore contended that there does exist a valid and lawful contract of sale between the Plaintiff and the Defendant.
119. Secondly, learned counsel for the Plaintiff has submitted that the Plaintiff duly complied with his part of the bargain culminating into the release of the certificate of title and original transfer instrument, respectively.
120. Nevertheless, it has been contended that despite the fact that the Defendant is aware of the sale of the suit property, same has however, commenced the process of obtaining and acquiring a provisional certificate over the suit property.
121. On the other hand, it has also been submitted that the Defendant herein has similarly failed, neglected and reneged on her obligation to avail and supply the requisite documents to facilitate the transfer and registration of the suit property in favor of the Defendant.
122. To this end, learned counsel for the Plaintiff has therefore submitted that the Plaintiff has established a basis to warrant an order of specific performance as against the Defendant.
123. In respect of the submissions premised on specific performance, learned counsel has cited and quoted inter-alia, the case of *Rose Wambui Wabito versus John Ian Maingey* (2013)eKLR and *Geoffrey Kinuthia Njoroge versus Macro Ventures Developers Ltd* (2013)eKLR.
124. Thirdly, learned counsel for the Plaintiff has submitted that the evidence and testimony of DW1, ought to be expunged from the record of the court, insofar as the named witness did not have the requisite authority to testify for and on behalf of the Defendant.
125. In any event, learned counsel has submitted that it was incumbent upon the witness to tender and produce before the court evidence of authority, given by the Defendant, if any, unto the witness.
126. Nevertheless, learned counsel contended that despite the witness contending that same was authorized to attend court and testify on behalf of the Defendant, no authority was tendered or adduced.
127. In a nutshell, learned counsel submitted that in the absence of either a power of attorney or a written affidavit, the witness herein cannot purport to have been duly authorized and mandated to testify on behalf of the Defendant.
128. Consequently, learned counsel for the Plaintiff has contended that the impugned evidence which was tendered and adduced by the witness herein is therefore devoid of any probative value.



129. To buttress the foregoing submissions, learned counsel has invited the court to take cognizance of the holding in *inter-alia*, the case of *Alfred Njau & Others versus City Council of Nairobi* (1982) KAR 229 and *Francis Mwangi Mugo versus David Kamau Gachago* (2017)eKLR.

b. Defendant's Submissions

130. Vide written submissions dated the 19th December 2022, learned counsel for the Defendant has raised, highlighted and amplified three issues for consideration.
131. Firstly, learned counsel for the Defendant has submitted that in the absence of a written agreement duly signed and executed by the Plaintiff and the Defendant, respectively, no valid contract of sale can be deemed to have arisen or accrued.
132. Additionally, learned counsel for the Defendant has contended that in the absence of a sale agreement, the instant suit, which touches on and concerns disposition of an interest in land is thus illegal and unlawful.
133. To this end, counsel has invited the court to take cognizance of the provisions of Section 3(3) of the *Law of Contract Act*, Chapter 23 Laws of Kenya as well as Section 38 of the *Land Act*, 2012.
134. In addition, learned counsel for the Defendant has also cited and relied on *inter-alia*, the case of *Peter Mbiru Michuki versus Samuel Mugo Michuki* (2014)eKLR and *African Cotton Industries Ltd versus Rural Development Services Ltd* (2021)eKLR.
135. Secondly, learned counsel for the Defendant has submitted that in the absence of payment or proof of payment of the purchase price, no sale agreement could arise. In this regard, learned counsel has submitted that despite the fact that PW2 contended that same remitted and paid out the purchase price, same (the witness) was unable to tender any credible evidence to prove payment of the purchase price.
136. Furthermore, learned counsel contended that the burden of proving that the purchase price was indeed paid or remitted was on the Plaintiff and his witness.
137. However, counsel contended that the Plaintiff and his witness failed to tender evidence to prove such payments and hence in the absence of such payments, no valid contract can arise to warrant the transfer of the suit property to and in favor of the Plaintiff.
138. Thirdly, learned counsel for the Defendant has contended and submitted that the Plaintiff's suit is barred vide the provisions of Section 4(1) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
139. To this end, it was contended that the contract or alleged contract, upon which the Plaintiff seeks specific performance is purported to have been entered into in the year 1989 and yet the suit herein was only filed on the 14th May 2019.
140. Finally, counsel for the Defendant has submitted that the Defendant herein was at liberty to testify by herself or through her appointed agent. In this regard, counsel has contended that the evidence of DW1, is therefore credible and ought to be taken into account.
141. Additionally, the counsel for the Defendant has contended that a party has a right to attend court and testify in person or through a witness and that where a party chooses to testify through a witness, such a process cannot be held to be un-procedural.



142. In any event, learned counsel has added that DW1 informed the court that same was conversant with the facts of the matter and the issues in controversy. In this regard, it was contended that the testimony of DW1 is therefore relevant and ought to be considered.
143. In a nutshell, learned counsel for the Defendant has impressed upon the court to find and hold that the Plaintiff has neither proved nor established his claim to and in respect of the suit property. In this regard, counsel has contended that the Plaintiff's suit therefore ought to be dismissed with costs.

Issues for Determination

144. Having reviewed the amended Plaintiff, the witness statement and the various documents filed therewith and having similarly reviewed the Statement of Defense and the incidental documents and having appraised the oral evidence tendered; and finally having considered the written submissions filed by the Parties, the following issues do arise and are worthy of determination;
 - i. Whether the Defendant's Witness (DW1) had the requisite authority to testify on behalf of the Defendant and if not, whether the Evidence tendered in that regard has any probative value.
 - ii. Whether there existed any Sale Agreement/contract between the Plaintiff and the Defendant, either as alleged or at all.
 - iii. Whether the Plaintiff herein has established Sufficient basis to Underpin and warrant an order for Specific Performance.
 - iv. Whether the subject suit is barred and prohibited by the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

Analysis and Determination

Issue Number 1 Whether the Defendant's Witness (DW1) had the requisite authority to testify on behalf of the Defendant and if not, whether the evidence tendered in that regard has any probative value.

145. It is common ground that the subject suit was commenced and mounted by the Plaintiff as against the named Defendant herein.
146. To the extent that the suit was filed against the Defendant, it behooved the Defendant herein to attend court at the requisite time and to tender evidence, if any, on her behalf and in answer to the various allegations mounted against her.
147. Contrarily, it was within the mandate and competence of the Defendant to appoint and authorize any person or agent to act or appear before the court and to inter-alia, testify on her behalf.
148. As pertains to the scenario where a party and in this case, the Defendant choses to appoint and authorize a third party to attend court and testify on her behalf, then same is under obligation to execute a written authority and thereafter, cause the said written authority, if any, to be filed with the Court.
149. Other than the execution and lodgment of a written authority, the Defendant was also at liberty to generate, execute and engross a power of attorney, which would then be duly registered with the relevant land registry.



150. At any rate, in the event the Defendant chose to go the way of a power of attorney, it would still be incumbent upon the Defendant or the duly authorized agent, by dint of the power of attorney, to cause the power of attorney to be lodged before the court before undertaking the designated act.
151. Despite the foregoing, it is worthy to recall that DW1 merely stated that same had the authority and mandate to testify on behalf of the Defendant. However, same was unable to point out or to refer to any authority, whatsoever.
152. In addition, it is not lost on the court that during cross examination DW1 conceded that no written authority or affidavit, executed by the Defendant, had been lodged or filed with the court.
153. In the absence of a written authority or a power of attorney, it is difficult, nay impossible for the honourable court to establish and authenticate whether indeed DW1 was duly authorized or not.
154. In any event, I must point out that in the absence of the requisite authority, prepared in accordance with the established principles of the law, then what remains and becomes apparent is that the impugned witness becomes an imposter devoid of the requisite capacity to speak for and on behalf of the Defendant.
155. Furthermore, in the absence of such authority, the words and statements of the impugned witness cannot be said or deemed to be the words/statements of the Defendant herein, who did not grant any authority, in the first place.
156. Additionally, it is important to underscore that where a party seeks to be represented by a third party in the course of civil proceedings, it behooves the party in question to reduce the authority in writing. For clarity, the *Civil Procedure Rules* do not countenance oral authority or otherwise.
157. To underscore and vindicate the foregoing observation, it is appropriate to take cognizance of the mandatory provisions of Order 9 Rule 2 of the *Civil Procedure Rules* 2010.
158. For convenience the provisions of Order 9 Rule 2 (*supra*) are reproduced as hereunder;
 2. Recognized agents [Order 9, rule 2.]

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

 - (a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;
 - (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
 - (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.
159. Additionally, it is important to point out that the issue of capacity or better still locus standi, is so central and integral in a matter to the extent that without such capacity, the impugned person has no right or competence to appear, testify or take any acts, before a court of law.



160. Based on the foregoing observation, I also come to the conclusion that even though no objection was taken at the onset, the evidence of DW1, is certainly devoid of any probative value and hence, same is of no legal consequence.
161. Respectfully, the importance of locus standi or better still the right to appear and take any legal steps before a court of law was underscored by the court in the case of *Francis Mwangi Mugo versus David Kamau Gachago* (2017)eKLR.
162. For coherence, the honourable court observed as hereunder;
20. I think the more fatal omission is not necessarily payment of the stamp duty, important as it is, but the failure to register the power of attorney before filing suit, for to me, it is that act of registration which then vests the donee with capacity to deal with the immovable property claimed by the donor. The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity, for one cannot act for another without having the legal capacity to do so. I hold the view, that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have capacity to act.
21. I do not think capacity is a technicality curable under Article 159 of the *Constitution*. It is either you have it or you do not. You do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney. I therefore have no option but to strike out the suit with costs which shall be paid by the said Francis Mwangi Mugo.
163. Without belaboring the point, I beg to state and reiterate that I share the sentiments and observations of the learned Judge in respect of the decision quoted and referred to in the preceding paragraph.
164. Perhaps, what I need to add is that whereas the Honourable Judge was dealing with the locus standi/legal capacity of a party to commence and originate a suit, the reasoning applies with equal force to a scenario where a party purports to represent another albeit without the requisite written authority.
165. Furthermore, where a party commences a suit without the requisite authority, the suit is amenable to be struck out. However, in this regard, in the absence of the requisite authority, the evidence adduced is either amenable to be expunged or to be regarded as devoid of any probative value.
166. Either way, the net effect is that the testimony of the third party who purports to speak or testify on behalf of a litigant, in this case, the Defendant albeit without authority, is therefore of nominal value if at all.
167. In a nutshell, I come to the conclusion that the evidence of DW1 (who was not duly authorized by the Defendant) is of no probative value and hence same is inconsequential

Issue Number 2 Whether there existed any sale Agreement/Contract between the Plaintiff and the Defendant, either as alleged or at all.

168. The Plaintiff herein tendered evidence and testified that on or about the year 1989, same developed a desire and need to purchase and acquire a property within the City of Nairobi.
169. Additionally, the Plaintiff also testified that late November 1989, same was appraised and informed by PW2, about the existence of L.R No. 12565/36, which was being sold by one Batuk Vitlani.



170. Premised on the foregoing, the Plaintiff contended that same thereafter advised and instructed his brother, namely PW2, to purchase the named property for him.
171. Furthermore, the witness added that upon due negotiations, the purchase price was agreed upon in the sum of Kes.850, 000/= only and that the said amount was thereafter paid in full through a nominee of the Defendant.
172. In addition, the Plaintiff also averred that upon the finalization of the contract, same requested for the release of the original transfer documents to his advocate at the time, namely, the firm of M/s Rayani, Rach & Sevany Advocates.
173. On the other hand, it was also the testimony of the Plaintiff that subsequently the Defendant herein released the original certificate of title and a signed transfer to his advocates at the time as agreed upon in order to facilitate assignment of the property.
174. It is imperative to state and underscore that the contents of the preceding paragraphs have been extracted from the written statement of the Plaintiff herein and which written statement was admitted as the evidence in chief, at the request and instance of the Plaintiff.
175. Nevertheless, from the testimony of the Plaintiff, what becomes apparent is that the Plaintiff had a dealing with the Defendant herein and that in the course of the named dealing, the Plaintiff was duly represented by the firm of M/s Reyani, Rach & Sevany Advocates.
176. Similarly, it is also discernable from the evidence in chief of the Plaintiff that after the due negotiations, culminating into an agreement to purchase the suit property at Kes.850, 000/= only (which is said to have been agreed upon by all parties), the said amount was paid in full through a nominee to the Defendant.
177. My understanding of the evidence of the Plaintiff is that indeed same transacted and dealt with the Defendant. In any event, it is the same Plaintiff who stated that upon finalization of the contract, same requested for the release of the original certificate of title and transfer of documents to his advocates at the time.
178. Notwithstanding the foregoing, during the cross examination of the Plaintiff, who testified as PW1, same adopted a contrary and antithetical position.
179. To be able to understand the antithesis of the testimony of the Plaintiff, it is imperative to reproduce certain pertinent aspects that arose during cross examination by counsel for the Defendant.
180. For completeness, the Plaintiff testified as hereunder;

“I was informed that the owner of the property was Mohinder Kaur. The transaction was however being carried out by one Amrik Sighn. I did not meet Mrs. Mohinder Kaur. I did not transact with Mrs. Mohinder Kaur. I did not sign any sale agreement with Mrs. Mohinder Kaur. I also say that I have not signed any agreement with her to date. I have not signed any document at all with Mrs. Mohinder Kaur over the suit property”.
181. Furthermore, the same witness stated as hereunder;

“I don’t have any evidence that show the remittance of the money. However, the transfer shows that the property was not being transferred to me. I requested for a blank transfer.



The transfer is dated the 20th November 1989. The title that was being purchased is dated the 7th May 1981”.

182. Other than the Plaintiff, the other witness who testified was PW2. For clarity, PW2 is a brother of the Plaintiff and also an advocate, who was (sic) retained to act on behalf of the Plaintiff.
183. As concerns the existence of a sale agreement, if any, between the Plaintiff and the Defendant, the Witness stated and testified, and more particularly, during cross examination, as hereunder;

“I don’t have the sale agreement between Batuk Vithani and the Defendant before the court today. I don’t recall whether a sale agreement was ever drawn/prepared”.
184. From the foregoing testimony, I am now called upon to discern and decipher whether there existed a valid sale agreement/contract or otherwise, between the Plaintiff and the Defendant.
185. However, before venturing to resolve the issue itemized in the preceding paragraph, it is appropriate to take cognizance of the submissions which were rendered by and on behalf of the Plaintiff.
186. Suffice it to point out that the Plaintiff’s counsel submitted that there does exist a valid Sale Agreement/contract between the Plaintiff and the Defendant, over and in respect of the suit property.
187. Furthermore, learned counsel for the Plaintiff added that for a valid contract to exist, it must be shown that certain critical elements exist and in this regard, counsel identified the existence of an offer, acceptance, consideration and an intention to create legal relations.
188. Having raised and amplified the foregoing issues, counsel thereafter submitted that the Plaintiff through his nominee paid the sum of Kes.850, 000/= only as consideration for the suit property.
189. Additionally, learned counsel has gone ahead to submit that upon the payment of the purchase price, the Defendant, through her advocates caused the original certificate of title and duly executed transfer instrument to be released to the Plaintiff’s nominated advocates.
190. Premised on the foregoing submissions, learned counsel for the Plaintiff has thereafter impressed upon the court to find and hold that there does exist a valid sale Agreement/ contract between the Plaintiff and the Defendant.
191. Notwithstanding the submissions by and on behalf of the Plaintiff, it is imperative to recall that the Plaintiff himself acknowledged and admitted that same neither dealt nor transacted with the Defendant over the suit property.
192. Similarly, the same Plaintiff testified that same did not execute nor sign any agreement with the Defendant. For good measure, no sale agreement either between the Plaintiff and the Defendant or the Plaintiff’s nominee and the Defendant, was ever tendered before the court.
193. Worse still, the Plaintiff stated that the transfer instrument which was duly executed and upon which the Plaintiff’s case is hinged was a blank transfer instrument, which did not refer to the Plaintiff. In this regard, it cannot also be contended that the particular transfer instrument create a nexus/ affinity between the Plaintiff and the Defendant, in any manner.
194. For the avoidance of doubt, what I understood the Plaintiff to be saying is that the Transfer Instrument was signed by the Defendant, albeit in favour of an undisclosed transferee and thereafter, the name of the Plaintiff was inserted ex post the execution thereof.



195. Be that as it may, the issue that I must resolve is whether there was a valid sale Agreement/ contract between the Plaintiff and the Defendant. In this regard, I must point out that the clear and explicit answers provided by the Plaintiff whilst under cross examination suffice.
196. For the sake of clarity, it is my finding and holding that no lawful sale agreement/contract was ever entered into between the Plaintiff and the Defendant or the Plaintiff's nominee and the Defendant, whatsoever.
197. Furthermore, it is not lost on the court that what was being transacted upon was an immovable property, namely L.R No. 12565/36 and hence, there was need for the Plaintiff to tender and adduce before the court some agreement, memorandum or note, in writing and which was signed by the Defendant or such other person authorized by the Defendant to do so.
198. In my humble view, the burden of proving that indeed there was a sale agreement/ Contract laid on the shoulders of the Plaintiff. In this regard, it behooved the Plaintiff to comply with the provisions of Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya (prior to the Amendment thereof which took effect on the 1st June 2003).
199. To underscore and amplify the statement that it was incumbent upon the Plaintiff to prove the existence of a valid sale contract, it is imperative to restate and reiterate the holding of the Supreme Court of Kenya in the case of Samson Gwer & 5 others versus Kenya Medical Research Institute & 3 others [2020] eKLR, where the Court stated as hereunder;
- [49] Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
- [50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
- “...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”
- [51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.
200. Additionally, the question of burden of proof and on whom same lies, was also considered and deliberated upon in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, where the honourable Court of Appeal expounded on the provisions of Section 107 and 108 of the Evidence Act.



201. For coherence, the court stated and observed as hereunder;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller v Minister of Pensions* (1947) explained as follows:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

202. In a nutshell, having analyzed and duly considered the totality of the evidence tendered by the Plaintiff and more particularly the response during cross examination, I come to the conclusion that the Plaintiff has not discharged the requisite burden of proof, as pertains to the existence of a valid sale agreement/ contract with the Defendant, over and in respect of the suit property.

Issue Number 3 Whether the Plaintiff herein has established sufficient basis to Underpin and Warrant an order for Specific Performance.

203. The Plaintiff herein has impressed upon the court to grant and inter-alia, an order of specific performance of the sale contract(sic) between the Plaintiff and the Defendant. In this regard, the essence of the Plaintiff’s claim is to direct the Defendant to facilitate the completion of the transfer and registration of the suit property in the name of the Plaintiff.

204. Before venturing to consider whether or not the Plaintiff is entitled to an order of specific performance, it is appropriate to state and underscore that specific performance is an Equitable relief and the grant of which, is at the discretion of the court.

205. Consequently and in view of the foregoing consideration, it is appropriate to observe that prior to and before a party partakes of the Equitable relief of specific performance, same must no doubt surmount various hurdles, first and foremost being proof of the existence of a valid sale agreement/contract.

206. In addition, it also behooves the claimant to tender before the court evidence to prove that indeed same has performed and executed his/her part of the contract, inter-alia, payment of the Purchase price/ consideration.

207. Thirdly, it is also not lost on the court that a claimant seeking to partake of and appropriate an order of specific performance, is also enjoined to show and establish that the impugned contract is also lawful and valid.

208. In respect of the foregoing, observations, it is appropriate to consider various decisions where the plea for specific performance has been canvassed and discussed hitherto.

209. Firstly and in this respect, the holding in the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR, is succinct and apt.



210. For coherence, Justice Maraga (as he then was) stated and observed as hereunder:

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

211. Additionally, the requisite conditions to be satisfied prior to and before the equitable remedy of specific performance can be granted were elaborated upon by the Court of Appeal in the case of *Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa versus Abubakar Madhbuti* [1997] eKLR, where the court stated and observed as hereunder;

It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of *Halsbury's Laws of England*, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

““must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim.”

The latter was the position taken by Lord Esher, M. R. in *Coatsworth v. Johnson*, (1886) 54 L. T. 520 at page 523 when he said that:

““The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract, the court of equity would refuse to grant specific performance and would leave the parties tot heir other rights. Then if the court of equity would not grant specific performance, we are not to consider specific performance as granted. Then the case is at an end.”

212. From the foregoing decisions, there is no gainsaying that an order of specific performance cannot be issued or be decreed unless there is a Valid Sale Agreement/ Contract and; the Plaintiff has specifically performed his/her part of the bargain.



213. In respect of the subject matter, two things do arise. Firstly, I have observed that there was no valid sale agreement/contract, binding on the Defendant and thus capable of being specifically performed.
214. Secondly, there is the question of payment of the purchase price. In this regard, it suffices to point out that the Plaintiff was unable to prove and tender in evidence proof, if at all, that indeed there is a purchase price that was tendered and paid for.
215. In this regard, it is imperative to recall that during cross examination of the Plaintiff, same stated as hereunder;

“I don’t have any evidence that shows the remittance of the money”.
216. Consequently and in the absence of proof that the purchase price/consideration was duly paid, then the crux or substratum of the contract dissipates.
217. In view of the foregoing considerations, I am afraid that the equitable reliefs of specific performance cannot ensue, be granted or better still issued in favor of the Plaintiff.

Issue Number 4 Whether the subject suit is barred and prohibited by the Limitation of Actions Act, Chapter 22 Laws of Kenya.

218. From the evidence of the Plaintiff and his witness, the contract, if any, pertaining to and concerning the purchase of the suit property was entered into in November/December 1989.
219. In any event, the Plaintiff tendered in evidence a copy of the transfer instrument, which was said to have been executed on the 20th November 1989. However, it is not lost on the court that the Plaintiff had hitherto stated that the initial transfer instrument was blank and undated.
220. Be that as it may, the bottom line is that the transfer instrument upon which the subject suit is anchored and grounded is dated the 20th November 1989.
221. Assuming, that the transfer instrument dated the 20th November 1989 constitutes and founds the basis of the contract between the Plaintiff and the Defendant, it then means that the Plaintiff was obligated to pursue and ensure that the impugned contract was concluded and finalized within six years from the date of execution.
222. Taking the date indicated on the named transfer instrument as the date of entry and execution of the contract, then it means that the contract in question ought to have been concluded on or before the 19th November 1995 and in default, there would arise the question of breach of the said Agreement/contract.
223. Other than the foregoing and assuming that there was no scintilla of evidence of breach of the contract, until the Plaintiff came across the signage erected on the suit property in December 2011, then it became evident that the Defendant was now not keen to conclude the impugned contract.
224. According to the 2nd scenario herein, it is then evident and apparent that the sale contract, if at all, there was one was now the subject of breach and infringement vide the impugned actions or omissions by the Defendant.
225. In the premises, there is no gainsaying that the Plaintiff was obliged to move the court within six years from December 2011, when same became knowledgeable of the breach on the part of the Defendant.
226. In this respect, it is worthy to recall that PW2, who was the Plaintiff’s advocate, generated a letter dated the 27th January 2012 and which Letter, was produced as exhibit P6 and wherein same alluded to breach



of contract. Furthermore, PW2, also contended that the actions Complained of at the foot of his Letter constituted an endeavor by the Defendant to accrue unjust enrichment.

227. To my mind, the cause of action for breach of contract had accrued by the time the Letter dated the 27th January 2012 was being crafted and generated, by and on behalf of the Plaintiff herein.
228. Irrespective of which of the three dimensions ones take into account, it is evident that the instant suit was filed well outside the statutory six-year period stipulated vide the provisions of Section 4(1) (a) of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
229. To my mind, where a suit is filed outside the stipulated limitation period, the impugned suit would be incompetent, stillborn and otherwise redundant. Clearly, such a suit is misconceived, legally untenable and for all intents and purposes, Bad in Law.
230. To underscore the fact that the suit was filed outside time, it is appropriate to reiterate the holding of the Court of Appeal in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) versus Rosaline Njeri Macharia & another [2016] eKLR, where the court stated and held as hereunder;
- (33) With regard to the third issue, namely whether the suit was statute barred under the Limitation of Actions Act, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the “suit” having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit. That answers the third issue.
231. Additionally, the importance and effect of the law of limitation in respect of suits filed outside time, was elaborated upon and succinctly espoused by the Court of Appeal in the case of Pius Kimaiyo Langat versus Co-operative Bank of Kenya Limited [2017] eKLR, where the court observed as hereunder;

“It is common ground that the cause of action in this matter was based on contract and that section 4 of the Limitation of Actions Act prohibits suits filed after the end of six years from the date on which the cause of action accrued. As Potter, JA observed in the case of *Gathoni v Kenya Cooperative Creameries Limited* (Civil Application No. 122 of 1981):

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

It is also trite law that the period of limitation cannot be extended. If any authority is necessary, this Court in *Divecon v Samani* (1995-1998) EA 48 stated as follows:-

“ ...to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for



the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract.

In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that „„the wording of section 4 (1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked??.

232. In my humble albeit considered view, the Plaintiff’s claim, which essentially is a claim premised on breach of contract and hence the prayer for inter alia, specific performance, was clearly barred by the provisions of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

Final Disposition

233. Having analyzed the various nuances/perspectives that flowed from the pleadings filed and the evidence tendered by the respective Parties, it is now apparent and evident that the Plaintiff’s claim is clearly devoid of merits.

234. Consequently and in the premises, I come to the conclusion that the Plaintiff’s suit, is not only pre-mature and misconceived, but same is also Legally untenable. Consequently, same ought to be dismissed.

235. In the premises, the Plaintiff’s suit vide amended Plaintiff dated the 6th July 2020 be and is hereby Dismissed with costs to the Defendant.

236. Further and in line with the provisions of Section 13(7) of the Environment and Land Court Act, I direct that the Plaintiff herein either by himself or his agent or nominee shall surrender and hand over the original certificate of title in respect of L.R No. 12565/36 to the Defendant within 60 days from the date hereof.

237. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Antony King’ara for the Plaintiff

Mr. Koech for the Defendant

